

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

Injury No.: 94-199907

Employee: Kim Feld
Employer: King O' Tile (Settled)
Insurer: Hartford Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged December 2, 1994
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 March 1, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Linda J. Wenman, issued March 1, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 21st day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Kim Feld Injury No.: 94-199907

Dependents: N/A Before the
Division of Workers'
Employer: King O Tile (settled) **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Hartford Insurance Company (settled)
Hearing Date: November 23, 2004 & December 2, 2004 Checked by: LJW:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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 2, 1994
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: While moving an optical machine Claimant felt a pop in his low back.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: From Employer, \$125,050.72 allocated for disability, payable at time of settlement; and \$350.00 to be paid monthly for life, guaranteed for 240 months.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None prior to settlement with Employer, at settlement \$54,949.28 from Employer.

Employee: Kim Feld Injury No.: 94-199907

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$618.40
19. Weekly compensation rate: \$476.38 / \$249.48
20. Method wages computation: Stipulated per settlement

COMPENSATION PAYABLE

21. Amount of compensation payable: Stipulated compromise settlement
22. Second Injury Fund liability: No

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Kim Feld	Injury No.: 94-199907
Dependents:	N/A	Before the
Employer:	King O Tile (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Hartford Insurance Company (settled)	Checked by: LJW:tr

PRELIMINARIES

The above referenced Workers' Compensation claim was heard by the undersigned Administrative Law Judge on November 23, 2004 and reconvened on December 2, 2004. Briefs were received and the case was formally submitted with receipt of the final reply brief on February 15, 2005. Attorney John Schneider represented Kim Feld (Claimant). King O Tile (Employer) was insured by Hartford Insurance Company, and represented by Attorney John Palombi. Assistant Attorney General Lee Schaefer represented the Second Injury Fund (SIF).

Prior to the start of the hearing the parties identified the following issues for disposition in this case: accident; arising out of the course and scope of employment; notice; medical causation; liability of Employer for past medical expenses; wage rate for temporary total disability; future medical care; temporary total disability; and liability of Employer and/or SIF for permanent total disability or permanent partial disability.

Claimant offered Exhibits A-LL. Any objections to Exhibits A-N2 and P-LL were overruled and the exhibits admitted. The objection to Exhibit KK was sustained. The objections to Exhibits O1-O3 are rendered moot by Claimant's settlement with Employer. Employer offered Exhibits 1-6, and SIF offered Exhibits I-II. These exhibits were admitted without objection. Any objections not expressly ruled on in this award are overruled.

Following hearing conclusion, but prior to the issuance of this decision, Claimant and Employer reached a compromise settlement approved on January 27, 2005. Claimant and Employer agreed to a stipulated wage rate of \$476.38 for weekly temporary total disability. The parties also stipulated Employer would pay \$54,949.28 allocated to medical expenses. Permanent partial disability in the amount of \$125,050.72 was to be paid immediately, and is stipulated to represent 30% BAW referable to Claimant's low back. Also, Employer agreed to provide a monthly payment of \$350.00 for life to Claimant to provide medical services and medications not covered by Medicare. The monthly payment is guaranteed for 240 months. Separately, provisions for funding a Medicare Set-Aside Trust were established in the settlement document.

SUMMARY OF EVIDENCE

As a result of the settlement between Claimant and Employer, the remaining issues and associated evidence is greatly reduced. The initial question that must be answered concerns the liability of SIF for permanent total disability (PTD). If SIF is not responsible for PTD benefits, all remaining issues would be moot. All evidence and testimony has been reviewed, but due to the voluminous evidence introduced at hearing, only testimony and evidence necessary to support this award will be summarized below.

Testimony

Claimant: Claimant is 46 years old, and has a tenth grade education. He has worked as a laborer throughout his working life. Prior to his last work injury, Claimant worked for Employer since 1991. Claimant was employed as a floor installer, installing carpet, tile, and hardwood floors.

On December 2, 1994, Claimant was working the night shift installing carpet in an optical office. As a part of this job, Claimant and his work partner were required to move and replace an optical machine weighing approximately 400 pounds. While replacing this machine, Claimant heard a pop in his back, and felt immediate pain. At the time of injury, Claimant was wearing a back brace as a preventative measure, and kneepads supplied by Employer. Claimant informed his work partner and went home to bed, not staying to assist in clean up.

The next day, Claimant asked his wife to arrange an appointment with Dr. Roedel, a chiropractor. He spent the weekend in bed due to back discomfort. Claimant returned to work the following week, and was treated by Dr. Roedel after working hours. When he did not improve under Dr. Roedel's care, Claimant sought treatment with Dr. Weiss, an orthopedist.

Claimant began treatment with Dr. Weiss on December 21, 1994. Claimant was given injections and physical therapy was provided. During this time period, Claimant worked approximately 32-40 hours per week. Claimant was offered, but did not work any overtime due to his back. Claimant last worked for Employer on January 5, 1995. In April 1995 a CT scan of Claimant's low back was obtained, and Dr. Weiss informed Claimant a disc was herniated in his back. Claimant was advised to see a neurosurgeon.

Claimant next saw Dr. Scodary, a neurosurgeon who reviewed Claimant's diagnostics, but provided no treatment. Employer then sent Claimant to Dr. Gragnani, who also provided no treatment. During June 1995, Claimant sought treatment in an emergency room due to increasing back pain.

Claimant's attorney referred him to Dr. Schoedinger. During the course of his treatment with Dr. Schoedinger, Claimant underwent four back surgeries. Claimant was also seen by multiple pain management specialists, and was provided different treatment modalities. Since 1999, Claimant has received pain management treatment under the care of Dr. Feinberg. Claimant has also received psychiatric care on occasion for depression.

Claimant's current complaints revolve around back pain that he considers continuous and excruciating. He reported non-stop pain for the last 1-2 years, and acknowledged taking multiple doses of methadone on a daily basis. Additionally, Claimant experiences sleep disturbance, as he has difficulty laying flat. In December 2003, Claimant fell down his basement stairs after losing his balance. Claimant's symptoms initially flared, but shortly returned to baseline. Claimant continues to drive, and he drove himself to the hearing. Claimant was released by Dr. Schoedinger in 2000, and has not seen him since.

Claimant testified to multiple preexisting injuries that included the following: a 1980 motor vehicle accident in which he fractured his pelvis; a 1982 injury from a scaffold fall in which he injured his back and fractured his right foot, requiring surgery to the foot/ankle; a 1983 injury that fractured his right wrist; another 1983 injury in which he was thrown from a motorcycle; a head/neck injury in 1984 after being assaulted; a 1984 work injury that resulted in his first back surgery; and a 1987 work injury to his right ankle.

Regarding his preexisting injuries Claimant testified as follows: following his 1984 back surgery, Claimant testified to experiencing stiffness, but had no difficulty lifting, bending, or stooping. Claimant later clarified his back soreness was due to the heavy work he did. He also never missed work, took medication, or had to seek post-release medical care for his back. Regarding his foot/ankle, including the 1987 re-injury, Claimant testified to stiffness/soreness, but never wore a brace at work, took no medication, and found it never limited his job duties. Regarding his neck, Claimant testified he had one neck spasm since recovering from the initial injury. Finally, Claimant acknowledged deposition testimony where he reported the ability to always do his job 100% after recovery from each preexisting injury.

Dr. Barry Feinberg: Dr. Feinberg began to treat Claimant in 1999, upon referral from Dr. Schoedinger. Prior to treatment with Dr. Feinberg, Claimant had received pain management treatment with two other pain management specialists. In addition to routine pain management treatment, Claimant had undergone two specialized treatments. The first involved an attempt to break up scar tissue by use of an endoscope. The second treatment was a denervation of a lumbar nerve. Neither procedure provided relief.

When he first examined Claimant, Dr. Feinberg found multiple spinal abnormalities, and concluded that additional spinal surgery would not be beneficial. Dr. Feinberg has provided Claimant with a multi-faceted treatment approach including trigger point injections, epidural steroid injections, facet blocks and medication. Dr. Feinberg opined that Claimant is PTD, and unable to compete in the open labor market. Dr. Feinberg further opined Claimant is PTD due to a combination of the last injury, and his 1984 preexisting low back surgery. Dr. Feinberg supported his opinion noting Claimant re-herniated his L5-S1 disc during the December 2, 1994 injury, and opined that the 1984 injury of the same disc made the disc more susceptible to re-injury. When questioned about the possibility that the fragment found at the S1 nerve root during Dr. Schoedinger's first surgery could have been present since Claimant's 1984 surgery, Dr. Feinberg testified that while it would be possible, he would have expected Claimant to have had symptoms from the fragment.

Upon cross-examination, Dr. Feinberg verified that when his report was prepared he relied upon the stated disability found on prior settlement stipulations, and he didn't ask Claimant if he continued to experience problems with the body parts involved in his preexisting injuries. Regarding Claimant's 1984 back surgery, Dr. Feinberg acknowledged Claimant recovered, and returned to unrestricted work within five months of surgery. Dr. Feinberg reported Claimant worked with pain, took over-the-counter medications, but did not require medical services. Dr. Feinberg acknowledged familiarity regarding the type of work Claimant performed after the 1984 back surgery, and considered the majority of work to be in the heavy labor category.

Pertinent Medical Records / Medical Depositions

Dr. Terry Weiss: The records provided confirm Claimant sought treatment as outlined in his testimony. The injections received by Claimant consisted of ACTH administered intramuscular. Initially, Dr. Weiss believed he was treating a lumbar sprain, but when Claimant did not respond to treatment a CT scan was obtained on April 20, 1995, and demonstrated a small central left herniated disc (HNP) at L4-L5, and a larger central left HNP at L5-S1. Dr. Weiss referred Claimant to a neurosurgeon, Dr. Scodary.

Dr. Daniel Scodary: Dr. Scodary examined Claimant on May 5, 1995. Claimant exhibited a normal neurological exam. Claimant complained of diffuse low back pain, bilateral leg numbness, left anterior leg pain with weakness, and left hand numbness. Dr. Scodary recommended pain management, and expressed discomfort treating Claimant's diffuse migratory pain, along with lack of true left-sided radiculopathy.

Dr. John Gragnani: Dr. Gragnani first examined Claimant on June 9, 1995, and ordered CT exams of Claimant's cervical and lumbar spines after his examination revealed inconsistencies. The cervical CT revealed no abnormal findings. The lumbar CT revealed changes consistent with a history of prior spinal surgery at L5-S1, and a mild bulge at that level with no compression on the spinal nerves. On June 12, 1995, Dr. Gragnani determined Claimant required no further treatment. Dr. Gragnani later continued to opine this finding in his deposition taken by Employer on August 18, 1999, after Claimant had undergone four back surgeries by Dr. Schoedinger.

Dr. George Schoedinger: Dr. Schoedinger's initial visit occurred on October 23, 1995, and he released Claimant from care on October 16, 2000. During this time period, Dr. Schoedinger performed four surgeries on Claimant's low back as outlined below [\[1\]](#):

Surgery #1 – 11/29/95 – a lumbar discectomy at L5-S1 with disc exploration at L4-L5. A disc fragment was found near the S1 nerve root. L4-L5 level was found to be normal.

Surgery #2 – 2/7/96 – removal of a new disc fragment at L5.

Surgery #3 – 3/18/96 – a spinal fusion at L5-S1 performed, no new disc fragments found, only scarring present.

Surgery #4 – 9/17/98 – discogram demonstrates severe narrowing of L5-S1 disc space. Based on discogram results an anterior discectomy and instrumented interbody fusion performed.

Between surgeries #3 and #4, Claimant was referred to Dr. Bernstein for a vocational evaluation. On July 3, 1996, Dr. Bernstein issued his report finding Claimant to be a younger worker and in need of retraining. Dr. Bernstein indicated that Claimant would need employment that would allow use of his hands, alternate sitting with standing, and he provided examples of suitable work that involved instrument repair or optical work. Dr. Bernstein concluded Claimant would be a good candidate for retraining if his condition improved.

On November 3, 1998, Dr. Schoedinger found Claimant to be PTD from all employment that requires prolonged sitting, standing, walking or other torsional motions of his back, or if he has to drive in excess of ½ hour. On December 8, 2000, Dr. Schoedinger added restrictions of no pushing, pulling, bending or significant walking. Later, during Dr. Schoedinger's depositions, he opined Claimant is PTD due to the combination of surgeries, including Claimant's 1984 surgery, finding that the 1984 surgery contributed to the PTD finding. When cross-examined regarding his PTD combination opinion, Dr. Schoedinger acknowledged Claimant recovered well after the 1984 surgery, and that Claimant returned to work full-time without restrictions.

Dr. Shawn Berkin: Dr. Berkin issued reports on June 15, 1998, and an addendum on July 15, 2000. Dr. Berkin outlined Claimant's current and preexisting conditions in his initial report, and concluded that Claimant is PTD due to the combination of preexisting and current conditions. Dr. Berkin's July 15, 2000 addendum does not change his opinion, but he rated Claimant's primary injury as 60% BAW referable to the lumbar spine. Dr. Berkin was not deposed.

Dr. Joseph Hanaway: Dr. Hanaway examined Claimant from August 1, 1999 until November 23, 1999, at the request of Claimant's former attorney. Dr. Hanaway found Claimant to be PTD, and diagnosed Claimant with failed back syndrome after undergoing five lumbar surgeries. In his July 13, 1999 report, Dr. Hanaway's impression is as follows:

This patient has a remarkable history of lumbar trauma that occurred in December 1994, and subsequently the patient has had five back operations, which have failed to relieve his symptoms, and has chronic low back pain and leg pain. This patient is permanently and totally disabled and has objective evidence of lumbar spine disease. . .

When questioned by Attorney Nichols regarding the cause of Claimant's PTD, Dr. Hanaway responded in a September 17, 2003 letter as follows:

. . .mainly because of the injury that occurred to his back on or about 12/2/94. Keep in mind that the patient was working up until that time and has not worked since. . .

Dr. Hanaway does not believe Claimant's prior injuries contributed to his PTD status as he was working successfully until the injury of December 1994. Dr. Hanaway rated Claimant's primary injury (12/2/94) as 80% BAW referable to the lumbar spine, and rated Claimant's 1984 preexisting lumbar injury/surgery as 15% BAW referable to the lumbar spine.

St. Luke's Hospital: The records provided relate to Claimant's 1984 lumbar surgery performed by Dr. Alex Marchosky. Claimant underwent an L5-S1 laminectomy and discectomy on October 23, 1984. On October 25, 1984, Claimant left the hospital against medical advice (AMA) after his narcotic dosage was not increased.

Preexisting Settlement Stipulations: The following stipulations were obtained from Division records, and reflect the following percentages utilized for compromised settlement:

10/18/82 – 50% right ankle, 10% BAW referable to low back, 10% right wrist

10/11/84 – 22.5% BAW referable to lumbar spine by employer; 15% BAW referable to pelvis, 10% right wrist, 50% right ankle, and 25% BAW referable to cervical spine by SIF.

3/13/87 – 8% right ankle from employer; 15% BAW referable to pelvis, 10% right wrist, 25% BAW referable to cervical spine, and 22.5% BAW referable to lumbar spine from SIF.

Vocational Deposition Testimony

Mr. James England: Mr. England is vocational rehabilitation counselor who evaluated Claimant on July 28, 2000. Mr. England interviewed Claimant, reviewed Claimant's medical records, and administered the Wide-Range Achievement Test. The test revealed Claimant is capable of reading at a high school level, but has difficulty with math, where he tested at a 4th grade level.

Mr. England noted that prior to his last injury Claimant was working approximately 60 hours per week. Claimant had job duties that required handling over 100 pounds, and he had to frequently bend, stoop, squat, climb, push and pull. Additionally, Claimant was always able to return to working a 40-hour week plus overtime, after he recovered from his previous injuries. Mr. England opined Claimant to be PTD, but noted that if not for the degree of his impairment, Claimant would have past acquired skills that would be transferable to a light duty of exertion. Mr. England concluded Claimant is currently functioning at less than a sedentary level due to the effects of the December 2, 1994 injury.

Upon cross-examination, Mr. England declines to opine whether the preexisting conditions combined to cause Claimant's PTD, deferring to the medical doctors to make that determination. When pressed, Mr. England testified his inability to make this determination is due to Claimant's history of working a physical labor job on a full-time basis prior to his last injury. Mr. England classified the type of labor Claimant was performing prior to his last injury as heavy work.

Mr. Michael Brethauer: Mr. Brethauer is a vocational rehabilitation counselor who reviewed a portion of Claimant's medical records during March 1999. Mr. Brethauer did not personally interview Claimant, or conduct any vocational testing. Based on his analysis, Mr. Brethauer reached the conclusion that Claimant is unable to return to his prior employment, but does remain employable in the open labor market.

Upon cross-examination, Mr. Brethauer acknowledged that he may not have been provided all of Claimant's medical records when rendering his opinion. Further, Mr. Brethauer believed Claimant had undergone two lumbar surgeries prior to the December 2, 1994 work injury. Mr. Brethauer also conceded he had no knowledge of Claimant's intellectual functioning, other than Claimant had attended school to the tenth grade.

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). 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).

After reviewing the evidence in its entirety, there is no doubt in this adjudicator's mind that Claimant is PTD. Multiple physicians and vocational experts reached the same conclusion. The difficult question presented involves who is responsible for payment of PTD benefits. When a claimant is found to be permanently and totally disabled, §287.220.1 RSMo., affixes and limits an employer's liability resulting from the last injury, as if there has been no preexisting disability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo.App.W.D. 1999). Step one in the liability analysis is to consider the employer's liability in isolation, or that liability which has resulted from the last injury had there been no preexisting disability. *Id.* 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.

The only physician who rendered an opinion, and does not have a stake in the outcome of this case is Dr. Hanaway. [2] Dr. Hanaway's opinion that Claimant is PTD due to the primary injury, and the treatment subsequently rendered to treat the primary injury. This opinion is amply supported by the evidence, and by Claimant's own testimony. Prior to the last injury, Claimant worked 40-60 hours per week in work that is considered heavy labor. In the period after the primary injury, but before the first surgery by Dr. Schoedinger, Claimant continued in either a working capacity, soliciting work through the union hall, or applying for unemployment benefits. [3] I find Claimant to be 100% PTD from the last injury standing alone, and the Employer would have been the liable party for the primary injury, if permanency had been the only disputed issue. Prior to issuance of this decision, Claimant settled his case against the Employer.

Once a claimant is found to be PTD from the last injury alone, evidence of a claimant's preexisting disability becomes irrelevant. *Kizior*, 5 S.W.3d 195 @ 206. As Claimant is 100% PTD from the last injury alone, there remains no further liability to assess against SIF. *Lockman v. Citizen's Memorial Hospital*, 140 S.W.3d 214 (Mo.App.S.D. 2004). Accordingly, I find SIF has no liability in the instant case.

CONCLUSION

In summary, Claimant is found to be 100% PTD from the last injury alone. SIF has no liability for PTD benefits. All remaining issues are moot.

Date: _____ Made by: _____

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

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[\[1\]](#) Two additional procedures were performed on an outpatient basis as part of pain management treatment, which several physicians have designated as surgeries #5 & #6.

[\[2\]](#) A prior attorney who had briefly represented Claimant hired Dr. Hanaway.

[\[3\]](#) While applying for unemployment benefits is not dispositive of the ability to work, it is a factor to be considered.