

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

Injury No.: 99-018713

Employee: Mark Duffy

Employer: City of St. Louis (settled)

Insurer: Self-Insurer (settled)

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

Date of Accident: January 4, 1999

Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 May 11, 2004. The award and decision of Administrative Law Judge Linda Wenman, issued May 11, 2004, 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 3rd day of January 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
Ken Jacob, Chairman

\_\_\_\_\_  
Bill I. Foster, Member

Attest: \_\_\_\_\_  
John J. Hickey, Member

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Mark Duffy Injury No.: 99-018713

Dependents: N/A Before the

**Division of Workers'**

Employer: City of St. Louis (settled) **Compensation**



TOTAL: \$5,249.14

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: Ray Marglous

## FINDINGS OF FACT and RULINGS OF LAW:

|                   |                             |             |                                    |
|-------------------|-----------------------------|-------------|------------------------------------|
| Employee:         | Mark Duffy                  | Injury No.: | 99-018713                          |
| Dependents:       | N/A                         |             | Before the                         |
| Employer:         | City of St. Louis (settled) |             | <b>Division of Workers'</b>        |
| Additional Party: | Second Injury Fund          |             | <b>Compensation</b>                |
|                   |                             |             | Department of Labor and Industrial |
|                   |                             |             | Relations of Missouri              |
|                   |                             |             | Jefferson City, Missouri           |
| Insurer:          | Self-insured                | Checked by: | LJW:tr                             |

### **PRELIMINARIES**

On January 4, 1999, Mark Duffy (Claimant) injured his left wrist while in the course and scope of his employment with the City of St. Louis (Employer). The parties stipulate that on October 1, 2001, Claimant and Employer entered into a stipulation for compromise settlement. Employer agreed to settle Claimant's work related injury for 25% permanent partial disability referable to Claimant's left wrist. At the time of settlement, Claimant's claim against the Second Injury Fund (SIF) was left open, to be concluded at a later date.

The SIF claim was heard by the undersigned Administrative Law Judge on March 8, 2004. Briefs were received, and the case was formally submitted on April 7, 2004. Attorney Ray Marglous represented Claimant. Assistant Attorney General Jennifer Sommers represented SIF. Any objections not expressly ruled on in this award are overruled.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: liability of SIF for permanent total disability benefits, wage rate for permanent total disability, SIF liability for permanent partial disability, and assessment of costs. Claimant offered Exhibits A-C, and Exhibit C was admitted into the hearing record. SIF objected to admission of Exhibits A & B on foundation grounds. SIF offered Exhibits I & II, and the exhibits were admitted without objection. The parties were asked to address SIF's objection in their post-hearing briefs, and the briefs have been reviewed.

Exhibit A contains the deposition testimony of Dr. Jerome Levy. Exhibit B contains the deposition testimony of vocational expert, Mr. James England. SIF objects to Exhibits A & B on foundation grounds, specifically that both depositions contain medical/psychological records relied on by Dr. Levy and Mr. England when forming their opinions that are not offered into evidence, and as such are hearsay. Section 490.065.3 RSMo., allows an expert to consider facts not in evidence when forming an opinion. To determine admissibility, a two-step approach is to be followed. The facts must be reasonably relied upon, and the trial judge must determine if the foundational facts meet a minimum standard of reliability before the offered opinion is considered admissible. *Bruflat v. Mister Guy, Inc.*, 933 S.W. 2d 829 (Mo.App. 1996) (overruled on other grounds). A determination regarding the admissibility of evidence will not be overturned unless an abuse of discretion is shown. *Id.* In the case at bar, Dr. Levy conducted a physical evaluation, and Mr. England conducted a vocational evaluation of Claimant. Mr. England in reaching his opinion of permanent total disability, relied heavily on psychological records of a psychiatrist, and testing conducted by a clinical psychologist. These records are not in evidence (Exhibit A, pg.44). In turn, Dr. Levy initially defers an opinion on permanent total disability to psychiatric and vocational experts, and later adopts the opinion of Mr. England (Exhibit B, pgs. 19-23). Regarding Exhibits A & B, I find the facts relied on meet the minimum standard of reliability, Exhibits A & B will be admitted, and the objections will be considered when determining the weight to be accorded the exhibits versus the admissibility.

### **SUMMARY OF EVIDENCE**

Only testimony necessary to support this award will be reviewed and summarized.

#### **Live Testimony**

**Mark Duffy:** Claimant is a 49 year-old former firefighter. Following graduation from high school, Claimant was selected and entered the fire academy. During the course of his 23-year career, he was routinely promoted, eventually reaching the rank of acting battalion commander where he supervised 20-30 firefighters. Other than firefighting training, Claimant has pursued no additional education or training. On occasion Claimant taught at the fire academy.

During the late 1970's Claimant injured his left knee, and underwent surgery to repair a tendon. He returned to his job duties and discovered kneeling caused discomfort. In the early 1980's Claimant injured his left wrist, and was diagnosed with a sprain. Following treatment he returned to firefighting, but experienced weakness, and at times severe pain in the wrist. Claimant re-injured his left wrist in 1984 and again in the 1990's. With each re-injury Claimant returned to firefighting duties, but reports further weakening of the wrist, and the need to "work around the injury". Claimant testified that each injury or re-injury bothered him mentally, but he didn't seek mental health treatment.

On January 4, 1999 while responding to a fire, Claimant slipped on ice falling on his left wrist. Claimant was seen by several physicians and was told the injury couldn't be treated. He was informed that he had previously broken a bone that had never healed. He was placed on light duty, which amounted to a desk job at fire headquarters. Eventually, Claimant requested firefighting duty, and was returned to a firehouse. Shortly after his return to active duty, Claimant determined he was unable to complete his firefighting duties without assistance. Claimant testified that working with assistance placed other firefighters at risk, and the fire department suggested he retire. During March 1999, Claimant retired from the fire department.

Claimant reports that today his left hand is virtually useless, he has difficulty gripping, and experiences pain in the wrist. He continues to experience pain in his left knee, and complains of instability of the knee. Claimant reports he suffers from depression with associated loss of appetite, sleep disturbance, and increased alcohol consumption. Claimant associates his depression due to losing his "lifetime dream of being a firefighter". He spends his day tending to his small handyman business, and keeping up with his family. Claimant believes he is unable to be employed due to his physical problems.

Upon cross-examination, Claimant describes firefighting duties as being physically demanding. Claimant started his small business in 1997 or 1998. Claimant describes his current business as a "small job specialist" and that at one time he employed 4-5 people, now he has 1 employee, and Claimant does non-physical work such as estimates. Claimant acknowledges his depression arose after his retirement, and that the only medication he takes is Lipitor for his elevated cholesterol.

#### **Medical Deposition Testimony**

**Dr. Jerome F. Levy:** Dr. Levy examined Claimant on September 23, 2003, and provided diagnoses with rating percentages for Claimant's January 4, 1999 (primary) injury, and his pre-existing injuries. Dr. Levy obtained a history and conducted a physical examination. Additionally, Dr. Levy reviewed Claimant's medical/psychological records.

During the examination, Dr. Levy noted Claimant walked with a normal gait, and is right hand dominant. The abnormal findings in the upper extremities involved only the left wrist/hand. Dr. Levy noted a loss in range of motion involving dorsiflexion, palmar flexion, radial deviation, and ulnar deviation. Claimant's grip strength was 45-50kg on the right, and 30-35kg on the left. The abnormal findings in the lower extremities involved only the left leg. Dr. Levy noted discomfort with motion of left knee, 2 cm loss in circumference of the left thigh, and moderate weakness in left leg.

Dr. Levy listed eight diagnoses which included; fracture with non-union of the left carpal navicular, contusion of left carpal navicular non-union, left wrist chronic strain, left wrist degenerative arthritis, repair of left quadriceps tendon, left knee chronic strain with atrophy, history of tinnitus, and history of depression. Of these diagnoses, Dr. Levy rated the primary injury as 30% permanent partial disability (PPD) referable to the left wrist. Dr. Levy rated Claimant's pre-existing injuries as 25% PPD referable to the left knee, and 20% PPD referable to the left wrist. Dr. Levy testified that Claimant's pre-existing injuries were a hindrance or obstacle to maintaining employment. Dr. Levy indicated that he would defer to a vocational expert regarding Claimant's ability to work, and later concurs with Mr. England's assessment of Claimant's employability.

Upon cross-examination, Dr. Levy acknowledges prior to the January 1999 injury there was no evidence of psychological issues regarding Claimant, and no evidence that Claimant was unable to complete his work duties.

### **Vocational Deposition Testimony**

**Mr. James England:** Mr. England is a vocational rehabilitation counselor who examined Claimant on December 9, 2002. Mr. England interviewed Claimant to obtain vocational and medical histories, and reviewed Claimant's medical records. Mr. England notes that several doctors have indicated that Claimant is unable to be employed as a firefighter. Mr. England also took note of a Global Assessment Functioning (GAF) test conducted by Dr. Rosen indicating a score of 50. Mr. England indicates that a GAF score of 50 or below is not commensurate with employability. Mr. England found Claimant to be articulate and cooperative, and possessing adequate academic skills. He reports Claimant scored at the post-high school level in reading, and at the high school level in arithmetic. Mr. England further notes that Dr. Rosen found Claimant to be well within the average range of intellect, and had detected no learning problems. Mr. England finds Claimant to be very depressed over having to give up his career as a firefighter, and noted Claimant refused therapy and/or medication when he had previously been offered further psychiatric treatment.

Based on the information reviewed and obtained, Mr. England concluded Claimant is unable to return to work as a firefighter, but Claimant would still be able to perform some types of work even working under the physical restrictions recommended by Dr. Levy. However, when the psychological and the physical problems are combined, Mr. England opines that Claimant is not employable in the open labor market.

Upon cross-examination, Mr. England confirmed his opinion regarding Claimant's ability to be employed rested on Claimant's psychological impairment. Mr. England verified that the totality of Claimant's psychiatric treatment consisted of two visits before Claimant refused further treatment. Mr. England also confirms that he was not made aware that Claimant was self-employed on a part-time basis.

### **FINDINGS OF FACT & 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 of the State of Missouri, I find the following:

#### **Liability of the Second Injury Fund for Permanent Total Disability**

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See also Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996) (overruled on other grounds). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999) (overruled on other grounds). SIF liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained. *Id.* An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003) (overruled on other grounds). The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App. 1995).

Two experts provided opinions concerning the employability of Claimant. Mr. England finds Claimant permanently and totally disabled. Dr. Levy adopts the findings of Mr. England. The testimony of Mr. England regarding the impact of Claimant's psychological condition on Claimant's ability to sustain employment is clearly stated as follows:

- Q. You state on page seven of your report that assuming certain physical restrictions alone or even the physical restrictions of Dr. Levy, Mr. Duffy would still be able to perform some types of work. Can you explain what you mean by that?

A. Sure. I think if you just looked at the physical problem, take the psychological out of this case, this man from a physical standpoint, he's a bright enough guy that there would be some kinds of alternative sedentary and light work that would be available out there in the labor market. It's only if you add in the psychological, I think, that he becomes totally disabled.

(Exhibit A, pg.44)

Claimant's psychological problems are related by both experts to the primary (1/4/99) injury. Dr. Levy testified that he saw no evidence of "psychological issues" prior to January 4, 1999, and notes in his report that psychologist, Dr. Rosen, causally relates Claimant's psychological disorders to Claimant's 1999 work injuries (Exhibit B, pgs.22&24). Mr. England indicates several times in testimony and his report that Claimant was emotionally distraught over being unable to return to firefighting, and that he was "really depressed over it" (Exhibit A, pgs.12,18,25,26). Mr. England testified that Claimant's inability to return to firefighting "triggered the emotional downfall" (Exhibit A, pg.42).

Based on the available evidence, I find no liability of SIF for permanent total disability benefits. Claimant has not met his burden to demonstrate that a combination of the last injury and his pre-existing injuries have rendered him unable to compete in the open labor market. Rather, the evidence suggests that if liability for permanent total disability existed, it attached to the last injury alone, and Claimant settled the claim against Employer prior to this hearing (Exhibit C). The psychological component does not arise until the January 4, 1999 injury, and according to Claimant's experts the psychological component is what prevents Claimant from continuing in the labor market.

### **Issues relating to permanent partial disability of Second Injury Fund**

Once a determination is made that a claimant is not permanently and totally disabled, the inquiry then turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W.2d 591 (Mo.App. 1995). Section 287.220.1 RSMo., provides that SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and pre-existing conditions must produce additional disability greater than the last injury standing alone.

Claimant settled his January 4, 1999 claim against Employer for 25% PPD referable to his left wrist (Exhibit C). Claimant alleges pre-existing conditions involving his left wrist and left leg at the knee. Of the listed pre-existing conditions, Claimant reports he was able to return to employment after treatment for these injuries, but adjusted his approach to work to deal with the lingering effects of the injuries. Specifically, it is documented that in 1982 Claimant had a wrist fracture that did not heal, and Claimant's 1977 left leg injury resulted in surgery to repair a tendon near the knee.

Claimant may have been released without restrictions and returned to full-time employment with each pre-existing injury, but these findings alone do not make the injuries non-disabling. I find Claimant's left wrist injury in 1982, and left leg injury in 1977 were a hindrance or obstacle to employment. Although the pre-existing injuries are reported to be work-related, no evidence was presented indicating previous settlement. Dr. Levy rated the pre-existing left wrist at 20% PPD, and the left knee at 25% PPD referable to the knee (Exhibit B, depo.ex.2). I adopt these ratings, and find when Claimant's last injury to his left wrist is combined with the previous disability in his left wrist and the disability at the left knee, the combination creates a synergistic effect and produces a substantially greater disability than the simple sum. Applying a 15% load factor, Claimant is entitled to receive an additional 17.81 weeks compensation from SIF or \$5,249.14.

### **Issues relating to wage rate**

Wage rate was only contested regarding temporary total disability for purposes of permanent total disability calculations. As no permanent total disability benefits were awarded, the wage rate issue is moot.

### **Issues relating to costs**

Both parties seek attorney costs incurred in pursuing and defending this claim. Section 287.560 RSMo., provides for the allowance of costs when a determination is made that "any proceedings have been brought, prosecuted or defended without reasonable grounds . . ." Each party set forth reasonable grounds when pursuing and defending the claim. There is no basis for requesting costs. The request for costs is denied.

### **CONCLUSION**

In summary, Claimant is entitled to receive \$5,249.14 in permanent partial disability from SIF. Claimant's attorney is entitled to a 25% lien.

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

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Reneé T. Slusher  
*Director*  
*Division of Workers' Compensation*