

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

Injury No.: 03-072619

Employee: Charles Curtis
Employer: Daimler-Chrysler Corporation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 16, 2003
Place and County of Accident: St. Louis County, 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. Having reviewed the evidence and considered the entire record, and having heard the oral argument of the parties, the Commission issues this modification of the award and decision of administrative law judge Matthew D. Vacca dated October 19, 2005 (Decision), pursuant to section 286.090 RSMo. The Decision is attached to and incorporated into this decision. 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.

As to the liability of employer, the administrative law judge awarded employee 200 weeks of permanent partial disability amounting to \$69,410.00. As to the liability of the Second Injury Fund, the administrative law judge determined that employee was permanently totally disabled commencing March 1, 2004, by concluding that the disability attributable to the last injury occurring July 16, 2003, when combined with employee's pre-existing disabilities, resulted in employee being permanently totally disabled.

Once a final award is issued by an administrative law judge, a party may apply for review by the Commission within 20 days from the date of the award. In the case before us, both employer and the Second Injury Fund filed timely applications for review to this Commission.

Review by the Commission results in a modified trial de novo. The Commission has plenary authority to review the decision of the administrative law judge. Where appropriate, the Commission determines the credibility of witnesses and the weight of their testimony, resolves any conflicts in the evidence, and reaches its own conclusions on factual issues independent of the administrative law judge. Upon its own motion or upon the application of any party in interest, the Commission may end, diminish, or increase the compensation awarded by the administrative law judge in the Commission's final award. The Commission is not limited to a review of the errors complained of by the moving party. See: *Waterman v. Chicago Bridge & Ironworks*, 41 S.W.2d 575 (Mo. 1931); *Shaw v. Scott*, 49 S.W.3d 720 (Mo. App. W.D. 2001); and *Champ v. Doe Run Co.*, 84 S.W.3d 493 (Mo. App. E.D. 2002).

The ultimate determination of credibility of witnesses rests with the Commission; however, the Commission should take into consideration the credibility determinations made by an administrative law judge. When reviewing an administrative law judge's award, the Commission is not bound to yield to his or her findings including those relating to credibility and is authorized to reach its own conclusions. An administrative law judge is no more qualified than the Commission to weigh expert credibility from a transcript or deposition. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865, 871 (Mo. App. W.D. 2004).

It is the employee's burden to prove the duration and extent of his disability to a reasonable certainty. *Davis v.*

Brezner, 380 S.W.2d 523, 528 (Mo. App. 1964); *Matzker v. St. Joseph Minerals*, 740 S.W.2d 362, 363 (Mo. App. E.D. 1987) (reversed in part on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003)). The determination of a specific amount or percentage of disability to be awarded an injured employee is a finding of fact within the unique province of the Commission. *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo. App. E.D. 1998) (reversed in part on other grounds in *Hampton, supra*).

In making this determination, the Commission can consider all the evidence in the record (*Id.*) and draw all reasonable inferences from that evidence. The Commission is not bound by the percentage estimates of the medical experts and is free to assess a disability either higher or lower of that expressed in the medical or vocational testimony. *Id.*

After reviewing the entire record before us, we conclude that the amount of compensation payable for permanent partial disability awarded under the Decision is excessive; consequently, we modify the award concerning employer as follows -- employee is 15% permanently partially disabled with respect to the body as a whole. Accordingly, the amount of compensation payable for permanent partial disability attributable to the accident occurring July 16, 2003, is 60 weeks x \$347.05 or a lump sum amount of \$20,823.00.

In reaching this conclusion and modifying the permanent partial disability awarded, the Commission has found the opinion of Dr. Wagner to be more persuasive, trustworthy, and consistent with surrounding facts than the opinion of Dr. Volarich. Consequently, we have relied more on Dr. Wagner's conclusions. We are equally able to make such determination as the administrative law judge, because both of these experts testified through depositions.

Unlike Dr. Volarich, Dr. Wagner is a board certified orthopedic surgeon (and has been since 1971). Dr. Volarich performs no shoulder surgery as a part of his practice. Dr. Volarich is not board certified in any type of surgery. Unlike Dr. Volarich, who only got to examine employee one time, Dr. Wagner had the opportunity to examine and evaluate employee numerous times over a period of approximately five months. He was able to see employee both before and after the September 25, 2003, repair surgery. Dr. Wagner actually performed this right shoulder repair surgery. Dr. Wagner also had the advantage of having treated other millwrights connected with employer and having visited employer's plant. Thus, he had the opportunity to see the type of tasks these millwrights had to perform.

Despite Dr. Wagner's better knowledge of employee's shoulder damage and repair and job demands, Dr. Wagner released employee without any restrictions to return to his regular work beginning January 14, 2004. His final exam revealed that employee's left shoulder range of motion was normal for a person of employee's age and that employee's right shoulder had a range of motion of 135 degrees (an approximate 30 degree loss of motion from what would have been considered normal). Employee had a good, smooth range of motion in both shoulders and no evidence of weakness in either shoulder. Never once had employee complained to Dr. Wagner about any left shoulder problems or sought advice or treatment. He had not even indicated on his initial intake form for Dr. Wagner that his left shoulder was a problem. Dr. Wagner rated employee's permanent partial disability to be 10% at the level of the right shoulder.

Employee's left knee complaints pre-dated the July 16, 2003, injury. No evidence was presented that the July 16 incident aggravated or caused any change in the pathology of employee's right knee. Claimant testified that prior to his primary accident, he did what he had to at work despite his right knee and never missed any work because of it. Concerning this knee injury, Dr. Volarich testified by deposition as follows: "He wore a brace and an elastic band when necessary. He was able to stoop, squat, crawl, and kneel, but this was painful. He could run and jump to some degree. He was able to climb stairs and ladders and navigate uneven surfaces but not repetitively." At the time of Dr. Volarich's examination, he found no active inflammation in the knee. Employee settled the workers' compensation claim connected with his previous knee injury based on a 15% permanent partial disability at the level of the knee.

After considering the above facts, the Commission is convinced that the administrative law judge's assessment of 50% permanent partial disability of the body as a whole was excessive. Therefore, we modify the award of the administrative law judge. We conclude that employer is responsible for permanent partial disability benefits to employee based on a 15% permanent partial disability with respect to the body as a whole (\$347.05 weekly for 60 weeks).

On the other hand, the Commission agrees with the administrative law judge's award concerning the Second Injury Fund. Employee was permanently totally disabled after the primary injury, but it was not the last injury alone that caused this total disability. Thus, the Second Injury Fund is responsible for permanent total disability benefits to employee in the weekly differential amount of \$315.50 for 60 weeks beginning March 1, 2004, and then in the amount of \$662.55 per week during the balance of employee's lifetime or until modified by law.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee in this case 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:

Secretary

AWARD

Employee: Charles Curtis

Injury No.: 03-072619

Dependents: N/A

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Second Injury Fund Relations of Missouri
Jefferson City, Missouri

Employer: Daimler-Chrysler

Additional Party:

Insurer: Self-Insured

Hearing Date: October 5, 2005

Checked by: MDV: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: July 16, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis County

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:
Injured both shoulders lifting chrome clutch.
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 and right upper extremities
14. Nature and extent of any permanent disability: 50% body as a whole
15. Compensation paid to-date for temporary disability: \$14,197.50
16. Value necessary medical aid paid to date by employer/insurer? \$15,334.68

Employee: Charles Curtis Injury No.: 03-072619

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$1,628.15
19. Weekly compensation rate: \$662.55/\$347.05
20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable:

200 weeks of permanent partial disability from Employer	\$69,410.00
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22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
 weekly differential (\$315.50) payable by SIF for 200 weeks beginning
 March 1, 2004, and \$662.55 thereafter for Claimant's lifetime *

TOTAL:	\$69,410.00 *
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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:

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Charles Curtis	Injury No.:	03-072619
Dependents:	N/A	Before the	
Employer:	Daimler-Chrysler	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Self-Insured	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	MDV:tr

ISSUES PRESENTED

The issues presented for resolution by way of this hearing are accident pertaining to the left shoulder, arising out of and in the course of employment and medical causation pertaining to left shoulder injuries, future medical care, and the nature and extent of any permanent disabilities to include the liability of the Second Injury Fund. The Employer acknowledges an accident and injuries to Claimant's right shoulder but denies that he injured his left shoulder in the admitted incident.

SYNOPSIS

Claimant is a millwright for Daimler-Chrysler. A millwright performs all maintenance and repair work to keep the overhead assembly line running. On the date of the accident herein Claimant was 62 years old and was lifting an 80-pound clutch which started to slip from his hands. This part was expensive and made of shiny chrome and difficult to lift. Claimant didn't want to damage the part and thus attempted to swing it to a box to protect it when he injured his shoulders with the right being worse than the left. Claimant alleges that as a result of the right and left shoulder injuries and a preexisting injury to his left knee involving a surgery that he is permanently and totally disabled from competing in the open labor market. I find that Claimant did injure his right and left shoulders while working for Chrysler. I also find that he is permanently and totally disabled following his healing from these injuries but that it is the combination of his shoulder injuries working in conjunction with his prior knee injuries that have brought him to his current condition of unemployment. Thus, after the payment of permanent partial disability, I impose liability on the Second Injury Fund for permanent and total disability benefits.

FINDINGS OF FACT

1. Claimant was born December 16, 1940 and is currently 64 years old. On the date of the accident herein Claimant was 62 years old. He is married and has an eleventh grade education, no GED and no specialized or

vocational post high school training. Claimant served in the Marine Corps from 1958 to February of 1961 and was granted an honorable discharge. In the military he worked as an engineer driving a dump truck and later driving a truck pulling a 105 Artillery piece.

2. Following his discharge from the Marines, Claimant went to work for a dairy manufacturer on Miami Street in St. Louis, Missouri from 1961 to 1969. In this capacity he built, installed, and serviced packing machines, conveyors and any other types of mechanical assembly line units used in the dairy business. This was considered millwright work.
3. In July of 1969 Claimant went to work for Chrysler as a millwright working eleven years until Chrysler shut down in December of 1994.
4. A millwright performs all of the conveyor work necessary on an assembly line including setting robots, placing structural steel, 8-inch I-beams, drilling, busting concrete, working gear boxes, repairing breakdowns on the line and performing everything of a maintenance or installation or repair process to keep the assembly line running. This was a very physical job that would require Claimant to lift steel, motors, and gearboxes and use a come-along device. Claimant would be on his feet all day and would be required to bend, stoop and lift. The majority of his work was performed overhead because the assembly line was an inverted line. He spent a great deal of his time on ladders.
5. When Chrysler shut down in 1994 Claimant worked with his brother in a small business known as Curtis Auto Glass. In this capacity Claimant performed all glazing, mirror work, window work, door auto glass work, storefront work, patio door work and plate glass work for installation in buildings, homes and automobiles. He would grind, install and unload glass and regularly lifted 72 x 120-inch by quarter-inch thick plate glass. This job required overhead work and forceful use of the upper extremities.
6. While working for Curtis Auto Glass Claimant injured his left knee when he was lifting glass and turning. He underwent surgery for injury to the left knee and following this injury crawling, kneeling, and climbing ladders was problematic. Whenever Claimant had to crawl on the ground he would throw down gloves or some other form of padding to cushion the knee.
7. In December of 1994 Claimant returned to work at Chrysler as a millwright. He worked until the date of the accident herein, July 16, 2003. On the date of the accident his supervisor called him to the supervisor's office and asked him to remove a chrome clutch that weighed 70 to 80 pounds. This clutch was solid chrome, shiny, slippery and difficult to grab. As Claimant picked up the \$10,000.00 clutch, it began to slip and he swung it to his right to avoid dropping and damaging the item. This dropping and jerking maneuver caused him to injure both shoulders as he set the chrome clutch on a box. Claimant was in immediate pain, the right worse than the left, but was able to finish his shift working the next 4 ½ hours. By the end of the day he was unable to raise his right arm.
8. The dispensary records clearly disclose that the next day Claimant was complaining of both right and left shoulder pain. Since the right was worse, the medical personnel addressed those problems first. Claimant was prescribed x-rays, an MRI, and a right rotator cuff tear was diagnosed. Claimant was placed on light duty and sent to physical therapy which was unsuccessful. He then underwent rotator cuff surgery and followed up with physical therapy.
9. Claimant performed all of the requirements of the physicians to cure and relieve him of the effects of this injury and was released on December 23 to limited duty with no overhead lifting. Claimant explained to the physician that there was no non-overhead millwright work available and thus his off work status was extended until January of 2004.
10. Claimant had to be cleared by way of a physical by Dr. Anderson before he was able to return to work full duty. Claimant was never returned to work full duty. He was given permanent physical restrictions of no overhead use and did restricted duty until February of 2004 when he was offered a buyout and early retirement.
11. By this time Claimant was given an apprentice to help him with his work. He was unable to pull a railroad bar out of a sleeve, he was unable to use a pry bar or do any prying, he was unable to pull a come-along, he was unable to climb ladders and was unable to do any overhead work. When Claimant tried to climb a ladder he was unable to use his arms to propel himself up a ladder and his left leg also was of limited help due to the prior injury in helping propel him up a ladder.
12. Claimant had planned to work up to age 66 years to fatten his pension and was required to accept a lesser pension due to the early retirement and buyout. The date Claimant last received any benefits was March 1, 2004.

13. Claimant now experiences a constant, deep pain in both shoulders, especially on attempting to reach overhead or backwards or to stick out his upper extremities in front of his body. He finds that he is only able to work in close to the body with his arms extended directly in front of him at waist level. Claimant admits that the right is worse than the left. Claimant uses over-the-counter Tylenol and a product called Mobisil to alleviate his aching symptoms. Claimant testified that sleeping is difficult and he requires at least three sleeping pills at night because he is unable to sleep on either shoulder due to pain. He is able to drive locally anywhere he pleases but he is not able to drive long distances because of pain in the shoulders. His left knee still hurts and some days he is unable to walk even four or five blocks in the neighborhood. He wears an elastic brace on the left knee and finds bending, squatting and standing difficult.
14. On an average day Claimant watches television, eats, walks around trying to figure out what he is going to do with his day, he goes to the grocery store with his wife, she pushes the cart and he sits on the bench at Wal-Mart. His wife carries the groceries into the house from the garage, a limited distance, but he is unable to help. Claimant is afraid to engage in any of his prior hobbies, such as fixing cars, for fear of injuring his shoulders. Claimant is able to ride his lawnmower to perform some home duties. He finds using tools or doing any work difficult and recalls working on a wheelbarrow his wife uses for plants. Repairing it was difficult even using a cordless drill. Claimant also helped his wife hang some curtains and had to get extremely close to the ceiling so that he could work with his arms close into his body.
15. Karen, at the Employer's dispensary, refused to treat Claimant's left arm until the right arm was treated and finished with. She wanted to treat his shoulders one at a time.
16. Claimant never turned down overtime as a result of his knee condition and never lost time from work as a result of his knee condition. He did not have any difficulty sleeping on his shoulders before the injury at Chrysler.
17. Dr. Wagner, on behalf of the Employer, rated Claimant's disability at 10% of the right upper extremity measured at the right shoulder.
18. Dispensary records clearly document complaints of right and left shoulder pain with the right greater than the left.
19. Dr. Volarich, on behalf of the Claimant, finds that he has sustained a 35% permanent partial disability of the right shoulder due to the open repair of a torn rotator cuff and a 20% permanent partial disability of the left upper extremity rated at the shoulder due to rotator cuff tendonitis and impingement syndrome. Preexisting these injuries, Dr. Volarich rates Claimant at 40% permanent partial disability of the left lower extremity rated at the left knee due to torn medial meniscus and chondromalacia requiring chondroplasty of the medial femoral epicondyle.
20. Vocational expert James England testified on behalf of the Claimant that Claimant has no transferable skills usable at the sedentary or light levels of exertion. He believes that Claimant would not be able to sustain work in the long run and that he is thus unemployable in the open labor market as a result of the combination of impairments together with his age, education, and lack of transferable skills.

RULINGS OF LAW

1. I find that Claimant sustained an injury on July 16, 2003 while working for Daimler-Chrysler and that as a result of the accident and the injuries sustained therein he injured his right and left upper extremities.
2. As a result of the accident and the injuries and after a healing period and reasonable and necessary medical treatment, Claimant has sustained a 50% permanent partial disability measured at the level of the body as a whole due to the multiplicity of the injuries and the fact that the injuries severely impacted his employability as a millwright.
3. Following this last injury at Daimler-Chrysler and the healing period therein, Claimant became permanently and totally disabled. It was not this last injury alone that caused Claimant to become permanently and totally disabled. Preexisting this last injury Claimant suffered from a left leg injury requiring meniscal repair and which resulted in a serious permanent partial disability at the level of the left knee.
4. The shoulder injuries and the left knee injury are working in a synergistic fashion greater than their simple sum total and are working in concert to deprive Claimant of his ability to compete in the open labor market. The synergy of these injuries is demonstrated by considering Claimant's ability to climb a ladder. His shoulders are unable to help him propel himself up a ladder and his left knee is no longer able to aid in that pursuit either. Nevertheless, as this is a claim for permanent and total disability the synergistic effect is not a prerequisite. All that is required is that Claimant is permanently and totally disabled after the last injury considered in and of itself and that it was not the last injury alone that led him to that point in his life.

5. I think it is clear that if Claimant retained use of his left leg, his exertion level would be increased and he would be able to compete for some jobs at the sedentary level although certainly not his prior occupation. Thus, I think I have significantly weighed the primary injury and taken into consideration all of his injuries in arriving at this decision.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation