

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

Injury No.: 02-019210

Employee: Paul Harvey
Dependent: Marie Harvey
Employer: GKN Aerospace (Settled)
Insurer: Fireman's Fund (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 March 15, 2011. The award and decision of Administrative Law Judge Kathleen M. Hart, issued March 15, 2011, 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 20th day of October 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

VACANT
Member

Attest:

Secretary

AWARD

Employee: Paul Harvey

Injury No.: 02-019210

Dependents: Marie Harvey

Before the
**Division of Workers'
Compensation**

Employer: GKN Aerospace (previously settled)

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

Additional Party: Second Injury Fund (SIF)

Insurer: Fireman's Fund (previously settled)

Hearing Date: January 3, 2011

Checked by: KMH

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: January 24, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis
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:
Claimant twisted his left knee at work when setting up fixtures.
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: left knee
14. Nature and extent of any permanent disability: 42.5% left knee previously paid by Employer and permanent and total disability benefits from the Second Injury Fund
15. Compensation paid to-date for temporary disability: \$30,713.12
16. Value necessary medical aid paid to date by employer/insurer? \$56,492.00

Employee: Paul Harvey

Injury No.: 02-019210

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$628.90/\$329.42
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

68 weeks of permanent partial disability from Employer (previously paid)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential \$299.48 payable by SIF for 68 weeks beginning
November 10, 2006, and, thereafter, \$628.90 per week as provided by law. TO BE DETERMINED

TOTAL:

23. Future requirements awarded:

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ann Dalton

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Paul Harvey

Injury No.: 02-019210

Dependents: Marie Harvey

Before the
**Division of Workers'
Compensation**

Employer: GKN Aerospace (previously settled)

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

Additional Party: SIF (only)

Insurer: Fireman's Fund (previously settled)

Checked by: KMH

A hearing was held on the above captioned matter January 3, 2011. Paul Harvey (Claimant) was represented by attorney Ann Dalton. The SIF was represented by Assistant Attorney General Karin Schuete. Claimant and Employer/Insurer reached a compromise settlement regarding Employer/Insurer's liability for this claim prior to hearing.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

STIPULATIONS

The parties stipulated to the following:

1. Claimant was injured by accident January 24, 2002, while in the course and scope of his employment.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Zurich/Fireman's Fund.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's rate for TTD/PTD is \$628.90 and PPD is \$329.42. Claimant has been paid 48 6/7 weeks of TTD totaling \$30,713.12 and \$56,492.00 in medical benefits.
6. Claimant last worked November 10, 2006.
7. On August 11, 2010, Claimant and Employer settled the primary claim for 42.5% of the left knee.

ISSUES

The parties stipulated the sole issue to be resolved by trial is the nature and extent of the SIF liability.

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a 64 year-old male who has been married to his wife, Marie, since May 2006. He has no other dependents. He has five prior failed marriages. He has not worked since November 10, 2006, which was his last day working for Employer. Claimant receives Social Security Disability, retirement benefits and VA benefits. Claimant obtained his GED while serving in the Air Force and later earned a college degree in Aeronautical Management. Claimant worked as an engineer for one year, but did not like dealing with people so he returned to work as a machinist.
2. Claimant's duties in the Air Force were pre-flight and post-flight maintenance. In 1967, a B52 he had just serviced crashed and caused several fatalities. Claimant witnessed the crash and aided in the recovery of the bodies. One of the bodies he recovered was his best friend, but Claimant didn't recognize his body since it was burned so badly.
3. Following this event, Claimant experienced sleeplessness, irritability, and avoidance of people and social situations. His occupational functioning was impaired as a result of his moods and behavior. He was confrontational with supervisors, and was often suspended and written up by Employer because of his attitude. Eventually, Claimant was diagnosed with PTSD and treated through the VA with medication and therapy for depression and alcoholism. Claimant continues to have extreme guilt, flashbacks and nightmares, particularly because the Air Force never ruled out that it was crew error.
4. After his military service, Claimant worked several years at Hercules Motors, and then began his career at McDonnell Douglas, now named GKN, in 1983. He worked for Employer the rest of his career as a machinist, which allowed him to be around machines and away from people. Claimant worked as a "set up man" which involved setting up fixtures and parts. He described this as a physical job requiring bending, squatting, kneeling, standing, reaching, pushing and pulling. He was on his feet most of the day, and did very little computer work. Claimant was able to work alone, or with only a few others, most of the time. Claimant often was aggressive towards his co-workers and management. He had an agreement with his supervisors that he could walk away from the work site if he started feeling anger.
5. In May 1992, Claimant was working when his left foot got caught on a fixture causing a pop and twist in the left knee. He was diagnosed with grade one chondromalacia of the

patella of the left knee, symptomatic medial synovial plica of the left knee and reactive synovitis of the left knee. A diagnostic arthroscopy was performed and included chondroplasty of the patella, excision of the medial synovial plica and reactive synovium. Claimant missed approximately 10 weeks of work following this injury and was eventually allowed to return to work full duty. He received compensation based on 15% PPD of the left knee. Following the 1992 left knee surgery, Claimant continued to have some complaints in the left knee. He testified he could do almost everything, and had some complaints with weather changes. Claimant wore a knee brace on occasion and took medication for pain periodically.

6. Without injury or incident, Claimant developed problems in his right knee which resulted in arthroscopic surgery for a torn meniscus in December 1993. Claimant missed approximately 8 weeks of work and eventually returned to work full duty. Claimant continued to have some complaints in the right knee following this surgery, and testified he had no complaints at the time of the hearing.
7. In June 2001, Claimant again sought treatment on his left knee. He had continued pain, was wearing a brace, and was treated with injections and Vioxx. X-rays show he had mild degenerative joint disease that was slightly worse than in 1992.
8. On January 24, 2002, Claimant was working on top of a platform when he twisted his left knee again. After conservative treatment failed to provide relief, Dr. Wagner performed excision of the medial meniscus and shaved chondromalacia of the medial femoral condyle and medial tibial plateau. This left Claimant with a very thin layer of cartilage on the weight bearing surface, and some of it was bare bone. During post-op physical therapy, the left knee condition worsened. Claimant worked four hour days, and had the knee aspirated and injected on several occasions. Claimant eventually had a total knee replacement on November 12, 2002.
9. When Claimant returned to work in 2003, he had medical restrictions, and worked two weeks on and two weeks off. He worked four hour days for ten months, he worked limited duty, and he also took family leave. Despite his knee replacement and work limitations, Claimant continued to have significant pain and swelling. Further surgery was recommended, but delayed because of Claimant's desire to wait until he was able to retire.
10. Between 2003 and 2006, Claimant's doctor limited him to a 40 hour work week, limited kneeling and required he be able to ice his knee when necessary. Employer accommodated these restrictions. Claimant testified as a result of the restrictions, he could only do about half as much set up as he did before the injury. He tried to work Saturdays and Sundays to avoid working with others because of his pain and the increased irritability it caused. When his knee pain was severe, he got upset and left work early to avoid assaulting a co-worker. Even with restrictions, Claimant missed several days and portions of days amounting to numerous weeks because of knee pain and increased aggressive behavior from the PTSD.
11. Between the time of his knee replacement and retirement, Employer sent Claimant to their Employee Assistance Program because he threatened two supervisors and a director.

Employer threatened to fire Claimant, so the union advised him to retire in order to avoid forfeiting his pension with a termination. Claimant testified his PTSD worsened with age and the increased pain. The last knee injury made the PTSD worse because he could no longer do what he had done before.

12. Although Claimant planned to work longer, he stopped working when he turned 60 on November 10, 2006, the first day he could retire with partial pension and medical benefits. As a result of early retirement, he lost a portion of his pension and health insurance benefits.
13. On a typical day, Claimant naps, cooks, and does some laundry. He cuts the grass in sections and takes breaks often. He does not go out or socialize. His wife has Cardinals' season tickets, but he won't go to the games. He believes he could not perform customer service work because there is no way he can deal with people. Claimant denies abusing alcohol. He testified he drinks about one case of beer a day.
14. Claimant began treatment for his PTSD at the Veteran's Administration in 2007. The doctor noted he saw his primary physician for PTSD for several years until his insurance ran out in 2007. The doctor noted Claimant had significant guilt, often felt he was reliving the crash, had nightmares about the event, and is frequently emotionally upset by something that triggers his memory. He exhibited aggressive behavior and coped by isolating himself and drinking alcohol. Claimant had these symptoms since he left the service. The doctor diagnosed co-occurring depression and alcohol abuse and opined his social and occupational functioning has been seriously impaired and his condition is directly linked to the trauma.
15. Claimant's expert, Dr. Volarich, reviewed the records, examined Claimant and opined Claimant had 65% PPD to his left knee from the primary injury, and 20% to each knee from his prior injuries. He opined the injuries combined to create a greater overall disability, and imposed significant physical restrictions. His restrictions and joint replacement prevent Claimant from returning to his lifelong occupation as a machinist. He deferred the question of employability in the open labor market to a vocational expert.
16. Claimant's vocational expert, Jim England, reviewed the records, interviewed Claimant and issued a report in March 2008. He noted Claimant's PTSD caused him difficulty at work, impacted his ability to get along with others, caused aggressive behavior, and limited his ability to sleep prior to the primary injury. His left knee injury caused significant restrictions at work and limit Claimant to entry-level, or sedentary, service employment. He opined Claimant's PTSD combined with his physical problems make him unemployable. A person with Claimant's difficulty dealing with people and who is so limited in sleep is not likely to be able to sustain even entry-level work. He concluded Claimant is totally disabled from a vocational standpoint and is likely to remain so.
17. Claimant is credible.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

Claimant is permanently and totally disabled as a result of the combination of his disabilities from his work injury and his pre-existing medical conditions.

Section 287.220 RSMO provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

- the percentage of disability resulting from the last injury alone;
- that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
- that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant settled his claim with Employer prior to this hearing. Based on my review of the treatment records, the medical opinions and the Claimant's complaints, I find Claimant sustained a 42.5% PPD of the left knee as a result of the January 24, 2002 injury. The settlement is consistent with the medical evidence as well as the Claimant's ongoing complaints. His work injury was the prevailing factor in causing the condition in his knee and the need for medical treatment.

Claimant had prior difficulties with both knees, including a 15% PPD of the left knee compromise settlement, which was entered into evidence. Claimant's testimony with regard to his prior knee problems was credible. He clearly did not exaggerate the complaints associated with his bilateral knee history. However, he did voice some limitations as a result of his pre-existing knee injuries. He also wore a brace on his left knee and sought treatment for increased complaints months before the primary injury. I find Claimant had pre-existing PPD in both knees that caused a hindrance and obstacle to his employment or re-employment.

Claimant credibly testified that although he did not know why at the time, he had difficulty with people in and out of the workplace following the Air Force incident in 1967. Although Claimant's PTSD worsened after the primary injury, it clearly impacted him before the primary injury. Claimant had a long history of difficulty working with people, he changed careers in order to avoid interaction with people, he had numerous reprimands at work, he abused alcohol, he had numerous failed marriages, and his PTSD significantly limited his ability to sleep more than four hours a night. Mr. England testified the ability to get no more than four hours of sleep a night has an adverse impact on a person's employability. Mr. England testified it would be very difficult for a person who abuses alcohol, has significant sleep deprivation, and has PTSD to maintain any type of regular work activity. Claimant was able to work for Employer because he had been with them for a long time, and they accommodated the effects of his PTSD. I find Claimant had pre-existing PPD as a result of the PTSD that caused a hindrance and obstacle to his employment or re-employment.

The final question is whether the combination of Claimant's injuries rendered him permanently and totally disabled. The test for total disability is whether Claimant is able to adequately compete in the open labor market. The question is whether any employer in the usual course of business would reasonably be expected to employ Claimant given his condition.

The SIF offered no vocational testimony. Claimant's vocational expert opined Claimant could perform sedentary work if one considered his physical limitations alone. But when his pre-existing emotional issues are considered, Claimant could not compete in the open labor market because of his physical limitations combined with his aggressiveness, irritability, lack of sleep and inability to deal with people. His employability was already limited by the time of his primary injury.

Based upon my observations of Claimant, his credible testimony, the vocational and medical evidence, I find that no employer in the usual course of business would reasonably be expected to employ Claimant.

I find the uncontradicted opinions of Dr. Volarich and Mr. England credible. Claimant made consistent efforts to maintain employment following his knee replacement. Ultimately, given the combination of his injuries and PTSD, he was unable to sustain employment as of November 10, 2006.

The pain and physical limitations caused by the 2002 left knee injury interact and combine with the Claimant's PTSD to create a greater overall disability. I find Claimant is permanently and totally disabled as a result of the combined effects of his 2002 work injury and his pre-existing disabilities. He testified his last date of employment was November 10, 2006. He received compensation from Employer of \$329.42 for 68 weeks. The SIF is hereby ordered to pay permanent total disability benefits at the differential rate of \$299.48 per week beginning November 10, 2006, during those 68 weeks, and thereafter \$628.90 per week for as long as provided by law. The amount accrued to date shall be paid forthwith with interest as provided by law.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation