

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

Injury No.: 03-140605

Employee: Ronald Combs
Employer: Edith James Steel, Inc. (Settled)
Insurer: Travelers Casualty Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: November 25, 2003
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated November 28, 2005.

The administrative law judge awarded the employee the following compensation payable from the Second Injury Fund: 85 additional weeks of permanent partial disability as the result of the combination of the permanent partial disability attributable to the primary injury with pre-existing disabilities.

The employee timely filed an Application for Review with the Commission alleging the award issued by the administrative law judge was erroneous in failing to conclude that the employee was permanently and totally disabled within the meaning of the workers' compensation law, upon combining the disabilities attributable to the primary injury and the pre-existing conditions and injuries.

The Commission agrees with the contention set forth by the employee in his Application for Review, and, consequently, modifies the award and decision issued by the administrative law judge by concluding that the Second Injury Fund is liable for permanent total disability benefits to the employee pursuant to section 287.220 RSMo, to be payable as follows: commencing January 14, 2004, 60 weeks at the weekly differential rate of \$315.50, and, thereafter, \$662.55 for employee's lifetime.

The facts were accurately recounted in the award issued by the administrative law judge and will not be repeated except to support the modification in the instant award.

At trial, the sole issue stipulated was nature and extent of liability concerning the Second Injury Fund.

The principal evidence adduced was the testimony of the employee, the testimony by deposition of three experts, Dr. Volarich, Dr. Stillings and Ms. Sherry Browning, a vocational expert, and various treating medical records.

In summary fashion, Dr. Volarich rendered the following opinions: 1) pertaining to the primary injury, the employee sustained 25% permanent partial disability of the body as a whole referable to the lumbar spine; 2) pertaining to pre-existing disabilities, Dr. Volarich testified that employee had pre-existing disabilities concerning his lumbar spine, right knee, right wrist and left shoulder amounting to 272.4 weeks of permanent partial disability; and 3) Dr. Volarich was of the opinion that when employee's disability attributable to the primary injury was combined with employee's pre-existing disabilities, employee was permanently and totally disabled and unable to return to the open labor market.

In summary fashion, the testimony of Dr. Stillings was as follows: 1) as to injuries occurring January 3, 2003 and November 25, 2003, to employee's lumbar spine, employee sustained 20% permanent partial disability of the body as a whole due to a mood disorder and 25% permanent partial disability of the body as a whole due to a pain disorder; 2) as to pre-existing disability employee had a Vietnam induced post-traumatic stress disorder of 35% permanent partial disability of the body as a whole; and 3) from a psychiatric standpoint alone, Dr. Stillings was of the opinion that employee was permanently and totally disabled when the psychiatric disabilities were combined.

Ms. Sherry Browning, a vocational rehabilitation counselor, rendered the following opinion: based on her evaluation of employee of November 27, 2004, employee's global condition precluded him from any gainful employment.

The Commission, upon review of the entire record, finds that none of the above three expert opinions were impeached or neutralized in any fashion. The Commission finds each of these three expert opinions credible, believable and trustworthy.

Upon review of the entire record, the only expert medical opinions concerning the issue of total disability were the two opinions of Dr. Volarich and Dr. Stillings. The only vocational expert opinion concerning employee's ability to compete in the open labor market, was the opinion expressed by Ms. Browning.

Accordingly, the Commission concludes that the competent and substantial evidence supports a finding that employee is permanently totally disabled; and the total disability results from the disability attributable to the primary injury when combined with employee's pre-existing disabilities.

The Commission adopts the remaining findings and conclusions of the administrative law judge that are not inconsistent with the instant modification. Accordingly, the Commission agrees that the primary injury resulted in a permanent partial disability of 15% permanent partial disability of the body as a whole referable to the lumbar spine. Consequently, permanent total disability benefits from the Second Injury Fund are payable beginning January 14, 2004, for 60 weeks at the weekly rate of \$315.50, and, thereafter, \$662.55 weekly for employee's lifetime. All remaining findings of fact and conclusions of law are affirmed.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 28, 2005, is attached and incorporated to the extent it is not inconsistent with this final award.

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 August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

AWARD

Employee: Ronald Combs Injury No.: 03-140605
Dependents: N/A Before the
Employer: Edith James Steel, Inc. (Settled) **Division of Workers'**
Additional Party: Second Injury Fund **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: Travelers Casualty Co.
Hearing Date: August 18, 2005 Checked by: JED:tr

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: November 11, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
Lifting a railroad tie.
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: low back
14. Nature and extent of any permanent disability: 15% body as a whole referable to the back,; 85 weeks PPD from Second Injury Fund.
15. Compensation paid to-date for temporary disability: \$946.50
16. Value necessary medical aid paid to date by employer/insurer? \$3,186.14

Employee: Ronald Combs Injury No.: 03-140605

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages:
19. Weekly compensation rate: \$662.55/\$347.05

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

60 weeks of PPD from Employer (Settled)

22. Second Injury Fund liability: Yes

85 weeks of PPD from Second Injury Fund \$29,499.25

TOTAL: \$29,499.25

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:

James J. Sievers, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Ronald Combs	Injury No.: 03-140605
Dependents:	N/A	Before the Division of Workers'
Employer:	Edith James Steel, Inc. (Settled)	Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Travelers Casualty Co.	Checked by: JED:tr

This case involves a low back injury to Claimant with a reported accident date of November 25, 2003. Employer previously settled its risk of liability. The liability of the Second Injury Fund ("SIF") is the subject of this hearing. Claimant seeks permanent total disability. Both parties are represented by counsel.

FINDINGS OF FACT

Stipulations

Applicable rate of compensation is \$662.55 for temporary total benefits and \$347.05 for PPD. The employer paid \$3,186.14 for medical and \$946.50 for TTD.

Primary (Low Back) Injury

Claimant testified he was employed as ironworker for thirty-three years following his honorable discharge from the Army in 1970. He has worked approximately 33 years as an ironworker. He testified that his job consisted of carrying angles and steel and setting steel at various times and on various jobs. He was required to bend, stoop, and lift heavy materials. Claimant testified he worked for Edith James Steel since 1979. He was working as a foreman since 2000 until his last day of work on January 14, 2004. This record demonstrates an ability to maintain regular and rigorous employment culminating with some supervisory responsibilities.

On the date of injury claimant testified he was lifting a railroad tie that was stuck in the mud and experienced immediate back pain. The pain was so severe he could not get out of bed the next day and sought medical treatment at the VA Hospital coming under the care of various doctors. Claimant testified he attempted to return to work after this injury but was extremely limited. He worked until January 14, 2004.

Months earlier Claimant had another serious low back injury while carrying iron stock which settled for thirteen percent PPD of the body (Exhibit H). The subject low back injury settled for fifteen percent PPD of the body (Exhibit I). Thus, Claimant's cumulative low back PPD is in the range of one-quarter to one-third PPD of the body. This is not atypical for a lifelong ironworker. Nevertheless, Claimant had minimal lost time on the last injury and returned to work. He apparently refused overtime and bad weather work during the time between the January 2003 injury and the November 2003 injury. He identified significant income loss to one of his experts.

His last day of work for Employer was January 13, 2004 which seems to coincide with Employer's bankruptcy and Claimant's retirement.

Prior Injuries

Claimant testified in 1967 he suffered a severe laceration to his right wrist cutting all the tendons. There is a great deal of scar tissue and problems moving and manipulating the wrist. Problems continued in 1998 and a carpal tunnel release was undertaken. The carpal tunnel release also excised a great deal of the scar tissue however a quarter-sized nodule with a one-half inch prominence on claimant's right wrist was observed at trial. Claimant testified he continued to have problems with his wrist but continued to work as an ironworker.

Claimant also testified between 1969 and 1970 he served in Vietnam and was honorably discharged at the rank of sergeant. He was involved in many firefights wherein many of his friends and fellow soldiers were killed in the line of duty. Claimant testified he had nightmares of this and is presently being treated for post-traumatic stress disorder. Claimant apparently underwent no treatment for PTSD during his thirty-three year career as an ironworker.

Claimant further testified that on or about 1978 he jumped off a truck when his foot became caught and injured his left shoulder. Claimant testified his left shoulder was irritated by carrying stock and forced him to carry iron on his right shoulder. His shoulder would pop out from time to time. He testified he missed very little time from work as a result of this. Surgery was discussed but not undertaken. His duties were unchanged as a result of this injury.

Claimant further testified that in 1979 he twisted his right knee and eventually underwent arthroscopic

surgery for repair. Claimant stated he thereafter had difficulty walking on uneven ground and performing connecting work (kneeling). He described some chronic pain symptoms.

Claimant testified in 1988 he was involved in a motor vehicle accident. He sustained a fracture to his skull and was in coma for approximately two weeks. He testified that he had some residual effects in articulating various words. He further testified it required him to think differently than prior to the automobile accident. Claimant appeared to follow the evidence and responded quite normally to questions as measured by his timing and the reasonableness of the content of his answers.

Claimant testified in he had bilateral elbow pain and received two cortisone shots in his right elbow. He further stated these injuries slowed him down in performing his duties as an ironworker. All of this accompanies heavy labor involving thirty years' use of the upper extremities.

Opinion Evidence

Claimant offered the deposition of Dr. David T. Volarich as Exhibit A. Dr. Volarich evaluated the claimant on two occasions and obtained a medical history, physical evaluation, and reviewed the medical records. Dr. Volarich assigned a 25% PPD of the lumbosacral spine due to the disc protrusion at L5-S1 causing parasthesis. Regarding claimant's pre-existing conditions, Dr. Volarich assigned a 10% PPD of the body as a whole rated at the lumbosacral spine due to mild chronic lumbar syndrome, a 35% PPD of claimant's right knee due to the torn medial meniscus, a 40% PPD of claimant's right wrist due to a deep lacerations as well as carpal tunnel syndrome which required an open release, and a 20% PPD to the left shoulder due to the AC separation which caused posttraumatic degenerative arthritis. Dr. Volarich opined that as a result of a combination of claimant's present and pre-existing injuries he found claimant to be permanently and totally disabled.

Claimant offered the deposition of Dr. Wayne A. Stillings as Exhibit C. Dr. Stillings evaluated claimant on 8/19/04. Dr. Stillings reviewed various informational sources, obtained complaints with respect to the injury, a detailed history, performed a record review and mental status examination, as well as administering the MMPI-2. Dr. Stillings diagnosed the claimant with post-traumatic stress disorder as being Vietnam related and severe in condition. Secondly, he diagnosed claimant with a mood disorder and pain disorder associated with psychological factors in general medical condition. Dr. Stillings opined that claimant's GAF was 50-52, which is moderate to severe. Pertaining to the psychiatric disability, it was Dr. Stillings opinion that claimant suffered a 20% psychiatric disability in relation to pain and mood disorder causally related to the injuries of 1/03/03 and 11/25/03. In addition, a 25% permanent partial psychiatric disability was issued as a result of the pain disorder causally related to the 1/3/03 and 11/25/03 work incidents. Dr. Stillings assigned the combat veteran-based PTSD at 35% PPD of the body. Dr. Stillings further opined that claimant, from a psychiatric standpoint, is permanently and totally disabled. Dr. Stillings identified no pertinent treatment records or treatment plan for Claimant's PTSD.

It is important to note that none of Claimant's experts discussed Claimant's retirement decision in their theories of disability. The expert silence makes it difficult to reconcile Claimant's decision with the opinions rendered. See Ransburg v. Great Plains Drilling, 22 S.W.3d 726 (Mo.App. 2000). Avoidance of such a rudimentary fact of employment history undercuts the probative value of the opinions.

RULINGS OF LAW

Claimant sustained serious low back injury as a result of the reported injury which, when combined with the low back injury earlier that year, cumulates to a thirty percent PPD of the body. Claimant's work history, limitations throughout 2003 and course of symptomatology corroborate this condition. Had Claimant not experienced a second low back injury during 2003, the earlier low back claim, accompanied by the same evidence might have been the basis of permanent total disability against the Employer. The evidence supports a finding on the primary injury herein as fifteen percent PPD which meets the statutory threshold for SIF liability. Section 287.220.1 RSMo (2000).

Claimant's significant pre-existing disabilities involving other body parts include the operated right knee meniscus, with twenty years of continued heavy construction labor, which equates to at least twenty-five percent PPD (40 weeks). Claimant right wrist with its two serious injuries and complications equates to at least twenty

percent PPD (35 weeks). The right wrist carries almost fifteen years of degenerative change. The left shoulder dislocation treatment revealed an AC joint arthroplasty recommendation which was not followed. This diagnosis and almost twenty years of additional heavy labor and degenerative change measures at least twenty percent PPD (46.4 weeks).

The possible examples of synergy are myriad since both upper extremities, the lumbar spine and a knee are all involved. The evidence suggests that Claimant is disabled in the range of two-thirds of the body, or 266.4 weeks.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained 85 additional weeks of PPD as the result of the combination of the primary injury with pre-existing disabilities to the shoulder, knee, and wrist, for which the SIF is liable.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation