

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

Injury No.: 09-040541

Employee: Johnathon Bernard
Employer: Paris Ready Mix and Precast
Insurer: Acuity A Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 2, 2016. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued June 2, 2016, is attached and incorporated by this reference.

The Commission further approves and affirms 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 ____4th____ day of January 2017.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Johnathon Bernard

Injury No.: 09-040541

Dependents: N/A

Employer: Paris Ready Mix and Precast

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Treasurer of the State of Missouri
Custodian of the Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Acuity A Mutual Insurance Company

Hearing Date: April 5, 2016

Checked by: HDF/scb

FINDINGS OF FACT AND RULINGS OF LAW

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: June 5, 2009
5. State location where accident occurred or occupational disease was contracted: Monroe 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 occurred or occupational disease contracted:
See Award
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right foot
14. Nature and extent of any permanent disability: Permanent and total disability
15. Compensation paid to-date for temporary disability: \$10,666.67
16. Value necessary medical aid paid to date by employer/insurer? \$25,572.61

Employee: Johnathon Bernand

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- 17. Value necessary medical aid not furnished by employer/insurer? - 0 -
- 18. Employee's average weekly wages: \$486.00
- 19. Weekly compensation rate: \$324.00 for all benefits
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Permanent and total disability as of January 15, 2010
(332 weeks through May 27, 2016 or \$107,568.00 less a credit of \$653.66
or \$106,914.34)
- 22. Second Injury Fund liability: No
- 23. Future Requirements Awarded: Ongoing PTD payments

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Scott Wilson.

Employee: Johnathon Bernand

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Johnathon Bernand

Injury No: 09-040541

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Paris Ready Mix and Precast

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of the State of Missouri
Custodian of the Second Injury Fund

Insurer: Acuity A Mutual Insurance Company

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on April 5, 2016. Memoranda were filed by April 22, 2016.

The parties stipulated that on or about June 5, 2009, the claimant, Johnathon Bernand, was in the employment of Paris Ready Mix and Precast (Paris Ready Mix). Mr. Bernand sustained an injury by accident; the accident arose out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was insured by Acuity A Mutual Insurance Company. The employer had timely notice of the injury. A claim for compensation was timely filed. Mr. Bernand's average weekly wage was \$486.00, resulting in a compensation rate of \$324.00 a week for all benefits. Temporary disability benefits have been paid to the claimant to date in the amount of \$10,666.67, paid from June 6, 2009, through January 15, 2010. Medical aid has been provided in the amount of \$25,572.61.

The issues to be resolved by hearing include 1) the nature and extent of permanent disability, including the date of maximum medical improvement in the event of an award of permanent total disability benefits, and 2) the liability of the Second Injury Fund.

The parties stipulated to credits due the employer in the amount of \$553.66 as the result of an overpayment of temporary total disability benefits, and \$100.00 as the result of a fee charged for a missed doctor's appointment.

FACTS

The claimant, Johnathon Bernand, lives in Moberly and has spent most of his life in Randolph County, Missouri. Mr. Bernand was employed by Paris Ready Mix when, on June 5, 2009, he was changing a tire and wheel on a bobcat when either the tire or the pry bar he was holding hit his right foot and caused him to fall backwards onto a steel frame. Mr. Bernand reported immediate pain in his right foot and his back. Mr. Bernand received immediate medical treatment and was treated for his right foot injury by Dr. Turnbaugh. Mr. Bernand understood the diagnosis

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of his right foot injury to be comminuted fractures of the distal phalanges of the second through the fifth toes of his right foot. Dr. Turnbaugh treated the right foot injury with a cast, a boot, and physical therapy, and eventually referred Mr. Bernand to Dr. Tiede with the University of Missouri Health System for pain management. On September 11, 2009, an MRI performed under Dr. Tiede's direction reflected degenerative disc disease in Mr. Tiede's back as well as a tear in the annulus at the L4-5 level.

Mr. Bernand was then seen by Dr. Krause who ordered physical therapy for the right foot and referred Mr. Bernand to Dr. deGrange for treatment of his low back. Under Dr. deGrange's direction, Mr. Bernand received an epidural steroid injection for the back and physical therapy.

Mr. Bernand was released from treatment with Dr. Krause on December 18, 2009; Mr. Bernand said that he was still wearing a surgical boot at the time of his release and that he still had pain in his foot just as he did at the time of the accident. Prior to his release from treatment with Dr. Krause, Mr. Bernand had a functional capacity exam done; apparently Mr. Bernand was still in a "cam walker" and using crutches at the time of the exam and had trouble maintaining his balance. Mr. Bernand was released from treatment for the back by Dr. deGrange on January 15, 2010.

Mr. Bernand saw Dr. Turnbaugh again on January 30, 2010, and understood that the bones in his foot were still broken. Mr. Bernand believes that Dr. Turnbaugh referred him to Dr. Trevino for desensitization therapy and pain management; Mr. Bernand believes he had this treatment but is not sure.

Mr. Bernand had no problems with his right foot prior to June 5, 2009.

Mr. Bernand had a low back injury in 1998 when he was injured on the job; Mr. Bernand settled his workers' compensation claim resulting from that injury for ten percent of the body. Mr. Bernand testified that walking, bending, stooping, and lifting caused him back pain after the 1998 incident and that he missed two or three days of work annually due to low back pain. Prior to 2009, according to Mr. Bernand, he had low back pain once or twice a week; Mr. Bernand took over the counter pain meds for his low back prior to June of 2009. Mr. Bernand testified that bending and squatting and heavy lifting caused him to have back pain prior to 2009.

Currently Mr. Bernand has back pain daily. Mr. Bernand testified that walking is his only form of exercise and that he can only walk 80 to 100 feet before the back pain increases. Mr. Bernand said that he can sit for 15 to 30 minutes before he needs to change positions as the result of back pain. Mr. Bernand also said that his right foot feels frozen and that he has a constant burning pain in his right foot from his toes to the ball of his foot; according to Mr. Bernand standing and walking increase his right foot pain. Mr. Bernand says that he is in his recliner from one to three times a day for a half hour to one and a half hours at a time.

Mr. Bernand completed the 11th grade and does not have his GED. Mr. Bernand testified that he does very little around his house and that he will go out to his brother's shop and talk to him.

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Mr. Bernand said that he has not worked or drawn unemployment compensation since June of 2009.

Mr. Bernand admitted that he posts on Facebook and that he is the sole person who has access to his Facebook account or page. Mr. Bernand testified that he is the administrator of a Facebook account devoted to his wife's swap shop. Mr. Bernand is also the administrator for a Facebook account called the Man Cave Trading Post. Mr. Bernand said that multiple entries on his Facebook pages relating to his woodworking activities are actually references to items his brother has made or refinished and that although the entries reflect that Mr. Bernand made or refinished items such as birdhouses, sleds, and rockers, Mr. Bernand did not actually make or refinish them. Mr. Bernand's Facebook account also contains offers to remove snow, which Mr. Bernand said were actually offers for his brother's snow removal. Mr. Bernand's brother has his own Facebook account or page on which he is active. Mr. Bernand's brother testified that he is the one who does the making and refinishing of woodworking items and he is the person who does snow removal. Mr. Bernand's brother admitted that he has attributed work to Mr. Bernand on Facebook, citing the assembly of an antique glider and the conversion of a baby cradle for which he credited Mr. Bernand for his help in completing the projects.

When asked about a surveillance video taken on April 10, 2015, Mr. Bernand noted that the video was of himself and his brother at Wal-Mart picking out stain for a woodworking project.

Dr. Garth Russell, orthopedic surgeon, testified by deposition that he examined Mr. Bernand on April 14, 2011, as well as on the morning of the deposition, November 13, 2015. Dr. Russell diagnosed a right foot crush injury involving the second, third, and fourth toes as well as complex regional pain syndrome as the result of the June 5, 2009 accident and injury. Dr. Russell opined that Mr. Bernand is not able to compete in the open labor market as the result of the right foot injury and the ensuing complex regional pain syndrome and is permanently and totally disabled. Dr. Russell dated Mr. Bernand's low back problems to his 1998 accident, noting that Mr. Bernand had left hip and left thigh symptoms prior to June 5, 1998; in Dr. Russell's words, referring to Mr. Bernand, it was the right foot crush injury of June 5, 2009 that "stopped him." (Russell depo p36,13) Dr. Russell said that Mr. Bernand denied having a back injury as the result of the accident of June 5, 2009. Dr. Russell explained that the epidural steroid injections in the lumbar spine that Mr. Bernand received after June 5, 2009, were as the result of back pain which would flare up as the result of the degenerative disc disease and the tear in the annulus or lining of a disc; Dr. Russell described the epidural steroid injections as settling down the pain. Dr. Russell said that the 2009 crush injury to the right foot did not cause a flare up or exacerbation of Mr. Bernand's back pain. Dr. Russell described the objective signs of complex regional pain syndrome as "swelling, abnormal firmness, hardness, discoloration to the skin, atrophy of the skin, thin skin" and said that they were not something Mr. Bernand could "fake." (Russell depo p61 14-7) Specifically with regard to Mr. Bernand's right leg, Dr. Russell noted swelling, tightness, the leg being hard as a rock, and color changes.

Dr. Eli Shuter, neurologist, testified by deposition that he evaluated Mr. Bernand on December 29, 2010, and issued a corresponding report dated September 9, 2011. Dr. Shuter testified that he assigned a 65 percent disability of the ankle and 25 percent disability of the body referable to the

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back as the result of the June 5, 2009 accident and injury. Dr. Shuter described prior disability of 15 percent of the body attributable to the prior back injury. Dr. Shuter diagnosed Mr. Bernard as having complex regional pain syndrome as the result of the June 5, 2009 foot injury. Dr. Shuter opined that Mr. Bernard is permanently and totally disabled as the result of the right foot injury and the back injury resulting from the June 5, 2009 accident and injury. Dr. Shuter opined that Mr. Bernard must lie down during the day as the result of his injuries from the June 5, 2009 accident. Dr. Shuter noted that Mr. Bernard had complex regional pain syndrome type 2, because of the lack of difference between his right foot and his left foot.

Gary Weimholt, vocational rehabilitation consultant, testified by deposition that he evaluated Mr. Bernard on November 1, 2011, and issued a report pertaining thereto on March 12, 2012. Mr. Weimholt opined that Mr. Bernard is permanently and totally disabled as the result of the right foot injury of June 5, 2009 and the back; Mr. Weimholt was not sure whether the back injury was sustained in 2009 or was the result of a preexisting disability.

Dr. John Krause, orthopedic physician specializing in knees, feet, and ankles, testified by deposition that he has treated Mr. Bernard since October 12, 2009, having last seen Mr. Bernard on July 20, 2012, after concluding treatment in 2009. Dr. Krause defined tuft fractures as breaking the ends of the bones on the toes. Dr. Krause indicated that tuft fractures usually heal with minimal treatment and without consequences. Dr. Krause felt that Mr. Bernard did not suffer from complex regional pain syndrome as the result of the tuft fractures and assigned zero permanent disability to Mr. Bernard's foot injury of June 5, 2009. Dr. Krause disagreed with Dr. Turnbaugh's analysis of complex regional pain syndrome as the result of the right foot injury. When asked about the radiographic evidence of incomplete healing of the tuft fracture found by Dr. Turnbaugh after Dr. Krause released Mr. Bernard from treatment in 2009, Dr. Krause distinguished radiographic healing from clinical healing and said that Mr. Bernard had healed clinically when he released him from treatment.

Dr. Donald deGrange, board certified orthopedic surgeon, testified by deposition that he initially saw Mr. Bernard on November 13, 2009, for his low back pain, and last saw him in August of 2012, for the same complaints. Dr. deGrange diagnosed a lumbar sprain as well as degenerative disc disease. Dr. deGrange also noted the presence of an annular tear at the L4-5 level; Dr. deGrange said that the annular tear could be acute, but that regardless, the annular tear was not related to significant herniation or nerve root compression. Dr. deGrange found the mechanism of injury to be inconsistent with an annular tear where Mr. Bernard described a hyperextension injury and annular tears are usually associated with a forward flexion, or axial compression, with or without a torsion component. When Dr. deGrange initially saw Mr. Bernard he found the right foot to be cooler than the left foot which he found indicative of reflex sympathetic dystrophy. Dr. deGrange explained that reflex sympathetic dystrophy is also called complex regional pain syndrome. Dr. deGrange saw Mr. Bernard again in December of 2009, January of 2010, and then again in August of 2012. In August of 2012, Dr. deGrange found no disability of the lumbar spine attributable to the June 5, 2009 accident and injury.

James England, rehabilitation counselor, testified by deposition that he evaluated Mr. Bernard on January 10, 2013, and issued a report pertaining to the evaluation on January 21, 2013.

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Mr. England concluded that given the opinions of Mr. Bernard's treating doctors that Mr. Bernard could return to work as a truck driver or correctional officer. However, based on Dr. Shuter's findings, including Mr. Bernard's claim of needing to lie down during the day, Mr. England would conclude that Mr. Bernard is unemployable. Mr. England felt that the lack of employment potential would result from the June 5, 2009 injuries combined with his preexisting back disability.

Dr. Turnbaugh's records reflect his treatment of Mr. Bernard for the tuft fractures of his 2nd through 5th toes of the right foot. On January 30, 2010, Dr. Turnbaugh referred to the tenderness on the top of the toes as possibly reflecting sympathetic reflex dystrophy. Dr. Tiede saw Mr. Bernard as a referral from Dr. Turnbaugh; Dr. Tiede diagnosed Mr. Bernard with the onset of complex regional pain syndrome and treated him with anesthetic blocks, initially to the lumbar spine and then to the ankle.

In his deposition testimony Mr. Bernard testified with regard to the jobs he has held between his 1998 back injury and his June 5, 2009 accident, including driving a truck for Paris Ready Mix and Precast, at Miller Residential Center where Mr. Bernard checked the doors to make sure they were locked and checked on patients, and at the Moberly Correctional Center where Mr. Bernard occasionally lifted, crawled, stooped and bent with "little occasional pains with [his] back." (Bernard depo p70, 123) Mr. Bernard testified that he took off two or three times in the year as the result of his back while working at the Moberly Correctional Center. Mr. Bernard described working at Miller Nursing and Rehab where his activities included walking, painting, fixing tile floors, and changing light bulbs and he had no difficulty with these activities.

Surveillance video on April 20, 2015 depicts Mr. Bernard and his brother walking down the aisle at Wal-Mart, kneeling down to look at something on a lower shelf, checking out, talking to a third person, and later in the video Mr. Bernard is pictured holding a box. Video surveillance on April 25 and 26, 2014 depicts Mr. Bernard talking on the telephone while outside smoking and walking around.

APPLICABLE LAW

RSMo Section 287.020.6 The term "total disability" as used in this chapter shall mean 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.

RSMo Section 287.220.2 All cases of permanent disability where there has been previous disability due to injuries occurring prior to January 1, 2014, shall be compensated as provided in this subsection. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting 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

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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 preexisting 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. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury 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 employer at the time of the last injury is liable is less than the 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 the second injury fund.

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AWARD

The claimant, Johnathon Bernand, has sustained his burden of proof that he is permanently and totally disabled as the result of the fractures of the 2nd through 5th toes of the right foot and the ensuing complex regional pain syndrome. Every physician who treated or evaluated Mr. Bernand's right foot opined that he had some form of complex regional pain syndrome, with the exception of Dr. Krause. Dr. Russell opined that it was the right foot injury and the complex regional pain syndrome alone that resulted in Mr. Bernand's inability to maintain employment in the open labor market. While Mr. Bernand's Facebook postings are in sharp contradiction to his testimony regarding days of complete inactivity, neither do they indicate that Mr. Bernand is capable of maintaining full time gainful employment in the open labor market. I find the testimony of Dr. Russell most persuasive on the issues of both permanent and total disability as well as attribution of the permanent and total disability to the June 5, 2009 accident and injury to the right foot along with the ensuing complex regional pain syndrome. Dr. Shuter's opinion taken as a whole is supportive of Dr. Russell's opinion regarding permanent and total disability;

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Dr. Shuter found no evidence of permanent disability impacting Mr. Bernand's abilities to work full time without missing work or sleep and being able to sit, stand, and walk prior to 2009 and found Mr. Bernand to be permanently and totally disabled after and as the result of the June 5, 2009 accident and injuries.

Mr. Bernand has failed to prove liability of the Second Injury Fund in this case as set forth in the preceding paragraph.

Made by: _____

HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation