Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 09-032321

Employee: Clifford Hutchings

Employer: W. B. Young Co. (Settled)

Insurer: Hartford Insurance Company of the Midwest (Settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion
The administrative law judge denied employee's claim for permanent partial or permanent total disability benefits from the Second Injury Fund. Employee appeals, arguing that the administrative law judge overlooked evidence of preexisting disabling conditions referable to diabetes, the low back, and the right foot. We agree with the result reached by the administrative law judge for the following reasons.

On page 9 of his award, the administrative law judge states as follows: "There is no medical evidence to support that Claimant's alleged preexisting low back/body as a whole disability 'equals a minimum of fifty weeks of compensation'" (emphasis added). Employee correctly points out that his evaluating expert, Dr. Stuckmeyer, opined that employee suffered a preexisting 15% permanent partial disability of the body as a whole referable to his low back.

After careful consideration, while we acknowledge there is some evidence of preexisting conditions that satisfy the applicable thresholds, we simply find insufficient credible evidence of any injury or condition that would meet the applicable thresholds and/or constitute a hindrance or obstacle to employment at the time employee sustained the primary work injury.

Accordingly, we agree with the administrative law judge's conclusion that employee failed to meet his burden of proving Second Injury Fund liability for permanent partial or permanent total disability benefits.

Conclusion
We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued August 29, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 23rd day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

_____
Secretary

AWARD

Employee: Clifford Hutchings

Injury No. 09-032321

Dependents:

Employer: W. B. Young Co. (settled)

Additional Party: Second Injury Fund

Insurer: Hartford Insurance Company of the Midwest (settled)

Hearing Date: July 25, 2013

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

Checked by: RJD/njp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No additional benefits are awarded.
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 4, 2009.
5. State location where accident occurred or occupational disease was contracted: Saline 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 tripped and fell and struck his right knee.
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: Right lower extremity.
14. Nature and extent of any permanent disability: 25% permanent partial disability of the right knee.
15. Compensation paid to-date for temporary disability: Unknown.
16. Value necessary medical aid paid to date by employer/insurer? Unknown.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.

18. Employee's average weekly wages: $522.87.

19. Weekly compensation rate: $348.58.

20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Second Injury Fund liability:

NONE. The claim against the Second Injury Fund is denied in full.

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Clifford Hutchings Injury No. 09-032321

Dependents:

Employer: W. B. Young Co. (settled)

Additional Party: Second Injury Fund

Insurer: Hartford Insurance Company of the Midwest (settled)

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

ISSUES DECIDED

The evidentiary hearing in this case was held on July 25, 2013 in Marshall. Claimant, Clifford Hutchings, appeared personally and by counsel, John Stanley. The Second Injury Fund appeared by counsel, Assistant Attorneys General David Zugelter and Leslye Winslow. The hearing was held to determine the liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on August 9, 2013.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Saline County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant, Clifford Hutchings, sustained an accident arising out of and in the course of his employment with W. B. Young Co. on May 4, 2009; and
6. That Claimant's average weekly wage is $522.87 and his compensation rate is $348.58.

EVIDENCE

The evidence consisted of the testimony of Claimant, Clifford Hutchings, as well as the deposition testimony of Claimant; the report and testimony of Terry Cordray, a vocational rehabilitation counselor; medical records; the deposition testimony and medical report of Dr. James Stuckmeyer; the stipulation for compromise settlement in this case between Claimant and Employer, W. B. Young Co.; and extensive records from the Missouri Division of Workers' Compensation ("Exhibit H"). The objection of the Second Injury Fund to uncertified medical records contained in Exhibit H was sustained; the medical records contained in Exhibit H were not entered into evidence.

DISCUSSION

Clifford Hutchings ("Claimant") was born on March 7, 1952. He is a high school graduate and has no specialized training other than on-the-job training as a welder and a truck driver. Claimant filed a claim for permanent partial disability against Employer and a claim of permanent total disability against the Second Injury Fund ("the Fund"). Claimant's primary injury to his right knee occurred on May 4, 2009. Claimant also alleged prior disabilities due to injuries to his lower back, left knee and right foot as well prior disability from insulin dependent diabetes. Claimant and Employer reached a compromise settlement for 25% permanent partial disability of Claimant's right knee on March 18, 2013.

Claimant testified at hearing that he is a single, sixty-one year old male who lives with his mother and has no dependents. He is currently receiving Social Security disability benefits. Claimant testified that he worked for Employer as a welder from approximately 1985 through 1992 and from approximately 2005 through 2009. In his full-time work with Employer, Claimant did welding, metal fabricating and heavy labor. Between his stints with Employer, Claimant worked as an over-the-road truck driver.

Claimant testified that prior to May 4, 2009 he frequently lifted up to thirty pounds, with additional physical requirements including walking, standing, bending, kneeling, and climbing. Claimant testified that, during his second stint with Employer, he worked full time and performed his job duties with no accommodations or restrictions and did not have to miss work due to any prior injuries or disabilities.

As stipulated, Claimant sustained a compensable accident on May 4, 2009, which caused injury to Claimant's right knee. Claimant testified that on May 4, 2009, after clocking in and gathering his tools, he was walking through the break room, when he stumbled over a steel block that was usually used to prop open a door. Claimant fell forward and struck the inside of his right knee against a picnic table. He immediately felt pain but began to work his shift anyway. Claimant testified that the pain worsened during the day, so he left work and went to Missouri Valley Physicians. On May 8, 2009 an MRI of the right knee was performed, which suggested a meniscus tear.

On May 15, 2009, Claimant was examined by Dr. Kelly Ross at Marshall Orthopedic and Sports Medicine. Claimant complained of clicking, catching and pain in his right knee. Dr. Ross took additional x-rays and recommended a right knee arthroscopy. On June 25, 2009, Dr. William Quinn of Columbia Orthopaedic Group performed a partial right medial meniscectomy; a chondroplasty of the articular surfaces of the medial femoral condyle, lateral femoral condyle and patella; and a pick arthroplasty of the articular surface of the lateral femoral condyle. From July 6, 2009 through July 10, 2009, Claimant received physical therapy at Peak Performance.

On July 13, 2009, Dr. Quinn examined Claimant and released him without restrictions. On February 15, 2010, Dr. Quinn conducted his final examination of Claimant, at which time Dr. Quinn found "no ligamentous instability and no effusion with crepitation" and rated Claimant's disability at 10% at the level of the knee.

It is not clear when or if Claimant returned to work. On April 15, 2010, in an interview with Dr. Stuckmeyer, Claimant told Dr. Stuckmeyer he was still employed at Employer. On July 5, 2012, in deposition, Claimant testified that he worked four, five or six months after the injury to his right knee. On July 25, 2013, at the hearing, Claimant testified that when he tried to return to work, he only worked one to two days before determining that he was unable to perform the requirements of the job due to pain in his right knee and foot and instability standing. Claimant testified that Employer did not offer any accommodations and that he quit and did not seek further employment. The fact that Employer stated in the STIPULATION FOR COMPROMISE SETTLEMENT between Claimant and Employer (Exhibit G) that Claimant was paid 48 weeks of temporary total disability benefits would strongly suggest that Claimant performed little or no work for Employer after May 4, 2009.

At deposition and hearing, Claimant testified regarding alleged prior injuries to his back, right foot and left knee as well as his history of diabetes. Claimant's testimony was inconsistent and vague. There are no medical records in evidence documenting the alleged injuries to his back and only incomplete records with regard to his treatment for diabetes.

In reciting his medical history, Claimant testified that he was diagnosed with Type II non-insulin dependent diabetes in 1996. In his deposition, Claimant stated that he became insulin dependent in 2006. However, at the hearing, Claimant testified that he became insulin dependent in December 2009. Medical records from Missouri Valley Physicians and Marshall Orthopedics also indicate that, at least through July 2009 when Claimant was being treated for the injury to his right knee, he was diagnosed with non-insulin dependent diabetes and was not prescribed insulin. Claimant testified that his diabetes did not affect his ability to work until he started taking insulin. Plaintiff stated that at that point he could no longer "drive commercial" because a driver who is dependent on insulin to control diabetes is ineligible for a Commercial Drivers' License ("CDL").

Claimant testified that in approximately 1988 and 1992, while working for Employer, he suffered injuries to his back. There are no medical records in evidence with regard to these alleged injuries. Claimant stated that he has been treated with injections and pain medications for back pain resulting from these alleged injuries on and off for more than 20 years. Claimant

stated that he filed a workers' compensation claim after the 1992 injury, but that he does not remember any permanent restrictions as a result of these alleged injuries.

Claimant testified that in February 2007, while at work, he dropped a heavy piece of metal on his right foot. Claimant testified that he was wearing steel-toed boots which protected his foot. Claimant went to his doctor four days after the alleged injury complaining of pain in the top of his foot. X-rays showed "no evidence of fracture or dislocation and no significant soft tissue abnormality" and Claimant was assessed as sustaining a crush injury. There is no record of any further treatment. No workers' compensation claim was filed.

Claimant testified that in March 2008 he injured his left knee at work when his foot slipped as he was getting off a forklift. He stated that he felt a pop in his left knee, but did not seek treatment until the next day and that he did not miss any work due to this injury. X-rays taken the day after the alleged injury showed "no evidence of fracture or subluxation." X-rays taken two weeks after the alleged accident showed "no obvious acute osseous pathology." The diagnosis was patellar tendinitis and the doctor recommended a patellar strap. There is no record of any further treatment. No workers' compensation claim was filed.

Claimant testified that in 2009 and 2010 he had surgery for ulcers on toes on both feet and surgery to correct hammertoes on both feet. Claimant's statements (albeit confusing and inconsistent) combined with medical records indicate that these bilateral infections and deformities were not a result of the injury to Claimant's right foot in 2007. The ulcers were caused by the steel-toed boots he wore for work and were exacerbated by his diabetes.

Claimant also detailed his work history and education at hearing. Claimant testified that he worked as a laborer and truck driver prior to 1987. Claimant testified that he worked for Employer as a welder from 1987 until 1992, when he allegedly injured his back and could no longer lift the heavy weight required by his job. He obtained his CDL and drove a truck until 2005. In 2005, Claimant returned to Employer and his prior job as a welder. Claimant testified that he was able to perform the job of welder again because equipment changes had been made so that the process did not require him to do as much heavy lifting, but that the other physical requirements remained the same.

Claimant testified that he graduated from Brunswick Senior High School in 1970, where he received average grades. He learned to weld from his father and has not received any special training or certifications since then other than his CDL. His only skills are heavy labor, welding and truck driving. He stated that he has never had a desk job or owned a computer.

Dr. James Stuckmeyer performed a medical evaluation of claimant's injuries and physical complaints on April 15, 2010 and again on July 25, 2012. It is clear that Dr. Stuckmeyer did not review any medical records with regard to Claimant's alleged prior injuries to his back or with regard to Claimant's history of diabetes. Dr. Stuckmeyer relied primarily on Claimant's recollection of his prior injuries and conditions and Claimant's subjective account of his present difficulties. In both the 2010 and 2012 evaluations, Dr. Stuckmeyer observed that Claimant had

full range of motion in his lumbar spine but that "he complains subjectively of pain with extremes of range of motion."

In April 2010, Dr. Stuckmeyer opined that Claimant had a 0% disability to the left knee; a 35% permanent partial disability to the right knee; 15% disability to the body as a whole for the diagnosis of insulin dependent diabetes; 15% disability to the right and left lower extremities at the level of the ankle for symptoms of chronic bilateral foot pain, tarsometatarsal pain and obvious mallet toe deformity; and a preexisting 15% disability to the lumbar spine. In addition, Dr. Stuckmeyer found a 15% augmentation factor due to the synergistic effect of combining the preexisting and current disabilities. In April 2010, Dr. Stuckmeyer did not find Claimant to be permanently totally disabled.

In July 2012, after meeting with Claimant again and reviewing Terry Cordray's report Dr. Stuckmeyer opined that Claimant was permanently totally disabled and imposed the following work restrictions: "no prolonged standing or walking greater than tolerated; no repetitive bending, kneeling, squatting, traversing of steps, ladder climbing; and accommodation at the work place to allow cane utilization and sitting as needed."

Terry Cordray, a vocational rehabilitation specialist, performed a vocational assessment of Claimant on May 31, 2011. Mr. Cordray did not review any medical records with regard to Claimant's alleged prior injuries to his back or with regard to Claimant's history of diabetes. Mr. Cordray relied primarily on Dr. Stuckmeyer's April 2010 evaluation and on Claimant's recollection of his prior injuries and conditions, including Claimant's assertion that he became insulin dependent in 2006. Based on these unsubstantiated assertions, Mr. Cordray opined that Claimant's "previous back injury and insulin dependent diabetes is a significant impairment and a barrier to employment."

After obtaining Claimant's full background, including his education, work history, functional limitations, and performing vocational testing, Mr. Cordray opined that it was "not realistic to expect that an employer in the State of Missouri in the normal course of business hiring individuals, would realistically hire a 59 year-old man who walked with a cane, took pain medications, is unskilled, has only a high school education in 1970, cannot perform any of his past jobs and has a history of pre-existing back injuries and diabetes." He therefore assessed Claimant as being permanently and totally disabled.

Claimant's description of his disabilities, work history and treatments to Dr. Stuckmeyer and Mr. Cordray and at deposition and the hearing were inconsistent in many important details. For example, Claimant told Dr. Stuckmeyer that he missed a number of months throughout the years due to his diabetic condition, but in his deposition, Claimant testified that he never missed any work due to his diabetes. Claimant told Dr. Stuckmeyer he was still working at Employer in April 2010, but Claimant told Mr. Cordray that he had not attempted to return to work after his primary injury and that no doctor had released him to return to work. At deposition, Claimant testified that he worked four to six months after his primary injury, but at the hearing Claimant testified that he only worked a day or two after his primary injury. In his deposition, Claimant stated that he became insulin dependent in 2006; however, at the hearing, Claimant testified that

he became insulin dependent in December 2009, and it is clear from the medical records that Claimant was not insulin dependent on May 4, 2009 or at any time prior thereto.

Claimant testified at the hearing that except for his dependence on insulin to control his diabetes, which he alleged prevented him from reinstating his CDL, he could and would go back to driving a truck. In fact, he further testified that he was physically able to climb in and out of a truck that his nephew owns and travel with his nephew while his nephew was working as a truck driver. However, dependence on insulin to control his diabetes is not the primary obstacle preventing Claimant from working as a truck driver. Plaintiff testified in his deposition that he was convicted of felony DWI sometime in the 1980's or 1990's and that at the time of his deposition in 2012, he did not have a valid drivers' license because of a 2004 DWI conviction.

Claimant alleges that he is permanently and totally disabled, and is seeking permanent total disability benefits from the Second Injury Fund. Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether a claimant is able to competently compete in the open labor market given his or her condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D.1999). When the claimant is disabled by a combination of the work-related event and pre-existing disabilities the responsibility for benefits lies with the Second Injury Fund. Section 287.220.1 RSMo. If the last injury in and of itself renders a claimant permanently and totally disabled the Second Injury Fund has no liability and the employer is responsible for the entire compensation. *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

There is no indication that Claimant's alleged low back problem presented a hindrance or obstacle to Claimant's employment for many years prior to the May 4, 2009 right knee injury, and Dr. Stuckmeyer testified that his examination of Claimant's back was essentially benign. Dr. Stuckmeyer did not believe that Claimant's alleged preexisting left knee injury constituted any disability whatsoever. The bilateral foot problems occurred after May 4, 2009 and thus cannot be considered as *preexisting* disabilities. In order to find the Second Injury Fund liable for permanent total disability benefits, the question boils down to whether the right knee injury of May 4, 2009, combined with the preexisting diabetes, prevents Claimant from competing in the open labor market. In answering this question, I cannot consider the deterioration of Claimant's diabetes after May 4, 2009.

When a claimant suffers subsequent deterioration of a preexisting disability, it is not relevant to the determination of claimant's disability. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W. 2d 789, 793 (Mo. App. S.D. 1992). Only disabilities existing at the time of the primary injury or caused by the primary injury may be used to determine disability. As such, the deterioration of Claimant's diabetes to insulin dependent status after May 4, 2009 cannot be considered in determining whether Claimant is permanently and totally disabled.

Claimant testified clearly and unequivocally that he could still physically perform all of the duties of a truck driver (a position he held for many years and for which he is vocationally

qualified), were it not for the fact that his *insulin dependent* diabetes prevents him from obtaining a CDL. Therefore, it is clear that Claimant, today, could compete in the open labor market if his pre-injury non-insulin dependent diabetes had not deteriorated, post-injury, to insulin-dependent status.

Therefore, Claimant's claim for permanent total disability benefits must be denied.

I also do not believe that the Second Injury Fund is liable for permanent partial disability benefits. I do not believe that any of Claimant's alleged preexisting disabilities meet the statutory threshold for Second Injury Fund liability. There is no medical evidence to support that Claimant's alleged preexisting low back/body as a whole disability "equals a minimum of fifty weeks of compensation". Likewise, considering that Claimant's preexisting diabetes was not insulin dependent and did not affect Claimant's ability to work, it likewise cannot equal "a minimum of fifty weeks of compensation"; considering the fact that Dr. Stuckmeyer (who was led to the erroneous belief that Claimant's preexisting diabetes was "insulin dependent") only rated same as a 15% body as a whole disability, it strains credulity to believe that Claimant's preexisting non-insulin-dependent diabetes constituted a 12.5% body as a whole disability. As discussed earlier, the bilateral foot problems were not preexisting.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following facts and make the following rulings of law:

1. The work-related accident and injury of May 4, 2009 resulted in a medial meniscus tear requiring surgery;
2. Prior to May 4, 2009, Claimant had been diagnosed and treated for diabetes for which he took medication, but did not require insulin;
3. Prior to May 4, 2009, Claimant's diabetes did not constitute a hindrance or obstacle to employment or reemployment;
4. Claimant's preexisting non-insulin dependent diabetes did not result in a disability equal to a minimum of fifty weeks of compensation;
5. After the right knee injury of May 4, 2009, Claimant's preexisting diabetes deteriorated to insulin dependent diabetes;
6. Claimant's alleged pre-May 4, 2009 permanent partial disability to his low back did not result in a disability equal to a minimum of fifty weeks of compensation, and same did not constitute a hindrance or obstacle to employment or reemployment;
7. If Claimant is permanently and totally disabled it is only because his diabetic condition deteriorated after the May 4, 2009 right knee injury;
8. The right knee injury that Claimant sustained in the May 4, 2009 accident was not sufficient to render Claimant permanently and totally disabled;
9. The right knee injury that Claimant sustained in the May 4, 2009 accident resulted in a permanent partial disability of 25% of the right knee;

10. Claimant has not sustained the burden of proof regarding his claim for permanent total disability benefits from the Second Injury Fund; and
11. Claimant has not sustained the burden of proof regarding his claim for permanent partial disability benefits from the Second Injury Fund.

ORDER

Claimant's claim for compensation against the Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is denied in full.

Made by /s/Robert J. Dierkes 08/29/2013
Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation