

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

Injury No.: 10-111143

Employee: Brian Fischer  
Employer: Pro Caliber Construction, LLC (Settled)  
Insurer: Accident Fund Insurance Company of America (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

**Discussion**

*Second Injury Fund liability*

The administrative law judge denied employee's claim against the Second Injury Fund on a finding that employee failed to meet his burden of proving his preexisting right knee injury constituted a hindrance or obstacle to employment or reemployment. On appeal, employee argues that the administrative law judge erred in looking to employee's testimony regarding past difficulties with his right knee in resolving the issue whether employee's right knee condition constituted a hindrance or obstacle to employment. We agree with employee that where the issue is whether employee's preexisting right knee condition constituted a hindrance or obstacle to employment, "the proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition." *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted). With that said, however, we cannot base an award purely upon speculation or surmise.

Employee, in his testimony, repeatedly and unequivocally made clear that his preexisting right knee condition in no way hindered him at the time of the primary work injury on December 17, 2010. He also testified that his right knee did not hurt a lot more after the 2010 left knee injury. This testimony, although entirely credible, is not entirely consistent with the description of symptoms relied upon by Dr. Volarich in arriving at his opinions in this matter. It appears that employee's symptoms may have abated somewhat with the passage of time.

In any event, when we apply the proper focus of the inquiry and consider the potential for employee's preexisting right knee condition to combine synergistically with a future work injury, we ultimately must agree with the administrative law judge that, given employee's

Employee: Brian Fischer

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credible testimony, this record provides no support for a finding that employee has a preexisting disability referable to his right knee of such seriousness as to constitute a hindrance or obstacle to employment, and/or that employee's work-related and preexisting disabilities combine synergistically.

**Conclusion**

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued November 25, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28<sup>th</sup> day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Brian Fischer

Injury No.: 10-111143

Dependents: N/A

Employer: Pro Caliber Construction LLC (Settled)

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

Additional Party: Second Injury Fund

Insurer: Accident Fund Insurance Co. of America (Settled)

Hearing Date: November 18, 2013

Checked by: MDL

### 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 17, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee twisted his left knee while pushing a cart of drywall sheets.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left knee
14. Nature and extent of any permanent disability: 32.5% PPD of the left knee previously settled with Employer
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Brian Fischer

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$418.58 for PPD
- 20. Method wages computation: By stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: SETTLED
- 22. Second Injury Fund liability: No
- TOTAL: 0
- 23. Future requirements awarded: None

Said payments to begin 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 N/A 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: Brian Fischer

Injury No.: 10-111143

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Pro Caliber Construction LLC (Settled)

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

Additional Party: Second Injury Fund

Insurer: Accident Fund Insurance Co of America (Settled)

Checked by: MDL

### **PRELIMINARIES**

A hearing was held on November 18, 2013 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Brian Fischer ("Claimant") was represented by Colleen Joern Vetter. Pro Caliber Construction ("Employer") and its insurer previously settled their liability with Claimant, and this matter proceeded to a hearing against the Second Injury Fund ("SIF") which was represented by Assistant Attorney General Rachael Houser. Ms. Vetter requested a fee of 25% of Claimant's award.

The parties stipulated that on or about December 17, 2010, Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; Claimant's Permanent Partial Disability ("PPD") rate is \$418.58, the last injury resulted in PPD of 32.5% of the left knee; a pre-existing disability resulted in PPD of 15% of the right knee, and should the court find the SIF is liable for PPD benefits, the amount of benefits will be calculated using a load factor of 15%. The only issue for determination by hearing is whether the SIF is liable for PPD benefits.

### **SUMMARY OF EVIDENCE**

Claimant is a 37-year-old man who was working as a drywall installer for Employer on December 17, 2010, when he sustained an accidental injury arising out of and in the course and scope of his employment that resulted in injury to his left knee. The accidental injury occurred when Claimant was pushing a drywall cart that contained several sheets of drywall which he estimated to weigh 700 to 800 pounds. As he pushed the cart to make a turn, he pivoted on his left knee, felt a pop, and the knee buckled. Dr. L'Hommedieu performed a left knee arthroscopy, partial medial meniscectomy and excision of medial parapatellar plica on May 26, 2011. As Claimant's symptoms did not improve, Dr. L'Hommedieu performed another left knee arthroscopy and partial medial meniscectomy on September 29, 2011. Claimant was off work for about seven months, during which time he had physical therapy.

After the December 17, 2010 accident and continuing through the present, Claimant continues to experience pain, loss of motion, crepitus, swelling, and weakness in his left knee.

He experiences ongoing symptoms with movements including prolonged standing, stooping, squatting, kneeling, crawling, running, jumping, climbing and pivoting on his knee. He can squat to only about 85% on the left side because of knee discomfort. Weather changes increase his left knee symptoms. He has difficulty performing yard work and house work. Mopping, sweeping, shoveling, carrying groceries and laundry up and down steps are all more difficult now. He has had to modify his approach to perform these tasks and paces himself now because he has no one else to do them for him. Claimant and Employer settled the workers' compensation claim arising out of the December 17, 2010 accident for 32.5% of the left knee.

On April 2, 1999, Claimant was working construction and pivoted on his right knee with his right foot stuck in mud, injuring his right knee. Dr. Britt performed a right knee arthroscopic partial medial meniscectomy that repaired a severe complex tear of the posterior horn of the medial meniscus with both oblique and bucket handle and horizontal cleavage components. Claimant was off work for about three weeks. Claimant and his prior employer settled his workers' compensation claim arising out of the April 2, 1999 injury for 15% of the right knee. Claimant testified that he didn't have any continuing complaints after his surgery and could do everything he could do before. He testified his knee was a little stiff from time to time, but not anything that hindered him from doing his job. He testified he had very little pain, but his right knee did not hinder him at all. He also testified his right knee did not hurt a lot more after he injured his left knee than it did before the primary injury.

On June 12, 2012, Dr. David Volarich examined Claimant, took a history, and issued a report. With respect to the primary work injury of December 17, 2010, Dr. Volarich diagnosed internal derangement left knee (bucket handle tear of the medial meniscus), status post arthroscopic partial medial meniscectomy and excision of plica, and recurrent left knee medial meniscus tear status post revision arthroscopy and partial medial meniscectomy. With respect to Claimant's preexisting injuries he diagnosed right knee internal derangement status post arthroscopic partial medial meniscectomy.

Dr. Volarich provided the following ratings of permanent partial disability, which he opined within a reasonable degree of medical certainty, combined to create a substantially greater disability than the simple sum or total of each separate injury, which constitute hindrances or obstacles to employment or re-employment, and for which a loading factor should be added. With respect to the primary injury of December 17, 2010, 40% PPD of the left lower extremity rated at the knee; due to the torn medial meniscus that required two separate arthroscopic repairs, and account for ongoing discomfort, minor loss in motion, as well as crepitus and weakness in the left lower extremity. With respect to his preexisting injury, he found 15% PPD of the right lower extremity rated at the knee, due to the torn medial meniscus that required arthroscopic partial medial meniscectomy in 1999, which accounts for aching and mild discomfort prior to December 17, 2010.

**FINDINGS OF FACT & RULINGS OF LAW**

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant has failed to establish a right to recover from the Second Injury Fund. A claimant in a workers' compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 W.W.3d 902, 911 (Mo.App. E.D. 2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has not met the burden imposed by law.

I find Claimant failed to prove that his pre-existing right knee injury constituted a hindrance or obstacle to employment or re-employment. Claimant testified he was not having any continuing complaints following his surgery and leading up to the primary injury other than a little stiffness from time to time. Claimant testified he could still do everything he did before the right knee injury, and it did not hinder him in doing his job. He testified his right knee did not hurt a lot more after he injured his left knee than it did before, and he his right knee injury did not hinder him at all before the primary injury.

In light of Claimant's testimony, I am not persuaded by the opinion of Dr. Volarich that Claimant's pre-existing right knee injury constituted a hindrance or obstacle to employment or re-employment. The claim for compensation is denied.

Date: \_\_\_\_\_

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

MARGARET D. LANDOLT  
*Administrative Law Judge*  
*Division of Workers' Compensation*