

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

Injury No.: 09-044477

Employee: Robert Claunch
Employer: Sean O'Sullivan and South Beach Development, Inc. (Settled)
Insurer: Travelers Commercial Casualty (Settled)
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 January 30, 2013. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued January 30, 2013, 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 20TH day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Robert Claunch

Injury No.: 09-044477

Dependents: N/A

Employer: Sean O'Sullivan
and South Beach Development, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**
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: N/A

Hearing Date: December 19, 2012

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: January 14, 2009
5. State location where accident occurred or occupational disease was contracted: Camden 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? N/A
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: Left wrist, body as a whole
14. Nature and extent of any permanent disability: 75% left wrist; 77% body as a whole
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Robert Claunch

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: ----
- 19. Weekly compensation rate: \$266.67
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Employer previously settled
- 22. Second Injury Fund liability: Yes
Permanent total disability as of September 7, 2018
(439 weeks and 2 days from April 7, 2010)
- 23. Future Requirements Awarded: None

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

The compensation awarded to the 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: Timothy M. McDuffey.

Employee: Robert Claunch

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Claunch

Injury No: 09-044477

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Sean O'Sullivan
and South Beach Development, Inc.

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: N/A

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on December 19, 2012. Memoranda were submitted by January 11, 2013.

The parties stipulated that on or about January 14, 2009, the claimant, Robert Claunch, was employed by Sean O' Sullivan and South Beach Development, Inc. The parties stipulated that all facts relevant to the claimant's relationship with his employer are resolved in the claimant's favor in his pending claim against the Second Injury Fund. Mr. Claunch's compensation rate is \$266.67 per week for all disability benefits.

The issue to be resolved by hearing is the liability of the Second Injury Fund for permanent disability benefits. Mr. Claunch is alleging permanent partial disability while the Second Injury Fund denies liability but contends that should Second Injury Fund liability be awarded that it should be for permanent total disability.

The parties stipulated that Mr. Claunch settled his workers' compensation claim for his injury of January 14, 2009, based on permanent disability of 75 percent of the left wrist and 77 percent of the body referable to the hip, pelvis and sacrum; the parties did not, however, agree that the percentages of permanent disability expressed in the stipulation for settlement reflect the permanent disability resulting from the January 14, 2009 accident and injury in the pending claim against the Second Injury Fund.

The parties further stipulated that in the event that permanent total disability is awarded against the Second Injury Fund that Mr. Claunch achieved maximum medical improvement on April 7, 2010.

FACTS

The claimant, Robert Claunch, testified by deposition that he was born in 1949. Mr. Claunch received his GED in 1969 and received no additional education other than participating in an online class. Mr. Claunch testified that while painting he fell from a ladder on his first day of

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work for Sean O' Sullivan and South Beach Development, Inc., January 14, 2009. Mr. Claunch testified that the majority of his working experience other than painting has been in building maintenance. Prior to the January 14, 2009 accident and injury, according to Mr. Claunch, he injured his right shoulder. Mr. Claunch testified that his employers accommodated his right shoulder injury thereafter by providing him assistance with carrying items. In addition, Mr. Claunch testified to seeing a chiropractor for his shoulder prior to his 2009 accident and injury. Mr. Claunch also testified that he currently needs to lie down during the day as the result of his left hip and leg injury of 2009.

Dr. David Volarich testified by deposition that he evaluated Mr. Claunch on April 12, 2011. Dr. Volarich found Mr. Claunch to have a permanent disability of 60 percent of the left forearm and 50 percent of the body referable to the pelvic injury as the result of the accident and injury of January 14, 2009. Dr. Volarich found permanent disability of 25 percent of the right shoulder preexisting the January 14, 2009 accident and injury and noted that there may be preexisting permanent disability as the result of post traumatic stress disorder, hearing loss, and an old right eye injury but that he would defer to the appropriate medical specialties for appropriate assessments. Dr. Volarich opined that the combination of Mr. Claunch's disabilities created a greater disability than their simple sum, but also stated that the January 14, 2009 accident and injury alone caused Mr. Claunch to be permanently and totally disabled.

Mr. James England, rehabilitation counselor, testified by deposition that he evaluated Mr. Claunch on April 26, 2012. Mr. England concluded that Mr. Claunch would not be able to return to employment as a painter as the result of his inability to be on his feet for extended periods of time, his inability to climb ladders, and his shoulder problems. However, based on Dr. Cantrell's limitations, Mr. England opined that Mr. Claunch would be able to be employed in less demanding employment; Mr. England stated that Mr. Claunch's GAF score would keep him from being employable even with Dr. Cantrell's limitations and that any unemployability resulting from the inclusion of the low GAF score as a factor would be as the result of the work injury of January 14, 2009, in combination with preexisting disabilities.

Mr. Aaron Eldred, certified vocational rehabilitation counselor, testified by deposition that he evaluated Mr. Claunch on September 27, 2011. Mr. Eldred identified Mr. Claunch's difficulty hearing, an old right eye injury, a 1999 right shoulder injury and post traumatic stress disorder dating back to the Viet Nam war as health issues Mr. Claunch had prior to January 14, 2009. Mr. Eldred did not feel that the right eye injury was an obstacle or hindrance to employment or re-employment but identified the hearing loss, right shoulder injury, and post traumatic stress disorder as rising to the level of an obstacle or hindrance to employment or re-employment. Mr. Eldred noted the Global Assessment Functioning (GAF) scores as pertaining to Mr. Claunch's post traumatic stress disorder (PTSD) and described the scores of 40 as the majority of Mr. Claunch's scores and as indicating "impairment in reality testing or communication or major impairment in several areas, such as work, family relations, judgment, thinking or mood." (Eldred depo p15) Mr. Eldred described Mr. Claunch's right shoulder as painful prior to January 14, 2009. Mr. Eldred noted that as the result of the January 14, 2009 accident and injury Mr. Claunch had injuries to his left wrist, hip, pelvis, and left leg. Mr. Eldred testified that Dr. Volarich's restrictions for Mr. Claunch as the result of the January 14, 2009 accident and injury would put Mr. Claunch at a less than sedentary work level while the

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restrictions imposed by Dr. Della Rocca and Dr. Cantrell as the result of the work injury would put Mr. Claunch at a sedentary work level. Based on Dr. Volarich's restrictions, Mr. Eldred concluded that the injuries that Mr. Claunch sustained in the January 14, 2009 accident and injury alone were enough to cause him to be permanently and totally disabled.

APPLICABLE LAW

RSMo Section 287.220.1. 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 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 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 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 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject

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to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

AWARD

The claimant, Robert Claunch, has sustained his burden of proof that he is permanently and totally disabled as the result of his injury of January 14, 2009, in combination with his preexisting disabilities to his right shoulder and his post traumatic stress disorder. Mr. Claunch testified to his need to lie down as the result of his January 14, 2009 injuries while Dr. Volarich described and evaluated the injuries resulting from the January 14, 2009 accident. Similarly, Mr. Claunch and Dr. Volarich discussed and evaluated, respectively, the disability to the right shoulder preexisting the January 14, 2009 accident and injury. Mr. England discussed the significance of the GAF scores in determining preexisting disability for Mr. Claunch and their effect on employability. I find that Mr. England is most credible in determining Mr. Claunch's status as not employable as the result of the combination of the injuries resulting from the January 14, 2009 accident and the preexisting disabilities. I further find permanent disability resulting from the accident and injury of January 14, 2009, to be 75 percent of the left wrist and 77 percent of the body as a whole.

Made by: _____

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