

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

Injury No.: 04-076234

Employee: Timothy Green
Employer: J. S. Alberici, Inc. (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 13, 2004
Place and County of Accident: St. Louis, 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 January 11, 2006. The award and decision of Administrative Law Judge Joseph E. Denigan, issued January 11, 2006, 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 24th day of May 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Timothy Green

Injury No.: 04-076234

Dependents: N/A
Employer: J.S. Alberici, Inc. (Settled)
Additional Party: Second Injury Fund
Insurer: Self-Insured
Hearing Date: October 27, 2005

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

Checked by: JED:tr

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: July 13, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis, Mo.
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 pulling water line, fell backwards into concrete vault.
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: Back, neck, ribs, left elbow
14. Nature and extent of any permanent disability: 15% body as a whole referable to the back
15. Compensation paid to-date for temporary disability: \$675.90
16. Value necessary medical aid paid to date by employer/insurer? \$20,833.81

Employee: Timothy Green Injury No.: 04-076234

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages:
19. Weekly compensation rate: \$675.90/\$354.05
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

60 weeks permanent partial disability from Employer

(Settled)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$321.85) payable by SIF for 60 weeks beginning
July 13, 2004 and thereafter 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, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Timothy Green	Injury No.: 04-076234
Dependents:	N/A	Before the
Employer:	J.S. Alberici, Inc. (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Self-Insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED

This case involves multiple injuries, including a low back injury, accompanying a fall sustained by Claimant with a reported accident date of July 13, 2004. Employer, J.S. Alberici, was a party in this case but previously settled its risk of liability. The single issue for trial is the nature and extent of the Second Injury Fund disability. All parties were represented by counsel.

FINDINGS OF FACT

Age, Education, and Employment History

Claimant testified he was born on July 10, 1956 and is currently 49 years old. He has no dependants. Claimant further testified he has been employed as laborer for J.S. Alberici since 1987. He testified that his job consisted of grade checking, pouring concrete, demolition clean-up, and digging ditches. He was required to bend, stoop, and lift heavy materials. He graduated from high school. He further testified his last day of work was on July 13, 2004.

Primary Injury

On the date of injury Claimant testified he was moving a water line from over a fence when he fell backwards into a concrete vault, landing on a pile of pipe and angle irons injuring his left arm, neck, back, right knee, and received a lacerated spleen and left elbow. Claimant testified he was transported to St. Johns Mercy Hospital where he was admitted for three days. He followed up with Dr. Doll for rehabilitation and received injections in his neck. Claimant testified he experiences a dull pain in his neck and must keep his head cocked for pain relief. He has consistent headaches that occur four to five times a week, sometimes more. Claimant testified he was unable to return to work after this injury due to all his combined injuries. Claimant testified he had experienced several other injuries to various parts of the body.

Significant Pre-existing Disabilities

Claimant testified that on 1/12/98 while changing a bucket hoe he smashed his left hand. He reported to Dr. Sudekum for treatment and was taken to surgery on 4/28/98 for a neurolysis of dorsal sensory branch of the radial nerve as well as a flap to attempt to cover the nerve. Claimant testified he was out of work for three days then returned to light duty as a laborer. Claimant testified he still experiences numbness and loss of strength. He further testified that this made his job difficult because he was unable to use his left hand but continued to work as a laborer up until his 3/29/00 injury.

On 3/29/00 while driving a concrete buggy, a wheel of which fell off causing the machine to turn, Claimant was thrown onto a rock-paved road surface. Claimant injured his left knee, left shoulder, and ribs. Claimant testified he sought treatment from Dr. Strickland wherein his knee was aspirated several times and eventually he was diagnosed with a torn left ACL. On 5/11/00 Dr. Strickland was able to repair the torn ligament by arthroscopy. Subsequently, Claimant continued to have complaints with his left shoulder. He received several cortisone injections and was taken for surgery on 5/29/02 for said shoulder. Currently, Claimant has difficulty walking, especially upstairs, kneeling, bending, and stooping. Shoulder restriction is consistent with the open decompression. Claimant testified these injuries severely limited his abilities at work.

Claimant testified on or about January of 2001 he began to develop numbness in his hands and elbows. Claimant testified he received treatment from Dr. Strickland and Dr. Rotman. He was diagnosed bilateral cubital tunnel and bilateral carpal tunnel syndrome. Dr. Sudekum performed a right and left cubital tunnel and carpal tunnel release. Claimant further testified he continued to have pain in his right elbow and eventually a revision of a right cubital tunnel release was performed. Claimant testified he continues to have numbness and tingling in both hands and cannot rotate palms without pain. He was unable to use his left hand and had to use his right hand only but has lost all grip functions in his right hand. He further testified his left elbow is significantly better but not quite secure. He further testified he cannot fully straighten his right elbow and when he tries he gets a tingling sensation leading to his right hand becoming numb. He keeps his right elbow constantly bent and experiences a loss of strength and gripping ability.

Claimant testified in an inexact but credible manner. His testimony compared well with his surgical record and the prior settlements and awards (Exhibit D). Claimant's testimony contrasted with Dr. Doll's comments on the primary injury which were generated as narrative reports. Claimant's testimony was essentially un rebutted and unimpeached.

Treatment Record

Exhibit E comprises all medical records for Claimant's various providers, treaters, for all injuries. Medical treatment

records of Dr. Anthony Sudekum including operative reports for 4/24/98 neurolysis of dorsal sensory of radial nerve of left hand, 2/20/02 left carpal tunnel and cubital tunnel release, 2/6/02 right carpal tunnel and cubital tunnel release, 3/20/02 revision of right cubital tunnel release. Medical treatment records of Dr. James Strickland for left shoulder as well as 5/11/00 operative report for left knee arthroscopy. Medical treatment records of Dr. Mitchell Rotman including 5/29/02 operative report for left shoulder arthroscopy. Medical treatment records from Dr. Stanley Sakabu of St. John's Mercy emergency room.

Opinion Evidence

Claimant offered the deposition of Dr. David T. Volarich as Exhibit A. Dr. Volarich evaluated the Claimant on 7/19/01, 7/17/03, 1/19/05, and provided an addendum letter dated 8/18/05. Dr. Volarich obtained a medical history, physical evaluation, and reviewed all of the medical records. Dr. Volarich assigned the following ratings to Claimant's pre-existing injuries: 35% permanent partial disability of the left shoulder due to impingement and partial rotator cuff tear that required surgical repair, 45% permanent partial disability of the right wrist and 35% permanent partial disability of the left wrist due to carpal tunnel which required an endoscopic carpal tunnel release, a 60% permanent partial disability to the right elbow due to cubital tunnel requiring two separate surgical repairs, a 35% permanent partial disability to the left elbow due to cubital tunnel which required surgical repair, a 50% permanent partial disability of the left knee due to the chondral fracture and partial ACL tear which required surgical repair, and 25% permanent partial disability of the left hand due to contusion of dorsal sensory branch of radial nerve which required surgical repair. Dr. Volarich opined that as a result of a combination of Claimant's present and pre-existing injuries he found Claimant to be permanently and totally disabled.

Claimant offered the deposition of Dr. Wayne A. Stillings as Exhibit C. Dr. Stillings evaluated Claimant on 8/1/05. Dr. Stillings reviewed various informational sources, obtained complaints with respect to the injury, a detailed history, performed a record review and mental status examination, as well as administering the MMPI-2. Dr. Stillings diagnosed the Claimant with anxiety disorder. Secondly, he diagnosed Claimant with a mood disorder and pain disorder associated with psychological factors in general medical condition. Dr. Stillings opined that Claimant's GAF was 55, which is moderate to severe. Dr. Stillings further opined that Claimant, from a psychiatric standpoint, is permanently and totally disabled due to a combination of psychiatric disabilities.

Claimant also offered the deposition of Sherry Browning, C.R.C. as Exhibit B. Ms. Browning performed a vocational assessment of Claimant on June of 2005. After obtaining a detailed medical history, Ms. Browning obtained a history regarding education and training as well as demographic information. Ms. Browning administered six tests within the Woodcock Johnson-III, Test of Achievement. In addition, the U.S. Department of Labor, Employment and Training Administration, O*NET occupational informational database was utilized. It was Ms. Browning's opinion that a combination of the functional effects of the injuries sustained by the Claimant, as well as the pre-existing injuries, precluded him from any substantial gainful employment.

The SIF offered the expert testimony of Dr. Doll, an osteopath, as Exhibit II. Dr. Doll stated he was both an examining and treating physician. His findings on physical examination clearly note a consistent lack of edema, erythema or ecchymosis. He notes strength and reflex examinations remain intact.

The SIF offered the deposition of Mr. England, vocational expert, as Exhibit I. This expert was not fully informed and the testimony is not discussed here.

RULINGS OF LAW

Nature and Extent of Disability

Claimant's evidence of permanent total disability is a result of the reported injuries and pre-existing injuries that were so 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 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. 1983). 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. Treasurer of Missouri, 795 S.W.2d 479, 483 (mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989).

Consistent with these cases, it is not reasonable to suggest any employer would employ Claimant in his present physical condition, which includes his level of educational and lack of transferable skills. Claimant has no training other than the experience of performing heavy, often dangerous labor associated with commercial construction. His abilities or experience are not transferable skills *per se*, since the same can be learned within thirty days. Claimant cannot be reasonably expected to perform regular hours in any line of work on a full-time basis.

Claimant’s expert evidence was sufficient and unimpeached. While Dr. Volarich’s ratings are high in several instances, the medical record supports his findings and conclusion on permanent total disability. The SIF offered contrary evidence that did not rebut the ultimate conclusions of Claimant’s medical expert’s opinions on orthopedic disabilities. He noted general conclusions, on strength for example, to be intact. His notes lack details and traditional orthopedic observations. His knowledge of specific orthopedic medical history is not apparent in his conclusions. The settlements and awards comprising Exhibit D belie Dr. Doll’s orthopedic analysis.

Curious throughout the SIF’s Dr. Doll’s comments is the absence of a strong panel of negative findings on *traditional orthopedic tests* or contrasts with surgeons’ notes and findings. Also curious is a comment that clinical history was “discussed” with Claimant. It seems reasonable that questions are posed in a discussion. It cannot be reasonably suggested that discussion of clinical history is contemplated in a routine “patient history.” What may be reasonably asked is whether Dr. Doll relied on an uneducated opinion given in such a discussion. This type of discourse with a medical examinee seems inappropriate and is certainly non-standard. It also purports a pretense of care perhaps intended to heighten the examiner’s credibility which is not a credible tact in a medico-legal adversary proceeding.

Also, after commenting on an odor of alcohol during Claimant’s first examination, it becomes more notable that he encouraged adherence to a narcotic drug regimen which is unconventional. On the other hand, alcoholism evidences psychiatric disability and related diagnoses. Neither interpretation serves Dr. Doll’s proponent.

Liability of the SIF

The liability of the Second Injury Fund is set out in Section 287.220 RSMo (1994). See Leutzing v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995). A previous disability need only be a “hindrance or obstacle to employment or obtaining employment.” Id. Section 287.220.1 RSMo (1994). Dr. Volarich and Dr. Stillings found Claimant to be totally disabled. They had in their possession all the medical records pertaining to Claimant’s pre-existing injuries as well as the primary injuries. Sherry Browning, vocational expert, found Claimant to be totally disabled and unemployable in the open labor market. Claimant’s experts were probative and un rebutted.

In contrast, Mr. England did not have all of the medical evidence. A medical expert’s opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence. Silman v Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990) Accordingly, any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984)

Conclusion

Accordingly on the basis of the substantial and competitive evidence contained within the whole record Claimant is found to have sustained permanent and total disability as the result of the combination of the primary injury with pre-existing disabilities to the back, left shoulder, right knee, both hands, and both elbows.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation