

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

Injury No.: 07-135302

Employee: David Connors  
Employer: FedEx Freight, Inc. (Settled)  
Insurer: Self-Insured (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 reviewed the evidence 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**

*Calculation of Second Injury Fund liability for permanent partial disability benefits*

The parties agree that the administrative law judge's award contains some apparent clerical or typographical errors with respect to the calculation of Second Injury Fund liability for permanent partial disability benefits. The confusion springs from the administrative law judge's references to an "augmentation factor" of 2.5% on page 6 of the award, as well as an "enhancement factor" of 2.5% on page 7 of the award, and also from the statement, on page 6 of the award, that "there is a total of 5.65 weeks of preexisting disability" immediately following findings suggesting instead that employee suffered a total of 202 weeks of preexisting permanent partial disability.

Employee argues that the administrative law judge meant to apply a 15% rather than a 2.5% load factor. Employee invokes the case of *Angus v. Second Injury Fund*, 328 S.W.3d 294 (Mo. App. 2010), arguing the administrative law judge was bound by testimony from employee's medical expert, Dr. Poppa, as to the issue of the appropriate load factor to use in calculating Second Injury Fund liability. The Second Injury Fund acknowledges the apparent inconsistencies in the award, but argues the administrative law judge intended to apply a 2.5% load factor, as evidenced by his ultimate award of 5.65 weeks of permanent partial disability against the Second Injury Fund.

We note that the administrative law judge's award of 5.65 weeks is consistent on both page 2 and page 7 of the award. We note also that the case of *Angus v. Second Injury Fund*, 328 S.W.3d 294 (Mo. App. 2010) dealt with an issue of medical causation and apportionment of permanent disability as between preexisting conditions and subsequent injuries affecting the same body part, and therefore is in no way applicable to the circumstances in this case. Ultimately, we are more persuaded by the Second Injury

Employee: David Connors

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Fund's argument that the administrative law judge meant to apply a 2.5% load factor, and we are not persuaded by employee's argument that we should disturb this finding, which was well within the discretion and expertise of the administrative law judge.

Accordingly, we hereby correct the apparent clerical or typographical errors as follows. On page 6 of the award, we delete the following sentences set forth in the sixth paragraph: "Applying an augmentation factor of 2.5% to the 2007 left knee injury in combination with the preexisting right knee disability is appropriate given the bilateral nature of the injuries. Therefore, there is a total of 5.65 weeks of preexisting disability." On page 7 of the award, we delete the following sentence in the first paragraph: "Further, Employee's testimony that the combination of his primary injury and preexisting disabilities rendered it difficult for him to lift, carry, push, pull, squat, stoop, kneel, crawl, and perform the other physical requirements of the job is consistent with a 15 percent enhancement factor."

**Conclusion**

We affirm and adopt the award of the administrative law judge with this supplemental opinion.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued September 24, 2013, is attached and incorporated by this reference.

The Commission approves and affirms as fair and reasonable the administrative law judge's allowance of a 25% lien in favor of employee's attorney on compensation awarded herein.

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

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of June 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

**FINAL AWARD  
AS TO THE SECOND INJURY FUND ONLY**

Employee: David Connors

Injury No. 07-135302

Dependents: N/A

Employer: FedEx Freight, Inc. (settled)

Insurer: Self (settled)

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

Hearing Date: August 6, 2013

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: December 14, 2007.
5. State location where accident occurred or occupational disease was contracted: Liberty, 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? N/A – Employer was self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While working in the course and scope of employment, Employee was unhooking a trailer when he slipped on an icy surface and twisted and wrenched his 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: 15 percent permanent partial disability to the left knee.
15. Compensation paid to date for temporary disability: \$6,502.77.
16. Value necessary medical aid paid to date by employer/insurer? \$24,833.66.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$797.53.
19. Weekly compensation rate: \$531.69/\$389.04.
20. Method wages computation: By stipulation.

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable: Employee previously settled his claim with the Employer for 15 percent permanent partial disability to the left lower extremity at the 160 week level.
22. Second Injury Liability: Permanent partial disability benefits from the Second Injury Fund of 5.65 weeks @ \$389.04 per week, a total of \$2,198.08.
23. Future requirements awarded: N/A

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Christopher Smith, Employee's attorney, for necessary legal services rendered.

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

Employee: David Connors

Injury No. 07-135302

Dependents: N/A

Employer: FedEx Freight, Inc. (settled)

Insurer: Self (settled)

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

Hearing Date: August 6, 2013

Checked by:

On August 6, 2013 the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, David Connors, appeared in person and with counsel, Christopher Smith. The Second Injury Fund appeared through Assistant Attorney General, Maureen Shine. There was no appearance on behalf of the Employer and Insurer as the claim between the Employer and the Employee has previously been settled.

## **STIPULATIONS**

The parties stipulated to the following:

- 1) that the Employer, FedEx Freight, Inc., was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law on December 14 2007 and was fully self-insured;
- 2) that David Connors was its employee and working subject to the law in Liberty, Clay County, Missouri;
- 3) that Employee sustained an accident or occupational disease arising out of and in the course and scope of his employment;
- 4) that Employee notified the Employer of his injuries as required by law and his claim was filed within the time allowed by law;
- 5) that Employee's average weekly wage was \$797.53, resulting in a compensation rate of \$531.69 for temporary total disability and \$389.04 for permanent partial disability compensation;
- 6) that the Employer has paid temporary total disability compensation in the amount of \$6,502.77 and medical care costing \$24,833.66;
- 7) that the Employer and Employee settled the primary claim for 15 percent permanent partial disability to the left knee.

## **ISSUES**

The issues to be resolved by this hearing are as follows:

- 1) whether the Employee's prior disability was a hindrance or obstacle to his ability to maintain employment or to be reemployed should he have become unemployed; and
- 2) whether the Second Injury Fund is liable to the Employee for any disability compensation.

### FINDINGS OF FACT AND RULINGS OF LAW

The Employee, David Connors, appeared in person and offered the following exhibits, and with the sole exception of Exhibit V, all were admitted into evidence without objection:

*Claimant's Exhibit A* – Stipulation for Compromise Settlement, Injury No. 07-135302, approved 9/16/10

*Claimant's Exhibit B* – Stipulation for Compromise Settlement, Injury No. 08-120575, approved 9/16/10

*Claimant's Exhibit C* – Transcript of the deposition of Michael J. Poppa, D.O. taken 9/27/12, with deposition exhibits 1, 2 and 3

*Claimant's Exhibit D* – Transcript of the deposition of Allan D. Schmidt, Ph.D., taken 11/20/12, with deposition exhibits 1 and 2

*Claimant's Exhibit E* – Transcript of the deposition of Mary W. Titterington, MS, CCFC, taken 9/25/12, with deposition exhibits 1 and 2

*Claimant's Exhibit F* – Transcript of the deposition of Claimant David Connors, taken 9/18/12

*Claimant's Exhibit G* – Medical records, Advanced Cardiovascular Specialists

*Claimant's Exhibit H* – Medical records, DiPoto Counseling Group

*Claimant's Exhibit I* – Medical records, Gary Go, M.D., rating report of 2/9/09

*Claimant's Exhibit J* – Medical records, KU MedWest Occupational Health

*Claimant's Exhibit K* – Medical records, KU MedWest Therapy

*Claimant's Exhibit L* – Medical records, Zafar Mahmood, M.D.

*Claimant's Exhibit M* – Medical records, Northland Bone & Joint

*Claimant's Exhibit N* – Medical records, Rockhill Orthopaedics

*Claimant's Exhibit O* – Medical records, Sharon Scott, M.D.

*Claimant's Exhibit P* – Medical records, St. Luke's Imaging Center

*Claimant's Exhibit Q* – Medical records, Surgicenter of Kansas City

*Claimant's Exhibit R* – Medical records, Mid American Foot & Ankle

*Claimant's Exhibit S* – Medical records, MidAmerica Neuroscience Institute

*Claimant's Exhibit T* – Medical records, Neurosurgery of Kansas City

*Claimant's Exhibit U* – Medical records, North Kansas City Hospital

*Claimant's Exhibit V* – Medical records, report of Douglas M. Rope, M.D., dated 2/23/10 (**not admitted**)

*Claimant's Exhibit W* – Medical records received from opposing counsel

*Claimant's Exhibit X* – List of Claimant's current medications

The Second Injury Fund did not call any witnesses, offered no exhibits and offered no evidence other than the cross examination of the Employee.

Based on the above exhibits and Employee's testimony, this Court makes the following findings:

On December 14, 2007, while on the job in Liberty, Missouri, Employee was unhooking a trailer when he accidentally slipped on an icy surface and twisted and wrenched the knee. Dr. Go performed arthroscopic surgery on the left knee on January 29, 2008 which consisted of a partial medial meniscectomy, chondroplasty of the medial femoral condyle and chondroplasty of the patellofemoral joint and extensive synovectomy. He was released to return to work regarding the left knee on April 21, 2008. The following day, April 22, 2008, he underwent surgery to treat pre-existing right knee problems.<sup>1</sup> He was released from treatment on the right knee on June 18, 2008 and then returned to his job at FedEx Freight on a full duty basis. He continued to work until he sustained another work-related injury to the left knee on July 15, 2008.

Employee settled a workers' compensation claim for the December 14, 2007 injury at FedEx Freight, Inc. for 15 percent permanent partial disability of the left knee.

Although his work status was technically "full duty" between June 18, 2008 and July 15, 2008, Employee's actual job duties were not as they had been before the injury in December, 2007. Due to the condition of his knees, he found it difficult to climb up and into a truck or the back of a trailer. He self-accommodated by crawling into the trailer and then rolling in. And, fortunately for Employee, his employer was tolerant of Employee's physical problems and worked with him as much as possible to try to help him. For example, he was provided a smaller truck with smaller steps which made it easier for Employee to get into the truck. Additionally, Employee sought and received the assistance of co-workers when he was required to crawl under trailers for pre-trip inspections and when he had to hook and unhook trailers.

Dr. Michael Poppa examined Employee at the behest of his attorney. Regarding pre-existing disabilities, he opined that prior to July 15, 2008, Employee had 20 percent permanent partial disability of the right lower extremity at the 160 week level, 15 percent permanent partial disability of the body as a whole referable to the cervical spine and 12.5 percent permanent partial disability of the body as a whole referable to the lumbar spine. The pre-existing right knee problems were progressive in nature. Regarding the pre-existing neck disability, Employee was diagnosed with cervical stenosis and three bulging disks and was once treated with a nerve block. And, Employee had a pre-existing diagnosis of lumbar stenosis. Dr. Poppa opined that there was 15 percent enhancement of disability due to the combination of the prior disabilities with each other and with the disability from the primary claim of injury in July, 2008.

Dr. Allan Schmidt, a psychologist, was retained by Employee to perform an independent psychological evaluation. Dr. Schmidt opined that prior to July 15, 2008, Employee had 15 percent psychological disability. Employee's pre-existing psychological problems included depression, patterns of obsessive behaviors regarding food, exercise, his weight, golf, jigsaw puzzles, fishing, drawing and shopping and anger management problems at work.

The first issue to be determined by this Court is whether the Employee's prior disabilities were a hindrance or obstacle to his ability to maintain employment or to be reemployed should he have become unemployed. In that regard, the Employee testified that due to the pre-existing

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<sup>1</sup> Employee underwent arthroscopic right knee surgery which consisted of extensive synovectomy, partial medial and lateral meniscectomies and chondroplasty of the medial femoral condyle and patellofemoral joint.

disabilities of the right knee, cervical spine and lumbar spine, he had difficulty lifting and carrying heavy weights and his employer allowed others to help him when he was required to unload heavy freight from a trailer. For example, if a particular item could not be lifted and moved with a forklift, the employer would send someone out to help Employee unload the heavy freight. The movement of the seats in the trucks he had to drive caused headaches with pain running down into the neck area and a burning sensation in the shoulders, and this slowed him down at work. He self-accommodated by taking frequent breaks – he would have to stop driving and get out of the truck in order to manage the headaches and pain in the neck and shoulders.

Moreover, Employee's pre-existing psychological problems presented issues at work prior to December 14, 2007. He reported a history of anger management problems beginning in 2005. The Claimant had numerous confrontations with co-workers and managers which usually turned into shouting matches. As a result, he was given verbal warnings and was written up for aggressive behavior in the workplace.

In reviewing the medical records, the reports from Dr. Poppa and Dr. Schmidt and Employee's testimony, this Court finds that Employee's prior disabilities did, in fact, cause a hindrance or obstacle to employment or to Employee's ability to obtain reemployment if he had become unemployed.

The next issue to be determined in this matter is whether the Second Injury Fund is liable to the Employee for any disability compensation. In order to establish Second Injury Fund liability for permanent partial disability benefits, the Employee must prove:

(1) That he has sustained a permanent disability resulting from a compensable work-related injury. See Section 287.210.1 RSMo (1964). This Court notes and determines that Employee has a compensable work-related injury resulting in a 15 percent permanent partial disability to the left lower extremity at the 160 week level which equates to 24 weeks of disability.

(2) That the Employee has permanent disability predating the compensable work-related injury which is of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the Employee had become unemployed. §287.220.1 RSMo (1994); Messex v. Sachs Electric, Co., 989 SW 2d (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). As previously determined by this Court, the evidence herein does show that Employee suffered preexisting disabilities which were a hindrance or obstacle to employment or to obtain reemployment if the employee should have become unemployed. This prior disability is rated at 20 percent permanent partial disability to the right lower extremity at the 160 week level which equates to 32 weeks of disability, 15 percent of the body as a whole, referable to the cervical spine, which equates to 60 weeks of disability, 12.5 percent permanent partial disability to the body as a whole, referable to the lumbar spine, which equates to 50 weeks of disability, and 15 percent of the body as a whole referable to psychological disability. Applying an augmentation factor of 2.5% to the 2007 left knee injury in combination with the pre-existing right knee disability is appropriate given the bilateral nature of the injuries. Therefore, there is a total of 5.65 weeks of pre-existing disability.

(3) That the combined effects of the disability resulting from the work-related injury and the disability that is attributable to any condition existing at the time that 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, 879 SW 2d 152 (Mo. App. 1994). Dr. Poppa opined that Employee did sustain a synergistic effect due to the combination of his primary injury and his pre-existing disabilities, assigning a 15 percent enhancement factor to the primary injury and all pre-existing disabilities. Further, Employee's testimony that the combination of his primary injury and preexisting disabilities rendered it difficult for him to lift, carry, push, pull, squat, stoop, kneel, crawl and perform the other physical requirements of the job is consistent with a 15 percent enhancement factor. Wherefore, this Court finds that the Second Injury Fund owes permanent partial disability to the Employee for a combination of his primary injury and his preexisting disabilities. The primary injury resulted in a 15 percent permanent partial disability to the left lower extremity at the 160 week level equating to 24 weeks, and his prior disabilities resulted in 20 percent permanent partial disability to the right lower extremity at the 160 week level equating to 32 weeks, 15 percent of the body as a whole referable to the cervical spine which equates to 60 weeks, 12.5 percent permanent partial disability of the body as a whole which equates to 50 weeks and 15 percent psychological disability which equates to 60 weeks. The enhancement factor is 2.5%. After applying the enhancement factors as stated, the combined weeks total 5.65, and at the weekly compensation rate of \$389.04 the Second Injury Fund owes to Employee \$2,198.08.

Finally, this Court awards to Employee's attorney, Christopher Smith, a fee of 25 percent of all benefits awarded herein.

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

Made by: \_\_\_\_\_

Mark S. Siedlik

*Administrative Law Judge*

*Division of Workers' Compensation*