

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

Injury No.: 08-105523

Employee: Ronald Herbert
Employer: Shelenhamer Construction, LLC (Settled)
Insurer: Auto Owners Insurance Company (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 § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 26, 2013. The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 26, 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 17th day of December 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: Ronald Herbert Injury No.: 08-105523
Dependents: N/A Before the
Employer: Shelenhamer Construction LLC (Settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Auto Owners Insurance Company (Settled) Jefferson City, Missouri
Hearing Date: June 19, 2013 Checked by: EJK/lsn

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 28, 2008
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
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:
The claimant, a construction superintendent, suffered a disc injury in his low back while driving steel posts into the ground.
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: Low back
14. Nature and extent of any permanent disability: 50% permanent partial disability to the low back
15. Compensation paid to-date for temporary disability: \$37,252.87
16. Value necessary medical aid paid to date by employer/insurer: \$246,410.43

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$692.31
- 19. Weekly compensation rate: \$461.54/404.66
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Settled

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$56.88) payable by SIF for 200 weeks beginning
February 14, 2011, and, thereafter, \$461.54 for Claimant's lifetime

Indeterminate

TOTAL:

Indeterminate

- 23. Future requirements awarded: None

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: Mark F. Haywood, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Ronald Herbert	Injury No.:	08-105523
Dependents:	N/A	Before the	
Employer:	Shelenhamer Construction LLC (Settled)	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Auto Owners Insurance Company (Settled)	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by: EJK/lsn	

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work related injury in which the claimant, a construction superintendent, suffered a disc injury in his low back while driving steel posts into the ground. The sole issues for determination are Permanent disability and Second Injury Fund liability. The evidence compels an award for the claimant for permanent total disability benefits from the Second Injury Fund.

At the hearing, the claimant testified in person and offered a deposition of David T. Volarich, D.O. The defense offered depositions of Ted Leonard, M.D., and James M. England, Jr.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On October 28, 2008, this 55 year old claimant, a construction superintendent, suffered a disc injury in his low back while driving steel posts into the ground. Following the injury, Claimant immediately felt back and leg pain. On December 1, 2008, Claimant underwent an MRI which revealed multilevel degenerative disc disease with spondylosis, right facet hypertrophy at the L5-S1 level and moderate right-sided neural foraminal narrowing as well as posterior osteophyte at the L4-5 level impinging the exiting left L4 root.

On December 11, 2008, Dr. Bult examined the claimant and performed an ESI to the left at the L4 level. Dr. Bult followed up with the claimant and performed two more injections. On January 16, 2009, a CT myelogram revealed no instability but severe degenerative disc disease at the L5-S1 level without impingement as well as degenerative disc disease at the L4-5 level with central to left protrusion touching the left L5 nerve root in the lateral recess. On January 21, 2009, Dr. Morgan reviewed the CT myelogram and recommended surgery. On July 7, 2009, the claimant underwent a transforaminal lumbar interbody fusion on the left at the L5-S1 level. On August 24, 2009, Dr. Lennard examined the claimant and recommended physical therapy.

On October 5, 2009, a CT scan revealed soft tissue encasing and exiting L5 nerve root on the left as well as disc bulge and facet arthropathy at the L4-5 level and L5-S1 level bilaterally worse on the left with neural foraminal narrowing at the L4-5 level. Dr. Morgan placed the

claimant in an LSO brace. On October 26, 2009, Dr. Morgan recommended an ESI and a bone growth stimulator.

On March 9, 2010, the claimant underwent a removal of hardware and exploration of the fusion doing a laminectomy at the L5-S1 level and posterior interbody fusion bilaterally at the L5-S1 level. On April 30, 2010, the claimant underwent an anterior interbody fusion. On July 19, 2010, Dr. Lennard examined the claimant and noted improvement with therapy and the claimant's spasms were nearly gone. On August 30, 2010, Dr. Morgan allowed the claimant to return to work. On September 24 and November 8, 2010, Dr. Lennard administered an ESI to the left at the L5 level. On December 6, 2010, Dr. Morgan re-examined the claimant and noted a CT showed a solid fusion. Dr. Morgan recommended the claimant wean the narcotics. On June 6, 2011, Dr. Lennard noted that an MMPI showed an adjustment disorder with depression and found the claimant to be at MMI as of February 14, 2011.

The claimant testified to having many limitations following the 2008 back injury. The claimant testified that he cannot kneel or bend at the waist. The claimant now uses a cane to help him get around and to support his balance. The claimant testified that the third back surgery did not help and that the pain became worse.

The claimant had a pre-existing injury to his back in 1988 and underwent back surgery. The claimant testified that after his 1988 surgery, he had back pain on and off because of his job duties. The claimant testified that he was able to work without limitations. The claimant testified that prior to October 2008 he had no problems physically doing his job. The claimant testified that before the primary injury, he had no problems walking, sitting, lifting, bending, kneeling, or stooping. Before the primary injury, the claimant golfed approximately 5 days a week, coached his daughter's softball and basketball team, mowed his yard, fished, and hunted. The claimant did not have to use a cane before the primary injury.

The claimant testified that he worked 50 to 70 hours a week for this employer doing a pretty physical type job. The claimant began employment at the employer in 2006 and last worked in September 2010.

Ted A. Lennard, M.D.

Dr. Lennard opined that the claimant was at maximum medical improvement on February 14, 2011. See Dr Lennard deposition, page 10. Dr. Lennard found that the claimant had a 20% permanent partial disability related to the October 28, 2008, injury and a 5% permanent partial disability unrelated to that particular injury. See Dr Lennard deposition, page 10. Dr. Lennard found that the claimant should avoid lifting more than 25 pounds and avoid prolonged bending activities. See Dr Lennard deposition, page 10.

Dr. Lennard last examined the claimant on November 8, 2010. See Dr Lennard deposition, page 14. Dr. Lennard testified that the claimant could go back to work within the restrictions he placed. See Dr Lennard deposition, pages 21-22. Dr. Lennard testified that he could go back to work even considering the prior back surgery the claimant had in 1988. See Dr Lennard deposition, page 22. Dr. Lennard testified that as a part of his medical practice, he treats

patients with similar injuries to the claimant on a regular basis. See Dr Lennard deposition, page 22.

David T. Volarich, D.O.

Dr. Volarich examined the claimant on October 20, 2011, and opined that the claimant sustained a 60% permanent partial disability of the lumbosacral spine from the accident and had a pre-existing 20% permanent partial disability to lumbar spine. See Dr Volarich deposition, page 10. Dr. Volarich also opined that the claimant is unable to engage in any substantial gainful activity and cannot be expected to perform in an ongoing working capacity in the future. Dr. Volarich found that the claimant cannot be reasonably expected to perform in an ongoing basis for 8 hours per day, 5 days per week throughout the work year. See Dr Volarich deposition, page 11. Dr. Volarich opined that based on his medical assessment alone, the claimant is permanently and totally disabled as a direct result of the work related injury of October 2008, in combination with the pre-existing low back surgical repair. See Dr Volarich deposition, page 12.

Dr. Volarich placed the following restrictions on the claimant referable to the spine after October 28, 2008: avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing, and other similar tasks to an as needed basis; not handle any weight greater than 20 pounds, and limit this task to an occasional basis assuming proper lifting techniques; not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain; avoid remaining in a fixed position for any more than about 30 minutes at a time including both sitting and standing; and change positions frequently to maximize comfort and rest when needed. Dr. Volarich opined that with regard to work and other activities referable to the spine prior to October 28, 2008, limitations were not required. Dr. Volarich testified that after the claimant's discectomy in the late 1980s, the claimant was able to return to work and perform heavy labor without having to favor his low back. Dr. Volarich testified that the claimant had muscle aches all over his body, not just the low back, after a hard day at work, and did not have to use medications. Dr. Volarich testified that the claimant consulted a chiropractor about every 6 to 9 months for a general adjustment but had no specific ongoing therapies for his low back. See Dr Volarich deposition, page 8. Dr. Volarich testified that if the claimant could find a job within his restrictions, he would have no objection to the claimant working. See Dr. Volarich deposition, pages 34-35.

James M. England, Jr.

Mr. England evaluated the claimant's employability and testified that based on Dr. Lennard's findings, there would be no contraindication to the claimant going back to that type of work or a variety of other work including sale of construction materials and supplies, tools, and a variety of other entry level kinds of jobs. See England deposition, page 19. Mr. England opined that if you take into consideration Dr. Volarich's findings, the claimant would be unemployable. See England deposition, page 19. Mr. England opined that if the claimant cannot sustain eight hours a day five days a week as the doctor indicated, then he probably would not be able to last in any kind of a job setting. See England deposition, page 19. Mr. England testified that based on Dr. Lennard's restrictions, the claimant could compete for employment in the open labor market. See England deposition, page 20.

Mr. England opined that the restrictions listed by Dr. Volarich on page 11 and 12 of his report, that those restrictions would avail themselves to a sedentary position. See England deposition, page 36. Mr. England testified that the restrictions themselves would (avail to sedentary position) absent the added statement that Dr. Volarich did not think the claimant could sustain eight hours a day five days a week consistently. See England deposition, page 36. Mr. England testified again that it is not until you add in Dr. Volarich's statement on page 10 of his report about the working eight hours a day five days a week that the claimant becomes unemployable. See England deposition, page 37. Mr. England testified that before that (statement) with the restrictions listed on pages 11 and 12, the claimant would be capable of performing sedentary employment within those restrictions. See England deposition, page 37. Mr. England opined that the claimant had the academics to handle a variety of different work activity and certainly has shown in his past work that he has academic ability to handle such things as inventory of supplies, scheduling, supervising, and writing construction reports.

SECOND INJURY FUND

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in '[a]ll cases of permanent disability where there has been previous disability.'" For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent, total disability is the worker's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. Id. at 48.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective

employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability."
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Based on the entire record, the claimant suffered a compensable work related injury in 2008 resulting in a 50% permanent partial disability to the low back (200 weeks). At the time the last injury was sustained, the claimant had a 12 ½% pre-existing permanent partial disability to the low back (50 weeks). The permanent partial disability from the last injury combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 10%.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how he performs many activities both at home and at work due to the combination of the problems. The claimant testified that as a result of the combination of the problems, he had limited ability to lift items.

The principal issue in this case is whether the claimant is employable in the open labor market and therefore, permanently and totally disabled due to his permanent partial disability from the 2008 accident in combination with his pre-existing permanent partial disability. Mr. England credibly testified that this determination depended on whether one places credence on the findings of Dr. Lennard or the findings of Dr. Volarich.

Dr. Lennard, a physician certified in physical medicine and rehabilitation, opined that the claimant should avoid lifting more than 25 pounds, avoid prolonged bending activities, and that the claimant could go back to work within those restrictions even considering the prior back surgery. See Dr Lennard deposition, pages 10, 21, 22. Dr. Lennard testified that as a part of his medical practice, he treats patients with similar injuries to the claimant on a regular basis. See Dr Lennard deposition, page 22.

Dr. Volarich placed the following restrictions on the claimant referable to the spine after October 28, 2008: avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing, and other similar tasks to an as needed basis; not handle any weight greater than 20 pounds, and limit this task to an occasional basis assuming proper lifting techniques; not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain; avoid remaining in a fixed position for any more than about 30 minutes at a time including both sitting and standing; and change positions frequently to maximize comfort and rest when needed. However, he opined that the claimant is unable to engage in any substantial gainful activity and cannot be expected to perform in an ongoing working capacity in the future. Dr. Volarich found that the claimant cannot be reasonably expected to perform in an ongoing basis for 8 hours per day, 5 days per week throughout the work year. See Dr Volarich deposition, page 11. Dr. Volarich opined that based on his medical assessment alone, the claimant is permanently and totally disabled as a direct result of the work related injury of October 2008, in combination with the pre-existing low back surgical repair. See Dr Volarich deposition, page 12.

The defense argued in its well written brief that Dr. Lennard's findings bear more credibility than those of Dr. Volarich:

However, the opinions of Dr. Lennard should be given more weight than those of Dr. Volarich. Dr. Lennard treated and examined the Claimant on at least 14 occasions, while Dr. Volarich only examined the Claimant once and at the request of Claimant's Attorney four years after the primary work injury. Because Dr. Lennard examined Claimant on a regular basis, Dr. Lennard was more aware of Claimant's complaints, symptoms, and limitations. Also, Dr. Lennard performed the injections to Claimant. In addition, Dr. Lennard treats the types of injuries that Claimant had on a regular basis as a part of his practice. Dr. Lennard was fully aware of Claimant's pre-existing back injury which was Claimant's only pre-existing injury. For these reasons, Dr. Lennard's opinions should be given more weight than Dr. Volarich's opinions. See Defense Brief.

In reviewing the two medical opinions, one difference between these two different visions of the claimant's capabilities is the temporal relationship between the observations of the physicians. Dr. Lennard last examined the claimant on November 8, 2010. See Dr Lennard deposition, page 14. Dr. Volarich examined the claimant almost a year later on October 20,

2011. See Dr. Volarich deposition, page 6. Another difference is that Dr. Lennard did not have an opportunity to evaluate the claimant after his course of medical care from the employer was completed on February 14, 2011. The medical records submitted showed active medical care until that date but no further medical care by way of medication, physical therapy, or injections, or physical therapy after that date. At the time of Dr. Lennard's last appointment, the claimant was still receiving extensive medication and injections in his back for pain relief. Perhaps the termination of those medical services resulted in a diminished medical condition reflecting Dr. Volarich's perception of the claimant's capabilities. The claimant's presentation at the hearing was more consistent with Dr. Volarich's perception of the claimant. Dr. Volarich opined that the claimant could not sustain full-time employment for a 40-hour work week. This appears to be consistent with the legal standard rather than determining whether the claimant is able to engage in a part time position. Dr. Lennard offered no contrary opinion. Based on these considerations, Dr. Volarich's findings seem more credible.

The defense also contests whether the claimant's pre-existing back injury was not an obstacle or hindrance to employment:

Specifically, Claimant testified that he had no limitations at his job because of his pre-existing back injury. Claimant admitted that prior to October of 2008 he had no problems physically doing his job. In addition, Dr. Volarich found that with regard to work and other activities referable to the spine prior to October 28, 2008, limitations were not required. (EE Exhibit A). Dr. Volarich testified that after Claimant's discectomy in the late 1980s, Claimant was able to return to work and perform heavy labor without having to favor his low back.

Also, Claimant continued to perform physical activities on a daily basis outside of work despite his pre-existing back injury. Claimant golfed 5 days a week, mowed his yard, fished and hunted up and until the primary work injury. Claimant may have had some aches and pains after performing a heavy job, but he was able to continue to perform his job duties and continue his hobbies after the pre-existing back injury. Claimant's testimony and the lack of restrictions certainly supports that his pre-existing injury to his back was not an obstacle or hindrance to employment. As a result, the SIF is not liable for any permanent partial disability to the Claimant. See Defense Brief.

It would have been logical to inquire of the only vocational expert to comment on this question, but a search of the record discloses no such evaluation from Mr. England. Dr. Lennard did not comment on this issue. However, Dr. Volarich opined in his medical report, "Pertaining to his medical conditions preexisting 10/28/08, it is my opinion that the following permanent industrial disabilities exist and are a hindrance to his employment or re-employment" referring to the claimant's pre-existing permanent partial disability to his low back. See Exhibit B, page 10, in Dr. Volarich deposition. Legal counsel elected not to cross examine Dr. Volarich on this point. The report was attached to the deposition and admitted into evidence by consent of counsel with only objections relating to hearsay. See Dr. Volarich deposition, page 12. None of those objections were taken up at the hearing.

In evaluating the strength of Dr. Volarich's medical opinion, the courts have compelled the Commission to avoid set aside the uncontradicted findings from qualified experts by substituting an ALJ's own personal view of the evidence without a finding that the expert opinion evidence lacks adequate foundation or is otherwise flawed.

“[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, “logic and common sense,” or an ALJ's personal views of what is “unnatural,” cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) (“The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

Certainly, a contrary opinion from the sole vocational expert or an opinion from any of the experts that Dr. Volarich lacked adequate credentials or information to render the opinion would have been powerful evidence. However, a search of the record reveals no such evidence. Further, the proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. See Wuebbeling, supra. For these reasons, Dr. Volarich's finding appears to be a valid finding based on the other evidence and, therefore, binding on the finder of fact.

Based on the weight of the evidence, the Second Injury Fund bears liability for permanent total disability benefits. The attorney for the claimant is entitled to an attorney fee of 25% of this award.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation