

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

Injury No.: 04-002087

Employee: Michael Doyle
Employer: United Parcel Service (Settled)
Insurer: Liberty Mutual Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: January 9, 2004

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 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 2, 2008. The award and decision of Administrative Law Judge Kathleen Hart, issued June 2, 2008, 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 November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Michael Doyle

Injury No.: 04-002087

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: United Parcel Service (settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (only)

Insurer: Liberty Mutual Insurance Company (settled)

Hearing Date: March 18, 2008

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: January 9, 2004
 - 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
 - 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:
Claimant injured his low back and developed a hernia while lifting a package at work.
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: Body as a whole - low back and hernia
 - Nature and extent of any permanent disability: 13% body as a whole previously paid by Employer and

permanent total disability against the SIF beginning October 13, 2004, due to a combination of the primary injury and preexisting injuries.

15. Compensation paid to-date for temporary disability: \$26,312.70
16. Value necessary medical aid paid to date by employer/insurer? \$70,394.63

Employee: Michael Doyle

Injury No.: 04-002087

17. Value necessary medical aid not furnished by employer/insurer? None

- Employee's average weekly wages: unknown

19. Weekly compensation rate: \$662.55/\$347.05
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

52 weeks of permanent partial disability from Employer

(previously paid)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
\$315.50 weekly differential payable by SIF for 52 weeks beginning
October 13, 2004 and, thereafter \$662.55 per week as provided by law.

Total:

TO BE DETERMINED

23. Future requirements awarded:

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: Tom Liese

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Doyle

Injury No.: 04-002087

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: United Parcel Service (settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (only)

Insurer: Liberty Mutual Insurance Company (settled)

Checked by: KMH

A hearing was held on the above captioned matter March 18, 2008. Michael Doyle (Claimant) was represented by attorney Tom Liese. The Second Injury Fund was represented by Assistant Attorney General Da-Neil Cunningham. Claimant's case against Employer was settled before this hearing.

All objections not expressly ruled upon in this award are overruled.

STIPULATIONS

The parties stipulated to the following:

- On January 19, 2004, Claimant was injured by accident during the course and scope of his employment for Employer.
- Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law. Employer's liability was fully insured by Insurer. Employer had notice of the injury and a claim for compensation was timely filed.
- Claimant's average weekly wage was sufficient to entitle him to the maximum rates of \$662.55 for TTD and PTD, and \$347.05 for PPD.
- Claimant received \$26,312.70 in medical benefits and 39 5/7 weeks of TTD benefits totaling \$70,394.68.
- On June 3, 2005, Claimant settled his case against Employer for 13% PPD to his low back.

ISSUES

The parties stipulated the sole issue for trial is Second Injury Fund liability.

FINDINGS OF FACT

Based upon the competent and substantial evidence and my observations of Claimant at trial, I find:

- Claimant is a 51 year-old male with a 12th grade education. He has no other employment training, specialized education or military experience.
- While in high school, Claimant worked part time at a gas station. After graduation, he continued to work at the gas station and started working part time for Employer in September 1974. He continued working for Employer until his retirement December 1, 2004.
- His initial duties with Employer were to load and unload package cars. In 1978 he began driving package cars and making deliveries. As a package car driver, Claimant lifted up to 70 pounds on his own. This job involved a lot of bending, stooping, and lifting.
- Claimant had a number of injuries prior to his January 9, 2004, work injury.
- Claimant fractured his right ankle in 1977. This healed well following surgery and didn't affect his ability to work. His only current complaint is his ankle aches when it rains.
- In January 1988, Claimant injured his low back at work when lifting or carrying a package. He received conservative medical treatment and was off work a short time. This case settled for 5% of the body as a whole (BAW) referable to the low back.
- In March 1989, Claimant again injured his low back when lifting a package. He was diagnosed with bulging discs at the L4-5 and L5-S1 levels and missed 22 4/7 weeks of work during his treatment. He filed a claim, had no surgery and settled this case for 15% of the BAW referable to the low back. Claimant testified he continued to have occasional low back pain after returning to work, and his back condition began affecting his ability to work.
- In April 1990, Claimant again injured his low back at work when lifting a package. He developed low back pain with pain into his lower extremities. He treated with Dr. Meadows and Dr. Cole. After conservative treatment failed, he had back surgery in October 1990 to repair a herniated nucleus pulposis at the L5-S1 level. This was his first back surgery. Claimant was unable to work for 45 6/7 weeks during this treatment. On January 21, 1991, Dr. Cole noted Claimant complained of intermittent low back pain, some restriction of movement in the lumbar area, and straight leg raising aggravated his low back pain. Dr. Cole released Claimant to return to work February 4, 1991. Claimant had difficulty at work following this injury due to low back pain. This case settled for 26% BAW.

- In February 1993, Claimant injured his neck and settled this case for 5% BAW. He currently has no neck complaints.
- In June 1994, Claimant injured his right shoulder when he was putting an oversized package on the top shelf. He had shoulder surgery by Dr. Lander. After he returned to work, Claimant continued to have popping and aching in his shoulder. He has less strength in this shoulder and has some loss of motion. He settled this case for 25% of the right shoulder.
- In November 1996, Claimant again injured his low back when lifting a package at work. Dr. Robson performed a L5-S1 microdiscectomy in November 1996. This was Claimant's second back surgery. By March 1997, Claimant continued to have pain and inability to lift more than 30-40 pounds in physical therapy. Dr. Robson ordered a follow-up MRI which did not reveal a recurrent herniation. Claimant was off work 26 1/7 weeks for this injury and was released to return to work April 1, 1997. When he returned to work, he continued to have stiffness and numbness in his right leg. His back bothered him all the time. The leg numbness got worse between his first and second surgery. Dr. Robson found Claimant at maximum medical improvement (MMI) in October 1997 and noted Claimant still had limited motion, stiffness and soreness in his back and numbness into his right foot. Claimant settled this case for 21% of the BAW.
- In April 1998, Claimant injured his low back when lifting a package. Dr. Mirkin diagnosed a large L4-5 herniated disc with left-sided radiculopathy. He performed an L4-5 discectomy in May 1998. This was Claimant's third surgery. Claimant attended several weeks of work hardening. On September 14, 1998, Dr. Mirkin reviewed a work hardening report which he felt was equivocal as to whether or not Claimant could return to the type of work he had previously done for Employer, so he recommended a trial of full work. If Claimant was unsuccessful, Dr. Mirkin planned to provide permanent work restrictions. On October 12, 1998, Dr. Mirkin noted Claimant was doing well at work although he had occasional aches and pain into his buttock. Dr. Mirkin found Claimant had reached MMI and could return to work without restrictions. He also stated if Claimant developed recurrent problems, he should consider a different occupation. Claimant testified he returned to work, and his back continued to get worse. He had more numbness in his leg and felt his back was "getting shot". This case settled for 20% of the BAW.
- In February 2000, Claimant developed bilateral carpal tunnel syndrome and had bilateral surgical releases. After returning to work, his complaints resurfaced in his left hand, and he continues to have numbness, tingling, and pain at night in his left hand. He has no ongoing complaints in his right hand. This case settled for 17 ½% of each hand plus a 10% load factor.
- Claimant testified as a result of all these injuries and before his January 2004 work injury, he had difficulty performing his duties at work. He bid on and received a residential route with light packages and fewer commercial stops.

- On January 9, 2004, Claimant hurt his back while lifting a package during a delivery. He developed pain in his back and into his legs. By March 2004, Claimant's symptoms had not improved, and Dr. Mirkin recommended a lumbar decompression and fusion. This was Claimant's fourth back surgery.
- As a result of his multiple back surgeries, Claimant has 2 rods, 6 screws, and 2 fusions and spacers in his low back.
- After his back fusion, Claimant felt he was not able to return to work performing his regular duties. In August 2004 Dr. Mirkin ordered a functional capacity evaluation (FCE). At this time of this FCE, Claimant was still taking Vicodin as recommended by Dr. Mirkin. He took one pill before the FCE and one during the FCE. Claimant testified that during the FCE, he had numbness in his legs, pain in his back and he could hardly get through the test. After the FCE, his complaints were worse than before the FCE. He returned to Dr. Mirkin to discuss his work status. Dr. Mirkin examined Claimant, reviewed the results of the FCE, and released Claimant for a trial of full work duties.
- On September 9, 2004, Dr. Byler, Employer's physician, continued to restrict Claimant from work due to his continued reliance on Vicodin.
- Claimant returned to Dr. Mirkin September 29, 2004, and stated he thought he could not work. He requested repair of his hernia which Dr. Mirkin opined occurred as a result of the abdominal surgery during his back fusion. Claimant had surgery to repair the hernia, and has no current complaints as a result of the hernia.
- Dr. Mirkin then saw Claimant again November 24, 2004. He again released Claimant to return to work. He also stated if Claimant did not do well with work, he would order another FCE and restrict Claimant's activities. Claimant testified when he tried to work, he had significant complaints in his back and legs. His legs frequently were numb and his back "locked up". He was unable to stand for any length of time without back pain. He was unable to bend at the waist or pick items up off the floor. He believed he could not return to work because he could not drive far, and he could not climb in and out of the truck on a routine basis.
- Claimant retired December 1, 2004.
- Claimant returned to Dr. Mirkin in February 2005, and told Dr. Mirkin he could not work. He complained of persistent pain, and wanted to know what he was able to do. Dr. Mirkin ordered another FCE. This was not authorized by Employer, and was never performed. Dr. Mirkin then rated Claimant at 20% PPD to the BAW as a result of his 2004 back injury.

- The January 2004 injury settled against Employer for 13% BAW. Claimant's settlements for his multiple low back injuries total 100% PPD to the BAW.
- Claimant continues to have significant complaints as a result of his injuries. His complaints have been consistent since his retirement. He is unable to bend down to put on his shoes and socks. He sleeps three to five hours at a time. If he sits, stands, or walks for a long time, his leg goes numb and he gets a shock sensation in his right foot. He moves about often during the day and lies down as needed to relieve his pain. Cold and damp weather increase his pain. He continues to take Vicodin on a daily basis. He also has occasional numbness in his fingers, and he has difficulty reaching overhead due to right shoulder pain.
- Dr. Mirkin, the SIF's expert, testified he released Claimant to work without restrictions because the FCE showed he was employable in the heavy demand capacity. He agreed Claimant's use of Vicodin immediately before the FCE could have decreased his complaints. He also agreed the work hardening reports from one month before the FCE showed Claimant's feasibility for returning to full duty was fair due to his decreased postural tolerance, decreased tolerance for the work level, decreased lifting ability, and subjective complaints. Dr. Mirkin testified the totality of Claimant's injuries caused a disability and limitation to his using his back.
- Delores Gonzalez testified on behalf of the SIF. She did not interview Claimant. She reviewed the medical records and expert opinions and opined Claimant is a candidate for vocational rehabilitation and is able to compete in the open labor market. She based this solely on the opinions of the treating physicians and the fact they released Claimant to return to work with no restrictions. She believes Claimant was able to work until he chose to retire in December 2004. She did not provide an opinion as to whether Claimant had any transferable skills because he had been released to return to work full duty. At the time Ms. Gonzalez wrote her report, she did not have the records of Dr. Musich or Mr. England reflecting their opinion that Claimant was totally disabled. She also did not know Dr. Mirkin had recommended another FCE due to Claimant's ongoing complaints.
- Dr. Musich, Claimant's expert, reviewed medical records and examined Claimant. He opined the settlement percentages from Claimant's injuries were reasonable and accurate representations of his disabilities. He opined the combination of Claimant's injuries is greater than their simple sum and will continue to produce a chronic hindrance in the routine activities of daily living. He found Claimant is permanently and totally disabled due to the combination of his injuries, his restrictions, and his ongoing narcotic medications. He opined Claimant should refrain from prolonged positioning, repetitive grip, squeezing, and lifting greater than 20 pounds.
- Jim England, Claimant's vocational expert, also reviewed Claimant's medical records and met with Claimant. He testified Claimant has no transferable skills outside of his work for Employer and is not capable of gainful employment. He opined given Claimant's combination of medical problems, his vocational history, and his day-to-day functional limitations, he is not able to sustain any kind of work activity on a consistent, daily basis.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

Claimant is permanently and totally disabled as a result of the combination of his injuries.

Section 287.220 RSMO provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

- the percentage of disability resulting from the last injury alone;
- that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
- that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant settled his last injury with Employer prior to this hearing. Based on my review of the treating records, the medical opinions and the Claimant's complaints, I find Claimant sustained a 13% permanent partial disability to his low back as a result of his January 9, 2004, work injury.

Claimant had a number of injuries prior to his 2004 work injury. The medical records and stipulations for compromise settlement regarding those injuries were admitted into evidence. Prior to his 2004 injury, Claimant had been compensated 87% PPD to his low back, 25% of his right shoulder, and 17 ½% of each wrist. In settling Claimant's 1989 SIF claim, the parties agreed Claimant had 20% PPD to his right ankle as a result of a 1977 right ankle fracture.

Claimant credibly testified he began having difficulty at work following his 1989 back injury. After his first back surgery in 1990, he had intermittent low back pain and restricted motion in his spine. Following his shoulder surgery in 1994, he had decreased strength in his shoulder and loss of motion. After his 1996 back surgery, he continued to have limited motion, stiffness and soreness in his back as well as numbness into his right foot. After his 1998 back surgery, Dr. Mirkin began questioning whether Claimant could return to his line of work. Claimant also had numbness and tingling in his left hand following his 2000 carpal tunnel surgery. Due to these complaints, Claimant bid on a route with lighter packages prior to his 2004 work injury. I find these injuries caused a hindrance or obstacle to Claimant's employment or to obtaining re-employment.

The final question is whether the combination of Claimant's injuries rendered him permanently and totally disabled.

The test for permanent total disability is whether Claimant is able to adequately compete in the open labor market given his condition. *Messex v. Sachs Elec. Co.*, 989 S.W. 2d 206, 210 (Mo. App. E.D. 1999). The pertinent consideration in this test is the determination of whether any employer in the usual course of business would reasonably be expected to employ Claimant given his condition. *Carlson v. Plant Farm*, 952 S.W. 2d 369, 373 (Mo. App. W.D. 1997).

Delores Gonzalez, SIF's vocational expert, testified Claimant is able to compete in the open labor market. She based her opinion solely on Dr. Byler and Dr. Mirkin's opinion Claimant could return to work in November 2004. I

find Ms. Gonzalez's analysis deficient and not reliable. She did not interview Claimant. She did not know Dr. Mirkin had recommended another FCE in February 2005. She did not consider Dr. Musich or Mr. England's opinions. She did not consider the permanent disability Claimant had as a result of his first two back surgeries.

Dr. Mirkin, a treating doctor and SIF's expert, also opined Claimant could work. However, he agreed the work hardening records showed the likelihood of Claimant returning to his occupation was only fair. He also agreed the totality of Claimant's injuries caused a disability and limitation to his using his back.

Claimant's expert, Dr. Musich, found Claimant is permanently and totally disabled as a result of the combination of his injuries, restrictions and ongoing medications. While Dr. Musich relied on prior stipulations to determine the PPD from prior injuries, Section 287.190.6 (RSMo 2000) provides "the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same...part of the body also results in permanent partial disability for which compensation under this chapter may be due". Claimant's prior back injury settlements total 87% PPD of the body as a whole. Those disabilities are conclusively presumed to continue, and Dr. Musich therefore may rely on those prior stipulations in formulating his opinion regarding PPD.

Claimant's vocational expert, Jim England, opined Claimant has no transferable skills outside of his work for Employer and is not employable in the open labor market. He found Claimant has a multitude of ongoing complaints, sleeps only three to five hours at a time, needs to lay down during the day as needed to relieve his pain, and continues to rely on narcotic pain medications. He opined Claimant is not able to sustain any kind of work on a consistent, daily basis due to his complaints and limitations.

I find the opinions of Dr. Musich and Mr. England more credible and reliable than the opinions of Dr. Mirkin, Dr. Byler, and Ms. Gonzalez.

Claimant has had one occupation his entire working career. While Claimant is young, and I believe he has the intellectual capability to learn a new trade, I find his physical limitations make it unlikely any Employer would reasonably be expected to employ him in his current condition. This is supported by the credible testimony of Dr. Musich, Dr. Mirkin and Mr. England.

Claimant is permanently and totally disabled as a result of the combined effects from his January 9, 2004, work injury and his preexisting disabilities. Claimant received TTD benefits of \$662.55 per week for 39 5/7 weeks, or until October 12, 2004, given that this was a leap year. I find Claimant's total disability became permanent October 13, 2004. He received compensation from Employer of \$347.05 for 52 weeks. The Second Injury Fund is hereby ordered to pay permanent total disability benefits at the differential rate of \$315.50 per week beginning October 13, 2004, during those 52 weeks, and thereafter \$662.55 per week for as long as provided by law. The amount accrued to date shall be paid forthwith with interest as provided by law.

An attorney lien of 25 percent of all compensation awarded herein is allowed Thomas Liese Claimant's attorney, for necessary legal services rendered.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffery W. Buker
Director
Division of Workers' Compensation

