

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

Injury No. 12-103570

Employee: Keith Jackson  
Employer: Big Boy Steel Co. (Settled)  
Insurer: Old Republic 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 § 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 December 18, 2014. The award and decision of Administrative Law Judge Joseph E. Denigan, issued December 18, 2014, 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 11<sup>th</sup> day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Keith Jackson Injury No.: 12-103570  
Dependents: N/A Before the  
Employer: Big Boy Steel Co. (settled) **Division of Workers'**  
Additional Party: Second Injury Fund **Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Insurer: Old Republic Insurance Co. (settled) Jefferson City, Missouri  
Hearing Date: September 16, 2014 Checked by: JED

### 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: November 21, 2012 (alleged)
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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 sustained injury while moving steel channel beam.
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: 7.5% PPD of body referable to low back; PTD against SIF.
15. Compensation paid to-date for temporary disability: disputed
16. Value necessary medical aid paid to date by employer/insurer? disputed

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$1400.00
- 19. Weekly compensation rate: \$827.75/\$433.58
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

30 weeks of PPD from Employer	(Settled)
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22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential (\$394.17) payable by SIF for 30 weeks beginning January 12, 2013 and, thereafter, \$827.75, for Claimant's lifetime	Indeterminate
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TOTAL:	INDETERMINATE
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23. Future requirements awarded: Unknown

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:

James J. Sievers

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Keith Jackson	Injury No.: 12-103570
Dependents:	N/A	Before the
Employer:	Big Boy Steel Co. (settled)	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	Old Republic Insurance Co. (settled)	Department of Labor and Industrial
Hearing Date:	September 16, 2014	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED

This case involves a low back injury resulting to Claimant on the alleged accident date of November 21, 2012. Employer/Insurer previously settled its risk of liability. The Second Injury Fund (“SIF”) remains a party to this Claim. Both parties are represented by counsel. The single issue for trial is the liability of the SIF. Claimant seeks permanent total disability benefits.

Issues for Trial

1. Notice;
2. Accident;
3. Whether injury arise out of course and scope of employment;
4. Nature and extent of permanent disability;
5. Liability of the Second injury Fund.

FINDINGS OF FACT

Claimant, age 57, worked for Employer on the alleged accident date as an ironworker which work he had performed for 33 years. Claimant’s job duties included loading and unloading trucks, welding and setting up iron structures. He was required to perform heavy lifting. His physical movements included kneeling, standing, squatting, bending and climbing ladders. Claimant also was required to wear a tool belt that when fully loaded weighed up to 60 pounds. Claimant worked 40 hours per week and overtime.

On the alleged accident date, Claimant reported a low back injury occurring after Claimant and a co-worker were moving a 180-pound beam. Claimant bent down and as he lifted the beam he felt pain in his low back that radiated into his left hip. Claimant reported his injury to the shop steward. He continued to work with pain but his condition got progressively worse. Claimant apparently treated privately. He first treated with Dr. Naemi in January when medications were prescribed. Claimant followed up with Dr. Nasrallah who provided numerous chiropractic treatments for his back. Claimant had serious prior low back injury.

On cross-examination, Claimant was confronted with the Report of Injury (Exhibit *Roman Numeral I*). The *Report* reflects a January 2, 2013 accident date which Claimant disputed. He testified, "they knew before then[.]" No other witnesses testified.

Claimant was unable to return to work as an ironworker. He testified that his primary condition and a host of other orthopedic problems prevented him from working. Claimant testified that he reported the accident to his supervisor and decided to get treatment on his own. Claimant testified that his lumbar strain injury caused additional back pain and lack of range of motion and occasional shooting pain down his left leg.

#### *Pre Existing Conditions*

In 1991, Claimant fell and injured his left ankle. Medical treatment was provided for a comminuted left ankle fracture with soft tissue swelling. Surgery was performed on 2/21/91 by Dr. Thomas Otto. He performed a left ankle open reduction internal fixation with a bone graft.

On August 11, 1991, Claimant fell down the stairs at home and fractured and dislocated his left ankle. Dr. Otto again performed surgery consisting of an open reduction internal fixation and exploration of tibial nerve with release of short flexures. Claimant returned to work as an ironworker, but climbing ladders and walking on uneven surfaces was very difficult.

In 1992, Claimant underwent a left knee arthroscopy, and also had some of the hardware removed from his left ankle. Claimant again returned to work as an ironworker after his left knee surgery but it was much more difficult to bend and lift because of his knee.

In September 1992 - March 1993, Claimant underwent several surgeries for left foot and ankle pain that included a left foot fusion. Claimant testified that this further limited him and caused his to walk with a limp. He had to wear support boots on his left side and he wore compression socks because of the continued swelling.

In 2004, Claimant sustained an injury to his right elbow and forearm. Dr. David Strege performed a right elbow radial head excision surgery. Claimant returned to work after his surgery and testified that his right elbow was weak and it limited him in the amount of weight he could lift. Claimant is right handed.

In 2009, Claimant noted pain in his left wrist. He received treatment from Dr. Subbarao Polineni who performed surgery for repair of the extensor carpai ulnaris with subluxation with extensor retinaculum. Claimant testified he returned to work after the surgery and had a loss of grip strength and overall strength in his left hand.

In 2011, Claimant sustained injury to his low back when he was moving hay. He treated with his primary care physician, Dr. Naemi, who noted he had radiating pain down his legs and was prescribed medication. He was eventually referred to Dr. Stanley Martin who performed low back surgery on August 12, 2011. Dr. Martin performed a left L4-L5 microsurgical lumbar discectomy. Claimant noted improvement after the surgery, but subsequently reported to the

emergency room with bilateral leg pain, right more than left. He also had difficulty walking. Dr. Martin ordered another MRI and on 9/9/11 took him back to surgery and performed a redo left L4-L5 microdiscectomy with drainage of epidural abscess. He was eventually released and returned to work after multiple epidural steroid injections. Claimant testified that his work as an ironworker was still more difficult because of his back surgeries. He no longer had the strength or stamina to stand for long periods of time and continued to have leg and back pain, but he remained on the job.

Currently, Claimant is unable to return to work due to pain and strength deficits. His typical day involves sitting in a recliner and watching television.

### Opinion Evidence

Claimant offered the deposition and narrative reports of Dr. David Volarich as Exhibit 1. Dr. Volarich reviewed the medical records and examined Claimant on December 12, 2103. He provided follow-up reports. Medical records review revealed serious prior injuries and conditions including: lumbar spine, left lower leg, left knee, right elbow and left wrist. Physical examination was consistent with the medical records and the multiple surgeries to the various body parts. Dr. Volarich diagnosed low back strain and aggravation of Claimant's pre-existing lumbar syndrome. Dr. Volarich assigned a 15% permanent partial disability due to the reported (primary) injury. He further assigned preexisting PPD including 45% PPD of the lumbar spine, 75% PPD of the left lower leg, 15% PPD at the knee, 30% PPD of the right elbow, 30 % PPD of the left wrist, and 5% PPD of the thoracic spine.

Dr. Volarich further opined in his December 12, 2013 report that Claimant is unable to engage in any substantial gainful activity nor can he be expected to sustain full-time work in the future. Dr. Volarich opined that based on his medical assessment, Claimant is permanently totally disabled as a result of the combination of the low back injury with his preexisting medical conditions. He stated Claimant was no longer able to work after January 11, 2013. Dr. Volarich's testimony was persuasive.

Claimant offered the deposition of James England, Licensed Rehabilitation Counselor, as Exhibit 3. He evaluated Claimant's employability in the open labor market. Mr. England interviewed Claimant, conducted vocational testing and reviewed the medical records. He concluded that because of Claimant's problems in combination with one another, Claimant is likely to remain totally disabled from a vocational standpoint and is not a candidate for rehabilitation services.

Claimant offered the deposition and report of Ms. Delores Gonzales, a Licensed Rehabilitation Counselor, as Exhibit 2. Ms. Gonzales interviewed the Claimant and reviewed his medical records. Following the examination, Ms. Gonzales was unable to identify any skills that Claimant could transfer to jobs within his physical capacity. She concluded that Claimant was not capable of any competitive work for which there is a reasonably stable job market. Ms. Gonzales also concluded that Claimant has a combination of adverse vocational factors that would preclude him from employment currently and in the future.

Claimant testified credibly and the expert evidence was probative and unopposed.

## RULINGS OF LAW

### Compensability: Notice, Accident and Whether Injury Arose out of and In the Course of Employment

The SIF raises several issues of liability but offered no rebuttal evidence to Claimant's testimony or that of his three experts. Claimant gave credible testimony that he sustained a work related low back injury with Employer and reported it to Employer through his shop steward. He continued to work without treatment while his symptoms progressed. His first treatment was not until about six weeks later.

Claimant sought treatment with Dr. Naemi for low back ankle and depression complaints which records do not reflect an accident history. Thereafter, Claimant treated with Dr. Nasrallah who noted an accident history. Diagnosed Dr. Nasrallah made several diagnoses, including lumbar syndrome. Thereafter, Claimant never returned to work. Dr. Volarich found Claimant's complaints, presentation and medical records sufficient for medical causation.

This evidence was credible and un rebutted.

### Nature and Extent of Permanent Disabilities

Claimant credibly testified that he had continuous pain with accompanying limitations due to his low back. Claimant offered substantial medical records and expert evidence through multiple exhibits. The prior surgeries and diagnosis are undisputed in the record. The records support a finding that Claimant demonstrated a 7.5 percent PPD of the low back as a result of the primary injury. Claimant had significant preexisting disability of the low back in the range of 40 percent PPD. Dr. Volarich found Claimant permanently and totally disabled and was not able to return to work after January 11, 2013.

Claimant's assertion of permanent total disability is supported by the injuries and preexisting injuries that were noted. Section 287.020.7 RSMo (2005) defines total disability as the: "inability to return to any employment and not merely... [the] the inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. Kowalski v. M-G Metals and Sales, Inc. 631 S.W.2d 919,922 (Mo. App. 1982)(*analyzing the same language*). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet the statutory definition." Id. at 922.

Consistent with these cases, it is unreasonable to suggest an employer would employ Claimant in his present physical condition. This assessment includes his level of education and transferable skills. Claimant has no transferable skills that do not depend on strong physical

attributes as well. Claimant cannot be reasonably expected to perform regular hours in any line of work on a full-time basis. Finally, here, age is a factor in the determination of permanent total disability. Reves v Kindell's Mercantile Co., Inc., 793S.W.2d 917, 920-921 (Mo.App. 1990).

In addition, the record supports a finding that, while working as an ironworker, Claimant exhibited serious pre-existing injuries to his lumbar and thoracic spine, left lower leg, left knee, right elbow, and left wrist. His productivity diminished over the years. Supported by a record of disability, Dr. Volarich found Claimant permanently and totally disabled. Again, the medical records and medical opinions were un rebutted.

Mr. England's and Ms. Gonzalez's vocational conclusions strongly support the conclusion that claimant is permanently and totally disabled; neither vocational expert was able to identify a rehabilitation plan to return claimant to work. The ultimate conclusions of Dr. Volarich are un rebutted and easily reconciled with the record of evidence. This record of evidence cannot reasonably support a conclusion that an employer would hire claimant with his ongoing pain and limitations.

#### Liability of the Second Injury Fund

Claimant presented substantial probative evidence on his inability to work and his condition of permanent total disability. The liability of the Second Injury Fund is set out in Section 287.220 RSMo (2000). SIF liability is premised on a synergistic combination of the primary and preexisting disabilities. Synergy is the concept in which the PPD are found in combination, to create a "substantially greater" disability, or increased overall disability, for which the employer should not be held liable. The medical evidence and other evidence support a finding that Claimant's disabilities are a hindrance and obstacle to reemployment.

Here, Claimant's primary injury and upper and lower extremity disabilities combine synergistically that belie any strength or stability, or physically demanding work. Further, common *upper body-lower body* synergy is appreciated by serious injury to each upper extremity in combination with the primary injury to the low back complicating, or preventing, any compensatory body mechanics.

Claimant presented substantial probative evidence of permanent disability in the reported injury and for Claimant's numerous pre-existing conditions. The PPD values assigned by Dr. Volarich are credibly articulated. The current disability for the reported (primary) injury is found to be ten percent PPD of the body referable to the low back. Pre-existing PPD of the low back is determined to be 40 percent. Claimant's prior left ankle equates to 75 percent PPD. Claimant's prior left knee is found to have 15 percent PPD and the right elbow equates to 60 percent PPD. Claimant's prior left wrist equates to 25 percent PPD. Claimant's prior left wrist equates to 25 percent PPD. Claimant's thoracic spine condition is found to be 5 percent PPD of the body as a whole. Ultimately, the synergistic combination requires a finding of permanent total disability.

Conclusion

On the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained 7.5 percent PPD of the body referable to the low back. In addition, Claimant is found to have sustained permanent total disability as a result of the combination of the primary injury with the pre-existing disabilities proven herein. The SIF is liable for the differential between the PTD rate and the PPD rate for the PPD installment period and, thereafter, for Claimant's lifetime, or until Claimant is no longer permanently and totally disabled. Section 287.200 RSMo (2009).

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

JOSEPH E. DENIGAN  
*Administrative Law Judge*