FINAL AWARD ALLOWING COMPENSATION

Injury No.: 08-123612

Employee: Martin George

Employer: Ajax Tocco Magnethermic (Default)

Insurer: Uninsured

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.[1] We have read the briefs, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision correcting the award and decision of the ALJ as modified herein. We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The Second Injury Fund challenges the validity of the amended award issued by the administrative law judge on December 24, 2012, to correct errors from the original award. The Second Injury Fund disputes the administrative law judge's authority to issue an amended award to correct those errors because the Second Injury Fund filed an Application for Review of the original award just hours earlier on the same day. We agree. We will review the December 3, 2012, award.

For clarification, the following paragraphs are hereby corrected:

Original award, findings of fact – current condition number 8 (page 4):

> Dr. Volarich found her to be at maximum medical improvement as of his second evaluation on June 12, 2009. Dr. Volarich imposed comprehensive restrictions of Claimant's activities. Dr. Volarich deferred to opined that Claimant was unable to work eight hours per day, five days per week as a result of the combination of his primary low back injury and her pre-existing left knee condition.

Correction:

> Dr. Volarich found him to be at maximum medical improvement as of his evaluation on May 20, 2010. Dr. Volarich imposed comprehensive restrictions on Claimant's activities. Dr. Volarich opined that Claimant was unable to do any work that was more than sedentary. If a suitable position could not be identified, it was Dr. Volarich's opinion that Claimant was totally disabled as a direct result of the work related injury on April 22, 2008, in combination with his pre-existing medical conditions.

Original award, rulings of law – permanent disability (page 5):

> Based upon the combination of the primary work injury and spine conditions, Claimant is permanently and totally disabled. The unrebutted spinal treatment record combined with the primary injury are sufficient to predicate permanent total disability. The combination is manifest as upper body-lower body synergy plus complete instability in the lower body by virtue of the lumbar disability and the lower extremity disability making any serious exertion implausible. Sufficient evidence is contained in the record

[1] Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

to find Claimant was unemployable on the open labor market. Claimant had extended back treatment and she had to undergo a severe back fusion surgery as a result of the last injury. Additionally, Claimant testified that she now has severe pain everyday as a result of the injury. Claimant uses a cane constantly and is dependent on assistance from friends. Claimant's expert, Dr. Volarich, rendered a reasonably cogent overall opinion that Claimant was permanently and totally disabled and unable to compete in the open labor market as a result of the combination of the primary and pre-existing conditions.

Correction:

Based upon the combination of the primary work injury and spine conditions, Claimant is permanently and totally disabled. The unrebutted spinal treatment records, combined with the primary injury, are sufficient to predicate permanent total disability. The combination of lumbar and cervical spine instability, and his primary injury to his right foot, makes any serious exertion implausible. Sufficient evidence is contained in the record to find Claimant was unemployable on the open labor market. Claimant had extended back treatment and underwent surgery for a microdiscectomy prior to the work injury. Additionally, Claimant testified that he now has severe pain everyday as a result of his pre-existing conditions and the work-related injury. Claimant is dependent on assistance from friends. Claimant and his expert, Dr. Volarich, establish that Claimant was permanently and totally disabled and unable to compete in the open labor market as a result of the combination of the primary and pre-existing conditions.

In all other respects, we affirm the award of the ALJ dated December 3, 2012.

We further approve and affirm the ALJ's allowance of attorney's fees herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The original award and decision of Administrative Law Judge Joseph E. Denigan, issued December 3, 2012, is attached and incorporated by reference except to the extent modified herein. The document entitled Amended Award dated December 24, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 2nd day of October 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD on DEFAULT

Employee: Martin George

Injury No.: 08-123612

Dependents: N/A

Employer: Ajax Tocco Magnethermic (default)

Additional Party: Second Injury Fund

Insurer: Uninsured

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

Hearing Date: August 28, 2012

Checked by: JED:sw

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: April 22, 2008
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? Uninsured
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was injured while climbing about demolition site for removal of brick liners for furnaces.
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: right ankle.
14. Nature and extent of any permanent disability: 50% PPD of right ankle; PTD against SIF.
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

17. Value necessary medical aid not furnished by employer/insurer? $10,982.33

18. Employee's average weekly wages: Unknown

19. Weekly compensation rate: $681.38/$389.04

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses	$10,982.33
11 weeks unpaid TTD benefits	7,495.18
77.5 weeks of permanent partial disability from Employer	30,150.60

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential ($292.34) payable by SIF for 77.5 weeks beginning May 20, 2010 and, thereafter $681.38, for Claimant's lifetime	Indeterminate
TOTAL:	INDETERMINATE

23. Future requirements awarded: Unknown

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:

Charles Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Martin George

Dependents: N/A

Employer: Ajax Tocco Magnethermic (default)

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: August 28, 2012

Injury No.: 08-123612

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

Checked by: JED:sw

This case involves injury to the right foot resulting to Claimant on the reported accident date of April 22, 2008. Employer filed no Answer to Claim herein and is in default. Employer paid neither medical benefits nor TTD benefits to date. The Second Injury Fund ("SIF") is a party to this Claim. Both parties are represented by counsel.

Employer remains in default and this hearing proceeds pursuant to Notice of Hearing by certified mail from the Division. (Group Exhibit A-Q.)

Issues for Trial

1. Liability for unpaid medical expenses (stipulated at $10,982.33);
2. liability for unpaid temporary total disability (stipulated at $7,496.18);
3. nature and extent of any permanent;
4. nature and extent of permanent disability;
5. liability of the SIF for medical expenses and PTD benefits;
6. whether Employer is insured herein.

FINDINGS OF FACT

1. Claimant injured his right foot on the reported accident date while climbing about a demolition site for removal of brick liners of industrial furnaces. Claimant underwent emergency medical treatment in St. Louis and returned home to Valparaiso, Indiana to complete his treatment.

2. Initial x-ray examination revealed no ankle fracture but revealed dorsal subluxation of the great toe proximal phalanx a 2d metatarsal neck fracture and possible fracture of the 1st metatarsal (great toe) head. He was placed on crutches and treated conservatively.

3. Dr. John Watson diagnosed right foot fracture, along with swelling and ecchymosis, and performed a closed reduction of the dislocated right great toe. Claimant remained off work.

4. Dr. Brian Coleman suspected plantar plate rupture of the right great toe secondary to dislocation of the 1st metatarsal phalangeal joint and healing fracture of the 2d metatarsal neck. Subsequent MRI of June 2, 2008 revealed bone marrow edema at the distal aspect of the 2d metatarsal. Claimant underwent physical therapy and was subsequently released.

Pre-Existing Disability

5. In 2002, Claimant was diagnosed with degenerative disc disease and large herniation at L5-S1. Claimant underwent surgery for disc herniation. Claimant took pain medication daily and limited himself at work.

6. In 2006, Claimant sustained cervical injury in a motor vehicle accident. MRI revealed disc protrusions at C2-3, C4-5, C5-6. Claimant had radicular symptoms and was treated conservatively. More recently Claimant had daily pain and missed work a few time per year. He limited himself at work.

Current Condition

7. Claimant has not worked since 2008. Claimant is experiencing serious pain on a daily basis.

8. Dr. Volarich found her to be at maximum medical improvement as of his second evaluation on June 12, 2009. Dr. Volarich imposed comprehensive restrictions of Claimant's activities. Dr. Volarich deferred to opined that Claimant was unable to work eight hours per day, five days per week as a result of the combination of his primary low back injury and her pre-existing left knee condition.

Opinion Evidence

Claimant offered the deposition and narrative reports of Dr. David Volarich as Exhibit A. Dr. Volarich reviewed the medical record, examined Claimant in 2010, and found Claimant attained maximum medical improvement as of his examination, May 20, 2010. Dr. Volarich rated the right foot injury at thirty-five percent PPD of the 1st metatarsal and forty percent of the 2d metatarsal plus fifteen percent PPD of the foot. He assigned a pre-existing PPD of thirty-five percent to Claimant's low back and twenty percent to his cervical spine. The SIF offered no opposing opinion evidence.

RULINGS OF LAW

Permanent Disability

The evidence conforms to Dr. Volarich's placement of Claimant at maximum medical improvement on the date of his examination, May 20, 2010. Dr. Volarich's PPD ratings on the primary injury (right foot) exceed what might be inferred from the clinical examination. The record suggests PPD in the range of forty-five to fifty percent PPD of the right foot. The ratings

on the spine are generally persuasive and consistent with the radiological and treatment records. Claimant's medical history together with Dr. Volarich's restrictions, suggest a thirty percent PPD of Claimant's low back and twenty percent PPD of his cervical spine.

Based upon the combination of the primary work injury and spine conditions, Claimant is permanently and totally disabled. The unrebutted spinal treatment record combined with the primary injury are sufficient to predicate permanent total disability. The combination is manifest as upper body-lower body synergy plus complete instability in the lower body by virtue of the lumbar disability and the lower extremity disability making any serious exertion implausible. Sufficient evidence is contained in the record to find Claimant was unemployable on the open labor market. Claimant had extended back treatment and she had to undergo a severe back fusion surgery as a result of the last injury. Additionally, Claimant testified that she now has severe pain everyday as a result of the injury. Claimant uses a cane constantly and is dependent on assistance from friends. Claimant's expert, Dr. Volarich, rendered a reasonably cogent overall opinion that Claimant was permanently and totally disabled and unable to compete in the open labor market as a result of the combination of the primary and pre-existing conditions.

Medical Expenses and TTD Benefits

Claimant presented comprehensive medical treatment records for the right foot injury together with companion bills. Both claimant and Dr. Volarich testified as to their necessity to cure and relieve the effects of the reported injury. (Exhibits A-H to A-M). The parties present stipulated the amount at $10,982.33. Claimant was unable to work during his recovery from the foot injury which the parties present stipulated at eleven weeks. Sections 287.120, 287.140, 287.250 RSMo (2000, Cum.Supp. 2005).

Insurance Requirement

Claimant testified that Employer's main office was located in Warren Ohio. He testified that Employer had approximately 200 employees. Claimant was a Regional Manager for Employer. Employer is responsible for Claimant's work related injury for which Employer should have been insured. See Sections, 287.030, 287.060, 287.280, 287.300 RSMo (2000, Cum.Supp. 2005). Nevertheless, Employer appears to be uninsured.

Conclusion

On the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained fifty percent PPD of the right foot as a result of the primary injury. In addition, Claimant is found to have sustained permanent total disability as a result of the combination of the primary injury with the pre-existing disabilities described. The SIF is liable for the differential between the PTD rate and the PPD rate for the period of the PPD installment period and, thereafter, for Claimant's lifetime, or until Claimant is no longer permanently and totally disabled. Section 287.200 RSMo (2009). In addition, Employer is

liable for $10,982.33 in medical expenses plus eleven weeks of TTD benefits. The SIF is secondarily liable for these medical expenses under Section 287.220.5 RSMo (2000).

Claimant seeks spousal benefits relative to this permanent total disability award under the caveat created by Schoemehl v. Treasurer, 217 S.W.3d 900 (Mo.banc 2007). Absent Claimant's death, any spousal application/determination is premature. Such an award would be a contingent benefit for which Chapter 287 makes no provision.

Since Employer is uninsured, this file is referred to the Office of Fraud and Non-Compliance.

I certify that on 12-3-12, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

Date: _____ By _____

Made by: Joseph E. Denigan

JOSEPH E. DENIGAN
Administrative Law Judge

DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF LABOR
INDUSTRIAL RELATIONS

Issued by DIVISION OF WORKERS' COMPENSATION

AMENDED AWARD

Employee: Martin George

Dependents: N/A

Employer: Ajax Tocco Magnethermic (default)

Additional Party: Second Injury Fund

Insurer: Uninsured

Hearing Date: August 28, 2012

Injury No.: 08-123612

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

Checked by: JED:sw

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
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4. Date of accident or onset of occupational disease: April 22, 2008
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? Uninsured
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was injured while climbing about demolition site for removal of brick liners for furnaces.
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: right ankle.
14. Nature and extent of any permanent disability: 50% PPD of right ankle; PTD against SIF.
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

17. Value necessary medical aid not furnished by employer/insurer? $10,982.33

18. Employee's average weekly wages: Unknown

19. Weekly compensation rate: $681.38/$389.04

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses	$10,982.33
11 weeks unpaid TTD benefits	7,495.18
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22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential ($292.34) payable by SIF for 77.5 weeks beginning May 20, 2010 and, thereafter $681.38, for Claimant's lifetime	Indeterminate
TOTAL:	INDETERMINATE

23. Future requirements awarded: Unknown

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:

Charles Bobinette

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Martin George

Dependents: N/A

Employer: Ajax Tocco Magnethermic (default)

Additional Party: Second Injury Fund

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Employer remains in default and this hearing proceeds pursuant to Notice of Hearing by certified mail from the Division. (Group Exhibit A-Q.)

Issues for Trial

1. Liability for unpaid medical expenses (stipulated at $10,982.33);
2. liability for unpaid temporary total disability (stipulated at $7,495.18);
3. nature and extent of permanent disability;
4. liability of the SIF for medical expenses and PTD benefits;
5. whether Employer is insured herein;
6. whether Claimant's spouse is eligible for PTD benefits.

FINDINGS OF FACT

1. Claimant injured his right foot on the reported accident date while climbing about a demolition site for removal of brick liners of industrial furnaces. Claimant underwent emergency medical treatment in St. Louis and returned home to Valparaiso, Indiana to complete his treatment.

2. Initial x-ray examination revealed no ankle fracture but revealed dorsal subluxation of the great toe proximal phalanx a 2d metatarsal neck fracture and possible fracture of the 1st metatarsal (great toe) head. He was placed on crutches and treated conservatively.

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Pre-Existing Disability

5. In 2002, Claimant was diagnosed with degenerative disc disease and large herniation at L5-S1. Claimant underwent surgery for disc herniation. Claimant took pain medication daily and limited himself at work.

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RULINGS OF LAW

Permanent Disability

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Claimant's medical history together with Dr. Volarich's restrictions, suggest a thirty percent PPD of Claimant's low back and twenty percent PPD of his cervical spine.

Based upon the combination of the primary work injury and spine conditions, Claimant is permanently and totally disabled. The unrebutted spinal treatment record combined with the primary injury are sufficient to predicate permanent total disability. The combination is manifest as upper body-lower body synergy plus complete instability in the lower body by virtue of the lumbar disability and the lower extremity disability making any serious exertion implausible. Sufficient evidence is contained in the record to find Claimant was unemployable on the open labor market. Claimant had extended back treatment and he had to undergo a surgery. Additionally, Claimant testified that he now has severe pain everyday as a result of the injury. Claimant is dependent on assistance from friends. Claimant's expert, Dr. Volarich, rendered a reasonably cogent overall opinion that Claimant was permanently and totally disabled and unable to compete in the open labor market as a result of the combination of the primary and pre-existing conditions.

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Conclusion

On the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained fifty percent PPD of the right foot as a result of the primary injury. In addition, Claimant is found to have sustained permanent total disability as a result of the combination of the primary injury with the pre-existing disabilities described. The SIF is liable for the differential between the PTD rate and the PPD rate for the period of the PPD installment period and, thereafter, for Claimant's lifetime, or until Claimant is no longer permanently and totally disabled. Section 287.200 RSMo (2009). In addition, Employer is liable for $10,982.33 in medical expenses plus eleven weeks of TTD benefits. The SIF is secondarily liable for these medical expenses under Section 287.220.5 RSMo (2000).

Claimant seeks spousal benefits relative to this permanent total disability award under the caveat created by Schoemehl v. Treasurer, 217 S.W.3d 900 (Mo.banc 2007). Claimant is married to Christine George, his wife of 26 years. Absent Claimant's death, any spousal application/determination is premature. Such an award would be a contingent benefit for which Chapter 287 makes no provision.

Since Employer is uninsured, this file is referred to the Office of Fraud and Non-Compliance.

I certify that on 12/24/2012, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

Date: _____ By: _____

Made by: _____
JOSEPH E. DENIGAN
Administrative Law Judge