

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 07-016046

Employee: Russell Beisner
Employer: Home Depot USA, Inc. (Settled)
Insurer: New Hampshire Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

The administrative law judge awarded permanent partial disability benefits from the Second Injury Fund. Employee appeals, arguing that the evidence shows he is permanently and totally disabled and that the Second Injury Fund is liable for permanent total disability benefits. Employee suggests that the administrative law judge misconstrued the opinions of the vocational expert Gary Weimholt, when he faulted Mr. Weimholt for classifying employee in a 66-year-old age group where employee was 63 years of age when he reached maximum medical improvement.

We have carefully reviewed Mr. Weimholt's report and testimony, and we are confident that we understand his opinions and his reasoning. We do not believe Mr. Weimholt made any mistake as to employee's age, nor do we perceive his testimony as supportive of a finding that there is any material difference in the job prospects available to an injured employee who is 63 years of age as compared to an injured employee who is 66 years of age.

With that said, however, we simply do not find Mr. Weimholt's ultimate opinions to be persuasive in this case as to the question whether employee is permanently and totally disabled. Rather, the more convincing testimony from Mr. England persuades us (and we so find) that employee is capable of performing the regular duties of substantial gainful employment. For this reason, we agree with the result reached by the administrative law judge, and hereby affirm the award.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Carl Strange, issued July 19, 2013, is attached and incorporated by this reference.

Employee: Russell Beisner

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We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 23rd day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Russell Beisner

Injury No. 07-016046

Dependents: N/A

Employer: Home Depot USA Inc.

Additional Party: Second Injury Fund

Insurer: New Hampshire Insurance Company

Hearing Date: April 15, 2013

Checked by: CS/rm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? January 19, 2007.
5. State location where accident occurred or occupational disease contracted: Jefferson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was moving a pipe threader and injured his low back.
12. Did accident or occupational disease cause death? N/A.

13. Parts of body injured by accident or occupational disease: Low back.
14. Nature and extent of any permanent disability: 25% permanent partial disability of the body as a whole referable to the low back.
15. Compensation paid to date for temporary total disability: N/A.
16. Value necessary medical aid paid to date by employer-insurer: N/A.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: \$747.77.
19. Weekly compensation rate:

\$498.51 for temporary total disability and permanent total disability; and
\$376.55 for permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
 - a. Employee's request for permanent total disability benefits from the Second Injury Fund has been denied (See Findings).
 - b. Employee awarded permanent partial disability benefits from Second Injury Fund in the amount of \$13,103.94 (See Findings).
22. Second Injury Fund liability: Yes (See Findings).
22. Future requirements awarded: N/A.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the employee shall be subject to a lien in the amount of costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Paul Hetterman.

FINDINGS OF FACT AND RULINGS OF LAW

On April 15, 2013, the employee, Russell Beisner, appeared in person and by his attorney, Paul Hetterman, for a hearing for a final award. The Second Injury Fund was represented by Assistant Attorney General, Kevin Nelson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about January 19, 2007, Home Depot USA Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by New Hampshire Insurance Company.
2. On or about January 19, 2007, the employee was an employee of Home Depot USA Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about January 19, 2007, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$747.77, his rate for temporary total disability and permanent total disability is \$498.51, and his rate for permanent partial disability is \$376.55.
7. The employee's injury is medically causally related to the work injury occurring on or about January 19, 2007.
8. Employee reached maximum medical improvement on November 29, 2007.

ISSUES:

1. Nature and Extent of Disability
2. Liability of the Second Injury Fund

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Medical records of Premier Care;
- B. Medical records of St. Louis Orthopedic Institute, Inc.;
- C. Medical records of Orthopedic and Sports Medicine;
- D. Medical records of SSM Corporate Health;
- E. Medical records of Concentra Medical Centers;
- F. Medical records of Signature Healthcare;
- G. Medical records of Pro-Rehab;

- H. Medical records of South County Open MRI;
- I. Medical records of St. Anthony's Medical Center;
- J. Medical records of St. Anthony's Medical Center;
- K. Medical records of St. Alexius Hospital;
- L. Stipulation for Compromise Settlement Injury No. 04-051897;
- M. Stipulation for Compromise Settlement Injury No. 05-090797;
- N. Stipulation for Compromise Settlement Injury No. 07-016046;
- O. Deposition of Dr. Dr. David Volarich; and
- P. Deposition of Gary Weimholt.

Second Injury Fund Exhibits:

- I. Deposition of James England.

APPLICABLE LAW:

- The burden is still on the claimant to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968). Therefore the employee has the burden of proving not only that he sustained an accident, which arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. *Griggs v A. B. Chance Company*, 503 S.W.2d 697 (Mo.App.1973).
- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

“All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the

compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.
- Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

Issue 1. Nature and Extent of Disability and Issue 2. Liability of the Fund

At the time of the hearing, Russell Beisner (“Employee”) requested an award finding that the Second Injury Fund was liable for permanent total disability benefits or in the alternative permanent partial disability benefits. In this case, Employee has offered the opinions of Dr. David Volarich and Mr. Gary Weimholt, a vocational rehabilitation expert, in support of his contention that he is entitled to benefits. The Second Injury Fund has offered the opinions of Mr. James England in support of their position.

On August 24, 2009, Dr. Volarich opined that Employee suffered 25% permanent partial disability of the body as a whole as a result of the January 19, 2007 work-related injury. Further, Dr. Volarich opined that the combination of his disabilities created a substantially greater disability than the simple sum or total of each separate injury and a loading factor should be added. At the time of his deposition, Dr. Volarich testified that after evaluating Employee he concluded that the Employee was able to return to work with restrictions (Employee's Exhibit O). On April 21, 2010, Mr. Weimholt evaluated Employee and opined that Employee was 66 years of age which was a factor in labor market access and placed him in an older age group of persons where fewer than 18% of such persons are actively employed in the open labor market. Further, Mr. Weimholt opined that Mr. Beisner “has a total loss of access to the open competitive labor market and is totally vocationally disabled from regular competitive full-time employment” (Employee's Exhibit P). On October 29, 2012, Mr. England opined that there is nothing in the medical that would lead him to believe that Employee was totally disabled, but rather simply has work limitations (Second Injury Fund Exhibit I).

Employee was born December 20, 1943, which would make him 63 years old at the time that he reached maximum medical improvement from the January 19, 2007 work-related injury on November 29, 2007. Mr. Weimholt based his evaluation on Employee being in a 66 year old age group. Consequently, I find the opinions of Mr. Weimholt to not be persuasive in this case. It is also important to note that Dr. Volarich testified that Employee was able to return to work with restrictions. Based on my above findings and the evidence, I find that the Second Injury Fund has failed to offer sufficient evidence to discredit the opinions of Dr. Volarich. I therefore find the opinions of Dr. Volarich to be more persuasive than any conflicting opinion. After thoroughly reviewing all the evidence, I find that Employee has failed to meet his burden of proof regarding permanent total disability against the Second Injury Fund. Although it is unnecessary to comment on the opinions of Mr. England since Employee has failed to meet his burden of proof, I do find the opinions of Mr. England more persuasive than those of Mr. Weimholt.

Although the Second Injury Fund is not liable for permanent total disability benefits, Employee has in the alternative alleged that he is entitled to an award for permanent partial disability benefits from the Second Injury Fund. Employee has pre-existing disabilities related to his left knee and back. Under Section 287.220.1 RSMo., Employee has the burden of proving that his pre-existing injuries were of such a serious nature as to constitute a hindrance or obstacle to employment or re-employment. Employee also has the burden of proving that his last injury and pre-existing disabilities exceed the applicable statutory threshold of 12½% for body as a

whole rating or 15% of a major extremity. Further, the Second Injury Fund is only liable if the combination of Employee's pre-existing injuries and the last injury had a synergistic affect which causes Employee's total disability to exceed the sum of the disabilities from the pre-existing injuries and the last injury.

Based on the evidence submitted, I find that Employee's pre-existing disabilities to his left knee and back were of such seriousness to constitute a hindrance or obstacle to employment or obtaining re-employment. I further find that the pre-existing left knee condition resulted in a permanent partial disability of 20% of Employee's left lower extremity at the level of the knee or 32 weeks of compensation. With regard to his pre-existing back, I find that Employee suffered a permanent partial disability of 25% of the body as a whole at the 400 week level or 100 weeks of compensation. As a result of the January 19, 2007 work-related injury, I find that Employee suffered a 25% of the body as a whole at the 400 week level or 100 weeks of compensation.

After considering all of the evidence, I further find that Employee's pre-existing injuries to his left knee and back along with the primary injury to his low back combined synergistically to create a total disability of 266.8 weeks. This total disability is based on a loading factor of 15%. After deducting the percentage of disability that existed prior to the primary injury (132 weeks), and the disability resulting from the primary injury, considered alone (100 weeks), from the total disability attributable to all injuries or conditions existing at the time of the last injury (266.8 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 34.8 weeks. The Second Injury Fund is therefore directed to pay to Employee the sum of \$376.55 per week for 34.8 weeks for a total award of permanent partial disability equal to \$13,103.94.

ATTORNEY'S FEE:

Paul Hetterman, attorney at law, is allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation