

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

Injury No.: 08-122058

Employee: Robert Gosche  
Employer: Drury Inns, Inc. (Settled)  
Insurer: Drury Inns, Inc. c/o Gallagher Bassett (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 24, 2010. The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 24, 2010, 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 7<sup>th</sup> day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

# AWARD

Employee: Robert Gosche

Injury No.: 08-122058

Dependents: N/A

Before the

Employer: Drury Inns Inc. (previously settled)

**Division of Workers'  
Compensation**

Additional Party: Second Injury Fund

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

Insurer: N/A

Hearing Date: August 30, 2010

Checked by: JED/sr

## 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: 11/20/08
5. State location where accident occurred or occupational disease contracted: St. Louis City
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? N/A
11. Describe work employee was doing and how accident happened or occupational disease contracted:  
Employee was performing construction work in building and sustained injury by ceiling collapse.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Parts of body injured by accident or occupational disease: left shoulder, head, cervical spine and  
lumbosacral spine
14. Nature and extent of any permanent disability: 15% PPD of low back; PTD against SIF
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$16,100.00
17. Value necessary medical aid not furnished by employer/insurer? None

- 18. Employee's average weekly wages: \$1,600.00
- 19. Weekly compensation rate: \$772.53 TTD/ \$404.66 PPD
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

60 weeks of permanent partial disability from Employer (settled)

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits: Weekly differential (\$367.87)  
payable by SIF for 60 weeks beginning August 31, 2009, and thereafter  
at the rate of \$772.53 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:

James J. Sievers

**FINDINGS OF FACT and RULINGS OF LAW:**

|                   |                                      |             |                                    |
|-------------------|--------------------------------------|-------------|------------------------------------|
| Employee:         | Robert Gosche                        | Injury No.: | 08-122058                          |
| Dependents:       | N/A                                  |             | Before the                         |
| Employer:         | Drury Inns Inc. (previously settled) |             | <b>Division of Workers'</b>        |
| Additional Party: | Second Injury Fund                   |             | <b>Compensation</b>                |
| Insurer:          | N/A                                  |             | Department of Labor and Industrial |
| Hearing Date:     | August 30, 2010                      |             | Relations of Missouri              |
|                   |                                      |             | Jefferson City, Missouri           |
|                   |                                      | Checked by: | JED/sr                             |

This case involves a neck, back and left shoulder injury resulting to Claimant with the reported accident date of November 20, 2008. Employer/Insurer previously settled its risk of liability. Both parties are represented by counsel. The single issue for trial is the liability of the Second Injury Fund.

**FINDINGS OF FACT**

Claimant was employed as laborer and later as a working supervisor for Employer. Claimant’s job duties included supervising the renovation of hotels and when he was not performing in a supervisory capacity, he was assisting workers doing the physical duties of electrical, plumbing, carpet laying, tile laying, concrete work and other construction activities required. Physical movements included kneeling, standing, squatting, walking, sitting and climbing on ladders, stepladders, and scaffolding and using various lifts. Claimant was often placed in abnormal positions when crawling, climbing and working overhead. He worked 12-14 hours a day, 6 days a week; with a one-hour lunch break and two fifteen minute breaks.

On the reported accident date Claimant was working under a room with a ceiling suspended about nine feet high. The ceiling suddenly gave way and fell on top of Claimant. Claimant estimated the ceiling and the accompanying materials weighed 400-500 pounds. Claimant experienced pain in his left neck, trapezius, shoulder and the left low back to the mid buttock area to the hip and down the posterior leg to the foot. Claimant was taken to a local emergency room in Colorado, where he was diagnosed with a closed head injury, contusion of the left shoulder and cervical strain.

Claimant continued to work in a supervisory only capacity only over the next couple of months. On January 12, 2009, Claimant sought additional treatment from a company

physician in Colorado. He complained of continued pain in his neck, left shoulder and headache. Following examination he was diagnosed with cervical strain, a face/scalp contusion and lumbar strain. Claimant was treated with medication and sent for physical therapy. On January 29, 2009, he complained of increased pain after lifting a 40 pound bucket of glue. An additional diagnosis of shoulder strain was provided, however Claimant was allowed to work regular duty and released from care.

On March 5, 2009, Claimant sought additional treatment from the company doctor. He offered complaints similar to those he reported with the original injury of November 20, 2008. Claimant was instructed to continue therapy, work regular duty and see his primary doctor for other potential causes of his low back pain. Notes of March 12, 2009 reflect physical therapy was causing an increase in Claimant's pain in his left shoulder, back, and left lower extremity. Claimant reported that he was experiencing numbness and tingling in his left lower extremity. Claimant's doctor diagnosed myofascial pain in the cervical spine, rotator cuff tendinosis with a near frozen left shoulder, and lumbar back pain with a left radiculopathy. Following his appointment with his primary doctor, Claimant went back to the company doctor where it was noted he had tenderness in the sacrum and left buttock, but he was released to regular duty and instructed to continue physical therapy.

Claimant was sent to Dr. Cantrell on March 31, 2009. After examination, Claimant was diagnosed with mechanical neck, left shoulder, and low back pain with strain injuries and was sent to physical therapy. Initially, some improvement was noted; however by April 29, 2009, there was numbness noted in the left lower extremity with a loss of range of movement and therapy was discontinued. An MRI of the lumbar spine showed facet changes at L2-3 through L5-S1 and diffuse disc bulging at L3-4 and L4-5. Dr. Cantrell provided Claimant with a TENS unit, which offered temporary relief, then recommended epidural steroid injections. Dr. Wayne performed a series of epidural injections. On August 31, 2009, Claimant underwent a functional capacity evaluation that suggested he could perform at the medium work level. Dr. Cantrell placed Claimant at maximum medical improvement and allowed him to work regular duty without restrictions.

Claimant testified that he continued to work regular duty until November 3, 2009. He stated that he was unable to perform his job duties due to a combination of physical problems. Claimant further testified to a myriad of prior injuries and health problems which included two surgeries on his left shoulder, three surgeries on his right shoulder, four surgeries on his right knee, multiple procedures on his right foot, injuries to his cervical and lumbosacral spine, diabetes mellitus and heart disease (five-way bypass surgery).

#### *Opinion Evidence*

Dr. Volarich examined Claimant on March 11, 2003, and November 30, 2009. Records review revealed serious prior injuries and conditions including: right shoulder internal derangement in the form of adhesive capsulitis and impingement, left shoulder internal derangement in the form of impingement syndrome and labral tear, right knee internal derangement, right foot puncture wound, coronary artery disease, insulin dependent diabetes mellitus, and hypercholesterolemia. Physical examination was consistent with the

medical record and multiple surgeries to both shoulder and right knee. Dr. Volarich assigned a thirty percent PPD of the right shoulder, a thirty-five percent PPD of the left upper extremity rated at the shoulder, a fifty percent PPD of the right lower extremity rated at the knee, a twenty-five percent PPD of the right lower extremity rated at the foot, a twenty-five percent PPD of the body as a whole due to insulin dependent diabetes mellitus and a thirty-five percent PPD of the body as a whole rated at the cardiovascular system.

Claimant's reported neck, back and left shoulder injury resulted in a twenty-five pound lifting restriction on an occasional basis. Dr. Volarich advised Claimant to avoid remaining in a fixed position for more than about 45-60 minutes at a time including both sitting and standing. He diagnosed closed head trauma with transient loss of consciousness, cervical strain and aggravation of underlying degenerative joint disease with residual myofascial pain, disc protrusion at L4-5 centrally and to the left with bulging at L3-4 as well as aggravation of underlying degenerative joint disease L2-S1 and aggravation of left shoulder syndrome. Dr. Volarich provided a disability rating of fifteen percent PPD of the body as a whole rated at the cervical spine, a twenty-five percent PPD of the body as a whole rated at the lumbosacral spine and a ten percent PPD of the left upper extremity rated at the shoulder.

Dr. Volarich further opined that Claimant is unable to engage in any substantial gainful activity nor can Claimant be expected to perform in an ongoing working capacity in the future. Claimant is unable to continue in his line of employment he last held as a project supervisor for Employer and could not be expected to work on a full-time basis in a similar job. He also noted that Claimant cannot reasonably be expected to sustain regular full-time hours, i.e. eight hours per day, five days per week throughout the year.

Based on his medical assessment alone, Dr. Volarich opined that Claimant is permanently and totally disabled as a direct result of the work related injury of November 20, 2008, in combination with his pre-existing medical conditions. He also noted that Claimant is fifty-six years old (advanced age), has an education that is limited to graduation from high school, has worked his entire career of 38 years for Employer as either a laborer, construction worker or project supervisor, has been unable to continue working since November of 2009. Dr. Volarich reviewed all of Claimant's medical records.

On March 1, 2010, Claimant was evaluated by Delores Gonzales to assess his potential for vocational rehabilitation. She reviewed the medical record. She concluded in so many words that Claimant is not capable of gaining employment in a competitive work environment.

On July 19, 2010, James England performed a records review in order to evaluate Claimant's employability in the open labor market. Based upon record review only, Mr. England testified that Claimant could perform a variety of construction supervision positions; and that if Claimant was permanently and totally disabled it was from the last injury alone. He did not explain how he could sustain regular hours with ongoing pain and guarding.

## RULINGS OF LAW

### Nature and Extent of Permanent Disability

Claimant testified that he has had continuous pain with accompanying limitations due to his right knee, cardiac and shoulder conditions since before the reported accident and, after the reported accident, never returned to work. The prior surgeries and diagnoses are undisputed in the record.

Claimant's assertion of permanent total disability is supported by the reported injuries and the preexisting injuries that were noted. Section 287.020.7 RSMo (1986) defines total disability as the "inability to return to any employment and not merely...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." Id. at 922; Brown v.

Consistent with these cases, it is not reasonable to suggest any employer would employ Claimant in his present physical condition. This assessment includes his level of education, and transferable skills. Claimant has no transferable skills that do not depend on strong physical attributes as well. Claimant cannot be reasonably expected to perform regular hours in any line of work on a full-time basis. Finally, age is a factor in the determination of permanent total disability. Reves v. Kindell's Mercantile Co., Inc., 793 S.W.2d 917, 920-921 (Mo.App. 1990).

Here, the record supports a finding that, while working as a foreman, Claimant exhibited serious pre-existing injuries to his right shoulder, left shoulder, right knee, and the body as a whole referable to coronary artery disease. His productivity diminished over the years. Supported by a record of overwhelming orthopedic and coronary disability, Dr. Volarich found Claimant permanently and totally disabled. The medical record and medical opinions were unrebutted and unimpeached. Ms. Gonzales conclusions enhance this evidence. The ultimate conclusions of Ms. Gonzales are more credible than those of Mr. England and are reconcilable with the medical record. This record cannot reasonably support a conclusion that employers would hire Claimant based on his ongoing pain, limitations, guarding and age.

### Liability of the Second Injury Fund

The Liability of the Second Injury Fund is set out in Section 287.220 RSMo (1994). A previous disability need only be a "hindrance or obstacle to employment or obtaining employment." Id. See Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995).

Claimant’s evidence demonstrated his serious right knee disability, bilateral shoulder disability and low back disability. The significance of the combination is manifest when considering Claimant’s inability to shift loads to his back from his legs, and vice versa, together with the accompanying pain. These limitations further combine synergistically with the factor of advance age which is accompanied by weakness and premature fatigue during exertion. Claimant also identified specific limitations on activity.

In addition, reasonable inference is made that, given his age and the natural degenerative changes beginning in as early as 1982 on the right knee, 1992 on the left shoulder and 2001 on the right shoulder, that have been aggravated and re-aggravated over many years, the degenerative joint disease will continue to progress and cause him increasing pain in the future. These physiological realities must be confronted in analyzing the synergistic effect between the primary injuries and the pre-existing injuries to the same body parts.

The record supports a finding that Claimant exhibited a fifteen percent PPD of the low back as a result of the primary injury. Claimant had significant pre-existing disability to each shoulder is in the range of thirty-five to forty-five percent. Claimant cardiac disability is in the range of one-third of the body as a whole. Both of Claimant’s experts found him unemployable. Their opinions were probative and un rebutted.

Conclusion

Accordingly, on the basis of substantial and competent evidence contained within the whole record, Claimant is found to have sustained a fifteen percent PPD of the body as a whole referable to the low back. 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 the PPD installment period and, thereafter, at the PTD rate for Claimant’s lifetime, or until Claimant is no longer permanently and totally disabled. Section 287.200 RSMo (2009).

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

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

JOSEPH E. DENIGAN  
*Administrative Law Judge  
Division of Workers' Compensation*

A true copy: Attest:

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*Division of Workers' Compensation*

