

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

Injury No.: 05-136005
Medical Fee Dispute No.: 05-01791

Employee: David Groves
Employer: Infrasource Services, Inc.
Insurer: Travelers Property & Casualty
Health Care Provider: Freeman Hospital
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This matter is submitted to the Labor and Industrial Relations Commission (Commission) for review. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge resolving the workers' compensation claim and the medical fee dispute is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 20, 2013. The award and decision of Administrative Law Judge Robert H. House, issued March 20, 2013, 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 29th 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

AWARD

Employee: David Groves

Injury No. 05-136005

Medical Fee Dispute No. 05-01791

Dependents: N/A

Before the

Employer: Infracource Services, Inc.

**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Travelers Property & Casualty

Hearing Date: February 18, 2013

Checked by:

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: OCTOBER 17, 2005
5. State location where accident occurred or occupational disease was contracted: JASPER COUNTY, 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:
DRIVING HEAVY EQUIPMENT
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: LEFT LEG, RIGHT LEG, LEFT ELBOW
14. Nature and extent of any permanent disability: PERMANENT TOTAL DISABILITY
15. Compensation paid to-date for temporary disability: \$87,236.00
16. Value necessary medical aid paid to date by employer/insurer? \$337,982.69
17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$902.30

Employee: David Groves

Injury No. 05-136005

19. Weekly compensation rate: \$601.63 / \$365.08

20. Method wages computation: STATUTORY

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: See medical fee dispute in award.

0 weeks of temporary total disability (or temporary partial disability)

234.4 weeks of permanent partial disability from Employer \$365.08 for a total of \$85,574.75

20 weeks of disfigurement from Employer

22. Second Injury Fund liability: Permanent total disability differential ($601.63 - 365.08 = 236.55$) x 234.4 weeks = \$55,447.32, thereafter, \$601.63 per week

TOTAL: UNDETERMINED

23. Future requirements awarded: FUTURE MEDICAL CARE

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

JohnWise

Employee: David Groves

Injury No. 05-136005

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Groves

Injury No. 05-136005

Medical Fee Dispute No. 05-01791

Dependents: N/A

Employer: Infracore Services, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Travelers Property & Casualty

Hearing Date: February 18, 2013

Checked by:

AWARD

The parties presented evidence at a hearing on February 19, 2013. Claimant appeared in person and with his attorney, John Wise. Employer/insurer appeared through their attorney, Greg Carter. The Second Injury Fund appeared through its attorney, Stephen Freeland. The medical fee provider appeared through its attorney, Matt Adrian. The parties presented five issues for determination:

1. The nature and extent of disability with claimant alleging permanent and total disability.
2. The liability of the Second Injury Fund for any disability.
3. The need for future medical care - although all of the parties agree that claimant is in need of future medical care and no doctors find otherwise.
4. Disfigurement of the left elbow.
5. The direct pay medical dispute of Freeman Health Systems show additionally as med fee dispute number 05-01791.

Claimant's attorney, John Wise, seeks an attorney's fee of 25 percent.

The parties agreed that claimant's average weekly wage was \$902.30 per week and that the workers' compensation rate for permanent total disability was \$601.63 and for permanent partial disability was \$365.08. The parties additionally agreed that medical benefits have been paid in the amount of \$337,982.69 and that temporary total disability benefits have been paid in the amount of \$87,236.00. The parties also agree that should I find claimant to be permanently

Employee: David Groves

Injury No. 05-136005

and totally disabled that claimant reached maximum medical improvement on August 9, 2010, and that permanent total disability benefits would begin on August 10, 2010.

Claimant was employed by Infrasource Services, Inc., and worked as a foreman/laborer. On October 17, 2005, he was injured when a large metal plate weighing approximately 5000 pounds fell onto his left leg. He was transported to the emergency room where it was noted that he had sustained an open left tibia and fibula fracture. He was also evaluated by Dr. Grantham who opined that claimant had a malleolus fracture, a left calcaneus fracture, a closed 5th metatarsal fracture, and a laceration of the left ankle joint. Dr. Grantham performed an open reduction internal fixation (ORIF) of the malleolus and the tabular fibular fracture. Claimant later underwent skin grafting procedures and was referred to Dr. Knudsen for pain management. Claimant experienced severe pain, and there was a delayed union in the left tibia and fibula requiring claimant to be placed on a bone stimulator. Claimant then developed a sympathetic nerve condition and underwent a left tarsal tunnel release by Dr. Silverberg. Claimant additionally underwent knee surgery in July 2006 because of a large tear of the medial meniscus resulting from his accident at work. In August 2006 claimant underwent an additional surgical revision of the scar on his foot. Claimant was later referred to Dr. Horton who performed multiple procedures on June 6, 2007. An MRI later revealed that claimant had a tear in the right knee for which a surgical repair was performed in August of 2007. Claimant also had pain in the left elbow and had a left lateral repair in October 2007 by Dr. Silverberg as a result of his accident at work. In November 2007 additional surgery was necessitated because of pain in claimant's foot resulting in an amputation of the left 5th metatarsal. In January 2008 claimant was evaluated by Dr. Grantham who performed a second right knee surgery because of claimant's continuing knee pain. Since that time claimant has had continuing pain in both legs, especially the left foot and ankle, which includes constant aching, burning, stinging, and throbbing along with pain in his right leg. Claimant uses an AFO or fiberglass brace, which he wears every day on his left ankle and foot, uses a cane regularly, and continues to use braces on his right knee.

Claimant has been examined by Drs. Lennard and Corsolini for employer/insurer and Dr. Swaim, an orthopedic surgeon and independent medical examiner for his attorney. All of the doctors have opined that claimant is in need of future medical care. The need for future medical care is undisputed even though the parties raise future medical care as an issue in this case. I find and conclude that claimant is in need of future medical care to cure and relieve him from the effects of his injury. I order employer/insurer to provide claimant with such medical care as is necessary to cure and relieve him from the effects of his injury.

All of the doctors opine that claimant is basically limited to sedentary work as a result of his October 17, 2005, injury alone. Only Dr. Swaim has addressed any disability as a result of a combination of his preexisting low back injury with his disability from the last injury at work.

Dr. Lennard, a board certified physical medicine and rehabilitation physician, has rated claimant as having a permanent partial disability to the left lower extremity based upon residual numbness, weakness, pain, immobility, and surgical treatment of 50 percent of the left lower extremity at the 160-week level. He has additionally assessed a 15 percent permanent partial disability to the right lower extremity at the 160-week level for the right knee disorder that

Employee: David Groves

Injury No. 05-136005

required two surgeries. He additionally assessed a 15 percent disability to the left upper extremity at the 210-week level for the residual left elbow problems from claimant's two prior surgeries.

Dr. Corsolini, a board certified physical medicine and rehabilitation physician, has also examined and rated claimant. He opined that claimant had a permanent partial disability of 75 percent of the left lower extremity at the 160-week level and a 15 percent permanent partial disability of the right lower extremity at the 160-week level. He further gave claimant a restriction of lifting and carrying no more than 20 pounds.

Dr. Swaim, an orthopedic surgeon (retired) and board certified independent medical examiner, rated claimant as having a 100 percent permanent partial disability of the left leg at the 160-week level. He additionally opined that claimant had a 25 percent permanent partial disability of the left arm at the 210-week level because of his elbow condition. Dr. Swaim also assessed a 25 percent permanent partial disability of the right leg at the 160-week level because of claimant's knee condition. Dr. Swaim also assessed a preexisting 20 percent permanent partial disability to the body as a whole due to claimant's earlier lumbo-sacral condition which included a fusion surgery. There is a notation in the record that claimant's treating physician at the time rated his condition as a 17 percent body as a whole disability. Dr. Swaim also found claimant had a 5 percent permanent partial disability to the body as a whole due to an aggravation of his preexisting lumbar condition and development of sacroiliac joint dysfunction and right hip discomfort. Dr. Swaim ultimately found that claimant was permanently and totally disabled as a result of the combination of his preexisting disability with the disabilities from the last injury at work.

Dr. Swaim also provided claimant with restrictions which were as follows:

He should restrict his occupational stresses to a sedentary work level according to the US Department of Labor Diction of Occupational titles with the ability to exert up to ten pounds of force occasionally and/or negligible amount of force frequently to lift, carry, push, pull or otherwise move objects. He should avoid repetitive bending, stooping, twisting, squatting, climbing, kneeling or crawling. He should avoid prolonged sitting, standing or walking, with the ability to change positions frequently.

He is extremely limited in his capacity to walk or stand for a prolonged period of time. He should avoid repetitive or prolonged forceful use of the left upper extremity. He will need to recline for various periods of time during the day to elevated the left leg and decrease stress on his back. He should avoid use of vibrating or jarring tools or equipment. He should avoid lifting from below knee level or above shoulder height.

Claimant was also evaluated by Philip Eldred, a vocational rehabilitation counselor, who ultimately found that claimant had restrictions defined as less than sedentary work level as provided by Dr. Swaim and that he was occupationally and vocationally permanently and totally

Employee: David Groves

Injury No. 05-136005

disabled as a result of the combination of his preexisting disabilities along with his disability from his last work injury. He ultimately concluded that claimant could not perform any of his past work and has no transferrable job skills. He also concluded that claimant has no training potential and could not perform unskilled jobs. Mr. Eldred also opined that claimant was unlikely to be placed with an employer in the normal course of business. As a result, Mr. Eldred found that claimant was vocationally and occupationally permanently and totally disabled as a result of the combination of his disability from his prior back injury with the disability from his last injury at work.

Claimant seeks permanent total disability. Total disability, as defined in Section 287.020, RSMo. “. . . shall mean inability to return to any employment and not merely mean inability to return to employment in which the employee was engaged at the time of the accident.” As stated in *Gordon v. Tri-State Motor Transit Co.*, 908 S.W. 2d 849, 853 (Mo.App. S.D. 1995):

The phrase "inability to return to any employment" has been interpreted as the inability of the employee 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.S.D.1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.E.D.1992). Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo.App.E.D.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d at 367. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.E.D.1993); *Kowalski v. M-G Metals and Sales*, 631 S.W.2d at 922.

Moreover, a claimant's ability to return to any reasonable or normal employment or occupation does not mean claimant's returning to a demeaning and undignified occupation such as selling peanuts, pencils or shoestrings on the street. *Vogle v. Hall Implement Company*, 551 S.W.2d 922 (Mo.App. 1977).

Section 287.220, RSMo, determines the liability of the Second Injury Fund for disability. Applying that statute, I must first determine claimant's disability from the last injury alone and of itself. The court in *Vaught v. Vaughts, Incorporated*, 938 S.W.2d 931 (Mo.App. S.D. 1997) stated:

As explained in *Stewart [v. Johnson]*, 398 S.W.2d 850, 854 (Mo.1966),] . . . §287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury "may be at least equal to that provided for permanent total disability."

Employee: David Groves

Injury No. 05-136005

Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. §287.220.1.

Based upon the testimony and reports of all of the experts in this case, I find and conclude that claimant is not permanently and totally disabled from the last injury alone. That was the opinion of Drs. Lennard, Corsolini, and Swaim. As noted by Dr. Swaim this is a very close case based upon the injuries and disabilities resulting from claimant's last accident at work, but there are no opinions from the experts based upon their findings and conclusions that would support a finding of claimant being permanently and totally disabled from the last injury alone. I find claimant's disability from the last injury alone to be as follows: 80 percent to the left leg at the 160-week level (128 weeks), 30 percent to the left leg at the 160-week level (48 weeks), 25 percent to the left elbow at the 210-week level (52.4 weeks), and 3 percent (6 weeks) to the body as a whole based upon claimant's sacroiliac problem at the low back. As a result, I find that claimant's permanent partial disability from the last injury alone is 234.4 weeks of disability. I order employer/insurer to pay to claimant \$85,574.75 ($234.4 \times \$365.08 = \$85,574.75$) for such permanent partial disability.

Only Dr. Swaim and Philip Eldred addressed claimant's preexisting disabilities in relation to his total disability. Both found that claimant was permanently and totally disabled when combining the preexisting disabilities with the disabilities from the last injury at work. There are no opinions to the contrary. Claimant clearly suffered a severe injury at work. However, none of the experts have found that claimant is permanently and totally disabled from the last injury alone. Although I agree with Dr. Swaim that is a close issue based upon the severe nature of claimant's injuries and the problems that he has suffered as a result of the injuries from his last accident at work, I find persuasive the opinions of Dr. Swaim and Mr. Eldred that claimant is permanently and totally disabled as a result of the combination of his preexisting disabilities with the disability from the last injury alone. I also find and conclude that claimant's preexisting disabilities and the disability from the last injury of October 17, 2005, are a hindrance or obstacle to employment or further employment. I also find and conclude that no reasonable employer could be expected to hire claimant and that he would be unable to perform any job to the expectations of a reasonable employer. Consequently, I order the Second Injury Fund to pay to claimant permanent total disability benefits starting August 10, 2010. I order the Second Injury Fund to pay the difference between the permanent total disability at the rate of \$601.63 and the permanent partial rate of \$365.08 for the period starting August 10, 2010, until the 234.4 weeks of permanent partial disability to be paid by employer/insurer have concluded. Thereafter, I order the Second Injury Fund to pay to claimant \$601.63 per week for permanent total disability benefits.

Employee: David Groves

Injury No. 05-136005

I have observed claimant's disfigurement to the left elbow. I find that claimant has 20 weeks of disfigurement. I order employer/insurer to pay claimant 20 weeks of disfigurement at the agreed upon rate of \$365.08, for a total of \$7,301.60.

The medical fee provider in this case is dismissing from its Application for Direct Payment the services set out as "5A" and "5C" of its application. The request for services under "5A" were emergency services for August 1, 2008. The medical fee provider admits that no authorization was provided for that service. The medical fee provider also is dismissing its request designated "5C" for emergency services for June 16, 2009, and June 17, 2009, because the employer/insurer have already paid that bill. The only Application for Direct Payment dates of service remaining are those shown in 5B which are those from November 25, 2008, through December 30, 2008, for injections in the amount of \$5,920.97. Employer/insurer deny that application based on the lack of authorization. No person is named within the Application for Direct Payment who authorized the services, nor is a date of authorization given. However, Med Fee Dispute Exhibit 1 and Med Fee Dispute Exhibit 2 were admitted into evidence setting out the dates of service and the charges for those services. Med Fee Dispute Exhibit 1 also shows an entry on November 24, 2008, as follows: "Work comp has been verified per Sherry at Dr. Knudsen's. It was verified for the office and the injection at the hospital. Approved by Diana 913-402-5348 or 800-255-5072, extension 5348." There is the additional notation on January 26, 2009 as follows: "Account reviewed CLD WC INC TT Diana she doesn't show receiving the billing for this DOS. Printed and faxing to her at 913.402.5456 Attention Diana." An additional record is shown on March 3, 2009, as follows: "Recd denial from INS:NRI on file. Forwarding for posting."

It is clear from the records in this case that other bills were paid by the employer/insurer including what was set out in "5C" of the Application for Direct Payment. There is no other evidence within the file regarding authorization of med fee dispute. Based upon the information in the records I find that the medical fee provider has provided sufficient evidence for me to find and conclude that authorization of the bill was given by the insurance carrier. The note in the records of Freeman Health System on November 24, 2008, demonstrated that workers' compensation was verified and approved by Diana, who later was shown as the workers' compensation insurance representative for the insurance carrier on January 26, 2009, when she indicated she had not received the bill. The insurance carrier denied payment of the bill on March 3, 2009. However, I find that a prima facie case has been made for authorization based upon the notation within the Freeman Health System records. Consequently, there is evidence from the records of the medical fee provider that authorization was given, and there is no evidence presented by employer/insurer of a lack of authorization. As a result, I order employer/insurer to pay to the medical fee provider, Freeman Health System, the sum of \$5,920.97 for the serviced provided to claimant as a result of his injury at work on October 17, 2005.

Employee: David Groves

Injury No. 05-136005

I allow claimant's attorney, John Wise, and attorney's fee of 25 percent of all amounts awarded herein, which shall constitute a lien upon this award.

Made by: _____

Robert H. House
Administrative Law Judge
Division of Workers' Compensation
Signed March 15, 2013