

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

Injury No.: 05-137173

Employee: Brian Hubbs
Employer: Benchmark Construction (Settled)
Insurer: Amerisure Mutual Insurance Co. (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 9, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued March 9, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Brian Hubbs

Injury No. 05-137173

Dependents: N/A

Employer: Benchmark Construction (settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and
Industrial Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of Missouri, as custodian of
the Second Injury Fund

Insurer: Amerisure Mutual Insurance Co. (settled)

Hearing Date: January 3, 2011

Checked by: VRM/db

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: May 20, 2005.
5. State location where accident occurred or occupational disease was contracted: Greene 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: Employee was lifting a propane tank when he injured his back.
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: Settled with employer and its insurer. No liability as to the Second Injury Fund.
15. Compensation paid to-date for temporary disability: Compromised.
16. Value of necessary medical aid paid to date by employer/insurer? Compromised.
17. Value necessary medical aid not furnished by employer/insurer? No applicable.
18. Employee's average weekly wages: Approximately \$619.38.
19. Weekly compensation rate: \$412.92 (TTD) / \$354.02 (PPD).
20. Method of wage computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Primary claim is settled.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

FINDINGS OF FACT AND RULINGS OF LAW

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INTRODUCTION

The undersigned administrative law judge conducted a final hearing in this case on January 3, 2011 in Springfield, Missouri. The claim against the employer and its insurer settled prior to the hearing. Attorney Todd Newcomb represented Brian Hubbs (Claimant). Assistant Attorney General Susan Colburn represented the Second Injury Fund. Assistant Attorney General Eric Cummings also was present during the proceedings.

STIPULATIONS

The parties stipulated that Claimant sustained injuries within the course and scope of employment with Benchmark construction culminating on May 20, 2005. The injury occurred in Greene County, Missouri. Employer was fully insured on each injury date. The parties agree there is no dispute as to employment, coverage by the Missouri Workers' Compensation Law, notice, statute of limitations, jurisdiction, venue and medical causation. The parties stipulate to the identity of the insurer. The parties stipulate that the permanent partial disability rate is \$354.05 and the temporary total disability rate is \$412.92.

ISSUES

- 1) Does the Second Injury Fund have any liability?
- 2) If yes, is the Second Injury Fund liable for enhanced permanent partial disability or permanent total disability?

EXHIBITS¹

The following exhibits were offered by Claimant and admitted:

- A. Deposition of Dr. Volarich
- B. Deposition of Philip Eldred
- C. Medical Records
- D. Stipulation for Compromise Settlement

The following exhibits were offered by the Second Injury Fund and admitted:

- I. Deposition of Brian Hubbs dated September 28, 2006
- II. Deposition of Brian Hubbs dated January 26, 2009

FINDINGS OF FACT

Claimant was born June 11, 1956. He is married and has children. He graduated from Central High School. He took vocational courses during high school. He did not attend college. He has performed physical labor most of his life, having worked in a warehouse, on a production line, as a landscaper, and in construction. In 1993, he went to work for Burke Bridge, performing heavy and highway construction. Claimant described this work as "gut-wrenching." He carried, scraped, oiled, erected, tore down and stacked concrete forms, and poured concrete. The concrete forms that he handled weighed 50 to 60 pounds, or more. He worked for this employer until he was laid off. While he anticipated being recalled, he instead chose to work for Benchmark Construction. He began working for that employer in June 2004, stating that it was easier than the work at Burke Bridge, although still physically demanding.

¹ If any of the exhibits contain markings, those were made prior to their admission and were not made by the Administrative Law Judge.

Prior Back Pain

When working for Burke Bridge, Claimant experienced back pain and left hip pain. He saw Dr. Williams in Ozark, Missouri who administered a cortisone shot. Claimant said this helped and the pain eventually would resolve. He also intermittently saw a chiropractor. But there were times, including a two year period, when he was completely pain free.

Claimant said at hearing that while working for the bridge company he occasionally would rest or lie down on the job. Claimant said his employer made this allowance when the work was done. Claimant also said at the end of the day when others were sitting back, Claimant would go home and lie in the Jacuzzi.

Claimant's co-worker testified credibly that he worked with Claimant for ten years at Burke Bridge. He last worked with Claimant in 2003 or 2004. He said he could tell that Claimant's back bothered him periodically. If Claimant complained of back pain, the co-worker would switch jobs with Claimant to give him a light job. But the co-worker conceded that the work was heavy, and trading off jobs was a common occurrence. It was not specific to Claimant.

Claimant worked for Burke Bridge for 10 years and they were happy with his work. Claimant said when he went to work for Benchmark, it was required that he lift what needed to be lifted; this included propane tanks weighed at least 100 pounds. He took some Motrin before the last accident, but no prescription narcotic medicine until after the last work accident.

Claimant's Deposition Testimony

Claimant was deposed twice. In his deposition testimonies, taken several years apart, he adamantly denied ever missing work due to pain prior to the last work accident. When asked if he ever stopped and rested because of the back pain, he responded:

A. Oh, I don't remember ever doing that. My boss at Burk Bridge was a slave Driver, so we didn't stop much. There wasn't much stopping.

(Exhibit II, Deposition January 26, 2009, pp. 9-10). Claimant denied that he needed to lie down during the day or anything like that. Although he took what he believed was an easier job at Benchmark after being laid off at Burke Bridge, Claimant continued to perform heavy lifting without any accommodation. Most telling is the following colloquy:

Q. How much would you have to lift on your job with Benchmark?

A. I mean, up to over 100 pounds.

Q. And I'm sure you told us this in you last depo. I just can't remember.

A. Yeah. I had to lift a lot. Them propane tanks, I don't know what they weigh but they're over 100 pounds, I know.

Q. Would you have to lift those by yourself?

A. Yeah. I had no one to help me.

Q. Did you have any difficulty bending over or twisting at the waist before your May of 2005 injury?

A. No.

Q. Did you limit yourself at all because of your problems with your back before your back injury in 2005? I mean, did you do anything differently in your job to accommodate your back pain?

A. No. I mean, I – when that was going on I worked for Burk Bridge and just, old hard work I had to do. I mean there was nothing easy about it. Everything was hard.

Exhibit II; Deposition January 26, 2009, pp 5-6. Employee also testified during his January 2009 deposition that he took over-the-counter medication for pain when he had a flare-up, but when he began at Benchmark in June or July 2004, he was in “no pain whatsoever.” (Tr. 7-8).

Last Injury

In early 2005, after carrying propane heaters weighing 100 pounds or more, Claimant began noticing pain that was no longer restricted to his back and hip. He said in his September 28, 2005 deposition that this pain was different in that it radiated into his right foot. He notified his superintendent. He sought treatment from Dr. Clarke who ordered an MRI. Subsequently, on June 1, 2005, Dr. Fred McQueary performed a right L4-5 decompressive laminectomy. Claimant thereafter had physical therapy. Claimant said the surgery did not help at all. He made a futile attempt to return to work in August 2005. He was unable to continue and has not worked since. He also has not looked for work, although he did draw unemployment benefits.

Current Complaints

Claimant takes prescription medication to alleviate for pain and inflammation. He does very little walking. He lies down two or three times a day, ten to 20 minutes at a time because of back pain. He occasionally spends the entire day in bed. He sometimes experiences a jolt of pain down his right leg causing him to fall. He can sit for 15 minutes at a time. He has difficulty driving for significant distances. He is unable to lift more than 10 pounds without pain. Even lifting a gallon of milk is painful.

Expert Opinions

Dr. David Volarich testified on Claimant's behalf. He opined that Claimant suffered a permanent partial disability of 45 percent to the body as a whole resulting from the last injury. The rating was based on the surgical repair at the L4-5 level, failed back syndrome, weakness of the leg, worsening pain, and lost motion. Dr. Volarich rated a 20 percent permanent partial disability to the body as a whole because of what he found to be pre-existing back problems which he diagnosed as chronic lumbar syndrome causing recurrent back pain without radicular

symptoms. Dr. Volarich admitted that no one had recommended surgery prior to the last injury. He conceded that prior to the last injury Claimant had gone periods of time without needing treatment, had not missed work, was able to perform his job, and reported no prior lifting restrictions or self-limiting.

Even though Dr. Volarich was aware that most of Claimant's last job involved lifting heavy objects weighing 100 pounds, Dr. Volarich still came to the conclusion that Claimant was permanently and totally disabled due to a combination of disabilities, and not from the last injury alone. He said he would disagree with any vocational expert who concluded that the permanent total disability was due to the last injury alone.

Dr. Volarich imposed the following restrictions that Claimant never previously had:

1. He is to avoid all bending, twisting, lifting, pushing, pulling carrying, climbing, and other similar tasks to an as needed basis.
2. He should not handle any weight greater than 15 to 20 pounds, and limit this task to an occasional basis assuming proper lifting techniques.
3. He should not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain.
4. He is advised to avoid remaining in a fixed position for any more than about 30 minutes at a time including both sitting and standing.
5. He should change positions frequently to maximize comfort and rest when needed, including resting in a recumbent fashion.

Exhibit A, Deposition Exhibit 2, Report of Dr. Volarich dated October 5, 2006.

Vocational Opinion

Philip Eldred testified by deposition after having reviewed Claimant's medical records, and having personally interviewed him on February 7, 2007. Claimant told the vocational expert that while he had back pain over the previous 10 years, he never missed any work. Mr. Eldred concluded that Claimant did not have a hindrance or obstacle to employment prior to the last

injury. He noted that Claimant was performing heavy work, did not report needing any accommodations, and was not on any medication prior to the last injury. The history Mr. Eldred obtained from Claimant was that whatever back pain he may have had prior to the last injury did not interfere with his ability to work.

Credibility Assessment

There is a striking contrast between Claimant's hearing testimony and his earlier deposition testimonies. To the extent that Claimant's hearing testimony differs from his earlier deposition, I do not find his testimony credible. Specifically, I do not find credible Claimant's testimony at the hearing that his former employer, Burke Bridge, accommodated him in any manner, including allowing him to lie down during the work day.

With respect to the opinion testimonies, I find credible the conclusion of Dr. Volarich that Claimant is permanently and totally disabled, but as explained below, I do not find credible his opinion that this is due to a combination of disabilities. I find the opinion testimony of Mr. Eldred in this case to be credible.

CONCLUSIONS OF LAW

Section 287.220 RSMo, creates the Second Injury Fund, and prescribes the compensation that shall be paid from the Fund in "all cases of permanent disability where there has been previous disability." To trigger liability of the Second Injury Fund, Claimant must show the presence of an actual and measurable disability at the time the work injury is sustained, and that work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo. App. W.D. 2002), *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Claimant also must show "either that (1) a preexisting disability combined

with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself.” *Gasson v. Liebengood*, 134 S.W.3d 75, 79 (Mo. App. W.D. 2004).

Prior to his hearing on January 3, 2011, Claimant steadfastly denied that his preexisting back pain interfered with his ability to work. He denied that he had ever missed any work due to back pain or anything else. He indicated in his depositions that his back pain resolved fairly quickly, that he went as long as two years without pain, that he was not in pain when he started work for the last employer. Moreover, Claimant routinely lifted 100 pounds without assistance in his last job. He explicitly indicated in his depositions that he received no accommodations from his prior employer, Burke Bridge. The first time Claimant provided any history of difficulty with his work was at the hearing. As noted above, I simply find Claimant’s hearing testimony, to the extent it differs with Claimant’s two earlier depositions, to be not credible.

As for Dr. Volarich’s opinion, he admitted that Claimant described no difficulty in performing his job prior to the last work injury. By all accounts, Claimant’s job at Burke Bridge involved heavy lifting. He conceded that Claimant had no restrictions prior to the last injury. While Claimant may have had a preexisting “condition,” the mere fact that a condition exists does not mean it is disabling. *Simmerly v. Baily Corp*, 890 S.W.2d 12, 14 (Mo. App. S.D. 1994). Further, “The Second Injury Fund is not liable when a work-related injury causes a change in a pre-existing condition, which is escalated in the work-related injury to a disability.” *Concepcion v. Lear Corp*, 173 S.W.3d 368, 372 (Mo. App. W.D. 2005), *citing Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 745 (Mo.App.1996), *overruled on other grounds, Hampton*, 121 S.W.3d at 223.

Claimant failed to prove he had a preexisting *disability* that was a hindrance or obstacle to employment which combined with the last injury to render him permanently and totally disabled. His own vocational expert found him to be permanently and totally disabled because of the last injury alone. Dr. Volarich's restrictions and Claimant's testimony regarding his current limitations, and his current use of prescription medication, make clear that Claimant is permanently and totally disabled from the last accident alone.

Having determined that Claimant is permanently and totally disabled from the last injury, there is no further inquiry. The Second Injury Fund has no liability in this case.

Date: March 9, 2011

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation