

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

Injury No.: 06-043009

Employee: Angie Bridges  
Employer: Home Depot (Settled)  
Insurer: New Hampshire Ins. Co. (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard the parties' arguments, reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated July 14, 2010. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Preliminaries**

The administrative law judge heard this matter to consider: (1) the liability, if any, of the Second Injury Fund; and (2) employee's claim for the cost of the proceedings under § 287.560 RSMo.

The administrative law judge concluded: (1) the Second Injury Fund is liable for 13.2 weeks of permanent partial disability; and (2) the Second Injury Fund's defense was without reasonable ground and employee is entitled to the cost of deposing her medical expert and a reasonable attorney fee for a total of \$2,274.00 in fees and costs under § 287.560.

The Second Injury Fund filed a timely Application for Review with the Commission alleging that: (1) employee failed to meet her burden of proving her preexisting disabilities were a hindrance or obstacle to her employment or reemployment; and (2) the Second Injury Fund presented a valid defense and the administrative law judge erred in assessing costs against the Second Injury Fund under § 287.560.

For the reasons set forth below, the Commission reverses the conclusion of the administrative law judge that employee is entitled to an award of attorney fees and costs in this matter. All other aspects of the award of the administrative law judge are affirmed.

**Discussion**

The question is whether the administrative law judge properly assessed costs and attorney fees against the Second Injury Fund. Section 287.560 RSMo provides, in pertinent part:

Employee: Angie Bridges

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All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

Under the foregoing section, the general rule is that costs of a proceeding before the Division or the Commission shall be paid out of the state treasury from the fund for the support of the Division. *DeLong v. Hampton Envelope Co.*, 149 S.W.3d 549, 555 (Mo. App. 2004) (citations omitted). However, as an exception to the general rule, the Division or the Commission may assess the whole cost of the proceedings upon a party who, without reasonable ground, brought, prosecuted, or defended a proceeding before the Division or Commission. *Id.* (citations omitted). The "whole cost of the proceedings" includes all amounts the innocent party expended throughout the proceeding brought, prosecuted, or defended without reasonable grounds, including attorney's fees. *Id.* (citations omitted).

We exercise our discretion under § 287.560 RSMo, with great caution and only where the case for costs is clear and the offense egregious. See *Nolan v. Degussa Admixtures, Inc.*, 276 S.W.3d 332, 335 (Mo. App. 2009). We disagree with the administrative law judge's finding that the Second Injury Fund defended this claim without reasonable ground. It was employee's burden to prove all of the elements of her workers' compensation claim, and the Second Injury Fund was entitled to challenge her ability to do so at the hearing. The record fails to disclose evidence sufficient to support a finding that the Second Injury Fund acted with the type of "egregious and outrageous conduct" exemplified in cases such as *Monroe v. Wal-Mart Assocs.*, 163 S.W.3d 501, 506 (Mo. App. 2005) and *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003). When we compare the facts of *Monroe* and *Landman* to the record before us, we are not persuaded that the Second Injury Fund engaged in the type of conduct that § 287.560 is designed to prevent.

In sum, we believe the award of costs and attorney fees is improper and reverse that portion of the administrative law judge's award. All other aspects of the award are affirmed.

### **Award**

The Commission reverses that portion of the award holding the Second Injury Fund liable for costs and attorney fees under § 287.560 RSMo. Each party shall bear their own costs and shall be responsible for their own attorney fees associated with this matter.

The award and decision of Administrative Law Judge Mark D. Siedlik, dated July 14, 2010, as modified, is attached hereto, and its findings and conclusions are

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incorporated to the extent they are not inconsistent with our findings and conclusions herein.

Given at Jefferson City, State of Missouri, this 7<sup>th</sup> day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

Employee: Angie Bridges

**SEPARATE OPINION**  
**CONCURRING IN PART AND DISSENTING IN PART**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed without modification. I dissent from the majority's decision to deny the award of costs and fees in this matter. I would affirm the award of the administrative law judge allowing the award of fees and costs against the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the portion of the award denying employee's fees and costs under § 287.560 RSMo.

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John J. Hickey, Member

## AWARD

Employee: Angie Bridges Injury No: 06-043009  
Dependents: N/A  
Employer: Home Depot  
Additional Party: Clint Zweifel, Missouri State Treasurer, Custodian, Second Injury Fund  
Insurer: New Hampshire Ins. Co.  
Hearing Date: March 25, 2010

Checked by: MSS/cy

### 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: May 18, 2006
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay 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:  
Employee was stepped in a hole and twisted her left knee.
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: Left Knee
14. Nature and extent of any permanent disability: 13.2 weeks of Permanent Partial Disability as to the Second Injury Fund
15. Compensation paid to-date for temporary disability: \$20,306.55 (by Employer)

- 16. Value necessary medical aid paid to date by employer/insurer? \$17,173.55 (by Employer)
- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$571.59
- 19. Weekly compensation rate: \$381.05 / \$365.08
- 20. Method wages computation: Stipulation of the parties

**COMPENSATION PAYABLE**

21. **Benefits Currently Due:**

Permanent Disability From Second Injury Fund

13.2 weeks of Permanent Partial Disability @ \$365.08 .....	\$4,819.06
Total Benefits Due:	<u>\$4,819.06</u>

Costs:

Expenses of Litigation.....	\$1,074.00
Attorney Fee.....	\$1,200.00

**Total Award .....** **\$7,093.06**

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of John B. Boyd, Attorney, for reasonable and necessary attorney's fees.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Angie Bridges Injury No: 06-043009  
Dependents: N/A  
Employer: Home Depot  
Additional Party: Clint Zweifel, Missouri State Treasurer, Custodian, Second Injury Fund  
Insurer: New Hampshire Ins. Co.  
Hearing Date: March 25, 2010

Checked by: MSS/cy

On March 25, 2010, the Employee and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Angie Bridges, appeared in person and with counsel, John B. Boyd. The Second Injury Fund appeared through its counsel, Kimberly Fournier, Assistant Attorney General. The primary issue the parties requested the Division to determine was the liability of the Second Injury Fund for Permanent Partial Disability compensation. For the reasons noted below, I find that Employee is entitled to Permanent Partial Disability compensation and her costs of litigation from the Second Injury Fund.

### **STIPULATIONS**

The parties stipulated that:

1. On or about May 18, 2006, (“the injury date”), Home Depot (“Employer”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully insured by its lawful authority to self-insure;
2. Angie Bridges was its employee working subject to the law in Kansas City, Clay County, Missouri;
3. Employee notified Employer of her left knee injury and filed her claim within the time allowed by law;
4. Employer provided Employee with medical care in the sum of \$17,173.55;
5. Employee met with injury by accident arising out of and in the course of her employment;

6. Temporary-total disability was paid by Employer-Insurer in the sum of \$20,306.55;
7. Employee's Average Weekly Wage at the time of the accident was \$571.59;
8. Employee and Employer settled the primary claim based upon a 25% permanent partial disability to the left knee, with an additional sum of \$22,373.09 included for future medical care.

### **ISSUES**

The parties requested the Division to determine:

1. What is the liability of the Second Injury Fund for Permanent Partial Disability, if any?
2. Is Employee entitled to an award for her costs, pursuant to an unreasonable defense asserted by the State Treasurer as Custodian of the Second Injury Fund?

### **FINDINGS**

Employee testified on his own behalf and presented the following exhibits, all of which were admitted into evidence:

- Exhibit A – Deposition of James A. Stuckmeyer, MD
- Exhibit B – Stipulation for Compromise Settlement with Employer/Insurer
- Exhibit C – Letter of December 21, 2009 from Boyd to Fournier
- Exhibit D – Letter of March 1, 2010 from Boyd to Fournier
- Exhibit E – Letter of March 4, 2010 from Fournier to Boyd
- Exhibit F – Invoice of Dr. Stuckmeyer for his deposition
- Exhibit G – Invoice of Dolginoff Court Reporting for deposition fee

The Second Injury Fund did not call any witnesses, and had no documentary exhibits to offer. Instead, its defense was based upon the cross-examination of its counsel.

Based on the above exhibits and the testimony of Angie Bridges, I make the following findings:

Employee met with an injury by accident when on May 18, 2006, she stepped in a hole and twisted her left knee. She was a floor supervisor who worked principally in the lawn and garden department of Home Depot. Her job required her to supervise a number of employees when the outdoor season occurred, and Employer accepted the injury as compensable, and furnished medical care and temporary-total disability. Her left knee was operated upon by Richard Curnow, MD, orthopedic surgeon on July 19, 2006, who performed an arthroscopic posterior horn meniscectomy with debridement of the medial femoral condyle. About three months post-operation, the Employee underwent the first of a series of five Hyalgan injections due to continue pain. In January through March, the Employee was placed upon light duty, then sent to physical therapy in April, 2007, followed by work hardening in May.

Dr. Curnow recommended additional Hyalgan injections in June, which were initially denied by the Employer. The Employer and Insurer fired Dr. Curnow, and sent the Employee to David Clymer, MD. He injected the knee with cortisone and lidocaine on two occasions, gave the Employee directions to have therapy at home, and released her in November 20, 2007, some 16 months following surgery. Dr. Clymer advised the employee that she may have ongoing symptoms, and cautioned her that she may require occasional injections into the knee, and the use of oral anti-inflammatories. Employee returned to Dr. Curnow after her discharge by Dr. Clymer, and underwent five more Hyalgan injections the last of which was on December 26, 2007.

Employee last saw Dr. Curnow on April 2, 2008. He suggested that at some point, she may end up needing a total knee replacement and advised her to take Aleve as needed.

Prior to this accident, the Employee had undergone surgery to her right (opposite) knee by Dr. Curnow, on December 7, 2005. That procedure was an arthroscopic resection of the posterior medial meniscus, with debridement of the medial femoral condyle. Further, she had undergone a left carpal tunnel release on August 23, 1999 by Dana Towle, MD. Employee did not claim significant disability from the left upper extremity surgery, but produced evidence of significant pre-existing disability to the right knee.

Employee described her complaints of pain, discomfort and limitation as to both knees. As to the right knee, it had been the source of ongoing symptoms for many months before she submitted to surgery. She could not kneel, climb ladders, or stand for prolonged periods of time. She could lift nothing greater than 25 pounds on only an occasional basis, and these were restrictions placed upon her by Dr. Curnow, which she observed prior to and following her surgery.

As to the left knee, she described identical limitations as she has on her right knee. Moreover, she has difficulty navigating stairs, arising from chairs, and being upon her feet for more than 30 minutes. She notes pain, swelling, stiffness, inability to bend, stoop or squat. To work on her flower beds, she sits on a chair outdoors, as she cannot kneel.

Dr. Curnow advised the Employee to get out of that line of work. While on light duty, she worked in the phone center, which allowed her to sit and elevate her left knee. When her restrictions were made permanent, the employer could not accommodate Employee by giving her

a permanent reassignment. Consequently, her employment terminated. Since leaving the employ of Home Depot, Employee and her husband have retired.

Testifying as an expert witness, James A. Stuckmeyer, M.D., evaluated the Employee on September 26, 2008. Dr. Stuckmeyer is of the opinion that the Employee sustained a 45% permanent partial disability to the left knee as a direct and proximate result of the accident of May 18, 2006.

Pre-existing the last accident, Dr. Stuckmeyer was of the opinion that the Employee had a 30% permanent partial disability to the right knee predating May 18, 2006. He assigned ratings of 15% increase for the combined effects of all such disabilities.

In order to establish Second Injury Fund Liability for permanent partial disability benefits, the Claimant must prove:

1) that she has a permanent disability resulting from a compensable work-related injury, See §287.220.1 RSMo (1994). I find and believe that Employee has a compensable injury resulting in a 25% permanent partial disability to the left knee, both from the evidence and the stipulations of the parties.

2) that she has permanent disability predating the compensable work-related accident which is "of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable." §287.220.1 RSMo (1994), *Messex v. Sachs Electric Co.*, 989 SW 2d 206 (Mo. App. 1997); *Garibay v. Treasurer*, 964 SW 2d 474 (Mo. App. 1998); *Rose v. Treasurer*, 899 SW 2d 563 (Mo. App. 1995); *Leutzinger v. Treasurer*, 837 SW 2d 615 (Mo. App. 1995). It is apparent from all the evidence that Employee has met this burden. I find that she has a 30% permanent partial disability to the right knee. She described, without significant challenge, how the right knee had permanent restrictions and how she modified or eliminated tasks of her employment prior to the compensable work-related injury.

3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained results in an enhanced permanent partial disability, greater than the sum of the individual parts. *Boring v. Treasurer*, 947 SW 2d 483 (Mo. App. 1997); *Reiner v. Treasurer*, 837 SW 2d 363 (Mo. App. 1992); *Frazier v. Treasurer*, 869 SW 2d 152 (Mo. App. 1994).

I find that the Claimant has a significant combined disability which arises from the combination of the three disabling conditions. Further, these pre-existing conditions I believe posed a hindrance and obstacle to daily work, and had the potential to combine with subsequent compensable disabilities. I believe the permanent disability assessments of Dr. Stuckmeyer are reasonable, probative and convincing. Claimant accommodated herself due to these many limitations, and was afforded temporary-accommodations by her employer. However, as the employer could not make such accommodations permanent, she lost her job.

There is no evidence in this case to combat a finding that the Claimant did not sustain a compensable claim for serious combination of disabilities arising from and pre-existing the accident of May 18, 2006. All of the evidence in this case points to the Second Injury Fund liability for the synergistic effect from the combined disabilities. I find accordingly that the Fund is liable for \$4,819.06, representing an additional 13.2 weeks of disability.

Claimant presented the Fund with documentation and settlement demand, in December, 2009. The Fund's inability to make voluntary offers of settlement is well known to this Judge and to all of the stakeholders in workers' compensation matters. Claimant sought to limit the costs of either party by offering to stipulate to the introduction of Dr. Stuckmeyer's report, allow the Fund to make non-foundation objections, and in exchange, to waive any claim for costs or post judgment interest. The Fund refused such offer, which is their right. However, the Fund did not produce any evidence to demonstrate that this was a case with reasonable defenses available to the Fund.

287.560 RSMo. provides the Division with the power to assess the cost of the proceeding against any party which brings, prosecutes or defends the claim without reasonable ground. *Clark v. Hart's Auto Repair*, 274 SW3d 612, (Mo.App.WD 2009) *Monroe v. Wal-Mart Associates, Inc.*, 163 SW3d 501, (Mo.App.ED 2005). The awarding of costs may include reasonable attorney fees. *Nolan v. DeGussa Admixtures, Inc.* 276 SW3d 332 (Mo.App.SD 2009).

The Fund had no evidence to demonstrate the Employee's claim should fail. The opinions of Dr. Stuckmeyer were not met with conflicting expert opinion. The testimony of the Employee was credible and forthright. No evidence was presented by the Fund to contradict or impeach the Employee. The medical records of treatment for both knee injuries were ample, yet no conflicting or contradicting evidence was presented to allow for a reasonable interpretation to favor the Fund. The defense tactic employed by the Fund was to cross examine the Employee and Dr. Stuckmeyer, to pick at the testimony, but to produce no evidence to challenge the foundation for Dr. Stuckmeyer's opinions nor to provide any reasonable basis for the Division to base any contrary findings upon credible and persuasive facts.

Accordingly, I find and believe the defense asserted by the Fund was without reasonable ground, and award Employee the costs of deposing Dr. Stuckmeyer of \$1,074.00, and a reasonable attorney fee of \$1,200.00. The total award, therefore, as to the Second Injury Fund, is \$7,093.06.

Claimant's attorney has requested a fee equal to 25% of all amounts awarded for disability. I find that such request is fair and reasonable and order a lien to attach to this award for sums due and owing at present and for sums accruing in the future.

Made by: \_\_\_\_\_  
Mark Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated, attested to and transmitted to the parties this \_\_\_\_\_ day of \_\_\_\_\_, 2010,  
by:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*