

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

Injury No.: 06-011681

Employee: Robert Kant
Employer: Dave Littleton Ford (Settled)
Insurer: Self-Insured (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 April 26, 2016. The award and decision of Administrative Law Judge Angie Robyn, issued April 26, 2016, 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 27th day of October 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Robert Kant

Injury No: 06-011681

Employer: Dave Littleton Ford

Insurer: Self-Insured

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

Hearing Date: February 11, 2016

Checked by: AR/lh

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: February 17, 2006.
5. State location where accident occurred or occupational disease was contracted: Smithville, Clay 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 walking to wash his hands when he tripped over an ankle-high wire, placed across the doorway by a co-worker/practical joker, falling and injuring his left knee and 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 and left knee.
14. Nature and extent of any permanent disability. Permanent Total Disability.

15. Compensation paid to-date for temporary disability: \$38,238.41.
16. Value necessary medical aid paid to date by employer/insurer: \$55,528.01.
17. Value necessary medical aid not furnished by employer/insurer: N/A
18. Employee's average weekly wages: \$770.60.
19. Weekly compensation rate: \$513.60/\$365.08.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: Employee previously settled his claim with the Employer for 15 percent of the left knee and 25 percent of the body as a whole, 124 weeks of compensation.
22. Second Injury Fund liability: Yes. Second Injury Fund liability beginning August 30, 2007, for weekly differential of \$148.68 for 124 weeks and \$513.76 weekly thereafter for Claimant's lifetime.
23. Future requirements awarded: N/A.

Said payments to begin as of the date of this award 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 all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jerry Kenter.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Kant

Injury No. 06-011681

Employer: Dave Littleton Ford

Insurer: Self- Insured

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

Hearing Date: February 11, 2016

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On February 11, 2016, the Employee and the Second Injury Fund appeared for a final hearing. The Employee and the Employer had previously settled the claim filed against the Employer. The Division had jurisdiction to hear this case pursuant to 287.110. The Employee, Robert Kant, appeared in person and with counsel, Jerry Kenter. The Second Injury Fund appeared through Assistant Attorney General Jacob Colling.

STIPULATIONS

The parties stipulated to the following:

- 1) That both Employer and Employee were operating under and subject to the Missouri Workers' Compensation Law;
- 2) That Robert Kant was Dave Littleton Ford's employee;
- 3) That Kant sustained an accident in the course and scope of his employment on February 17, 2006;
- 4) That Kant provided notice and filed a timely claim for compensation;
- 5) That Kant has a compensation rate of \$513.76/\$365.08;
- 6) That Kant received \$38,238.41 in temporary total disability benefits and \$55,528.01 in medical benefits; and
- 7) That Kant reached maximum medical improvement on August 30, 2007.

ISSUES

- 1) Second Injury Fund liability.

FINDINGS OF FACT AND RULINGS OF LAW

The Employee, Robert Kant, testified in person and offered the following exhibits, all of which were admitted without objection or if deposition transcripts, subject to the objections contained therein:

Exhibit A - Medical Records Volumes I & II
Exhibit B - The Kansas City Neurosurgery Group, LLC

Exhibit C - Kant Letter to Jeff Littleton 1/19/08
Exhibit D - Tasks of a Master Technician
Exhibit E - IME from John A. Pazell, M.D. 10/28/08
Exhibit F - John A. Pazell, M.D. Disability Rating 11/26/08
Exhibit G - Rehabilitation Expertise, LLC Report 10/9/09
Exhibit H - Kansas Vocational Rehabilitation Records
Exhibit I - Report of Injury
Exhibit J - Stipulation for Compromise Lump Sum Settlement
with the Employer
Exhibit K - Deposition Transcript of Terry Cordray 3/15/10
Exhibit L - Deposition Transcript John A. Pazell, M.D. 10/29/09

The Second Injury Fund offered the following exhibits:

Exhibit No. 1 - Deposition of Robert Kant 9/3/2009

Based on the above exhibits and the testimony of the Employee, this Court makes the following findings:

Robert Kant is a 64-year-old former auto mechanic for Dave Littleton Ford. Kant is a high school graduate.

Kant has been an auto mechanic for 30 years and has worked for several of the Ford Automotive Dealerships in the Kansas City Metropolitan area. He is a certified Senior Master Mechanic. Kant attended classroom and online training with Ford to satisfy the requirements necessary to become a Senior Master Mechanic. Annually, he successfully completed required tests to maintain his certification. As a Ford certified Senior Master Mechanic, Kant testified that he is qualified to work on all parts of a Ford automobile bumper to bumper but that training is not necessarily transferrable to other car manufacturers.

As a Senior Master Mechanic at Dave Littleton Ford, Kant was required to lift 80-150 pounds; however, he used a hoist when possible. He performed a lot of overhead work. Kant was also required to kneel frequently.

Kant testified that he used a computer frequently at work and at home for personal use. However, he does not have strong typing skills.

On February 17, 2006, he had finished a repair job and was walking to a restroom to wash his hands. A practical joker had placed a thin wire across a doorway about ankle high and Kant tripped over the wire causing him to fall on his left side. He testified that he injured his left knee, left shoulder and his low back when he fell. Although he did not realize the damage to the left shoulder until he was no longer on narcotic pain medicine and was in physical therapy over a year after the fall.

Kant reported his accident and injury immediately to the Employer. The Employer first sent Kant to St. Luke's Medical Group in Smithville, Missouri. Kant gave a consistent history of his primary and prior back injuries and was complaining of severe low back pain. On March 3,

2006, Kant underwent an MRI of the lumbar spine at Shawnee Mission Medical Center which showed degenerative disk disease and facet changes of the mid and lower lumbar spine with mild acquired canal stenosis at L5-S2 and degenerative disc bulging at L3-4 and L2-3. (Ex A p 274)

On March 7, 2006, Kant returned to Dr. Charles Striebinger who he had not seen since 2003. He indicated that he had been able to function on a daily basis at work and could even bale hay in the summer, work around his house, and had not missed work from the prior 2001 accident involving an injury to the low back, until the last accident of February 17, 2006. Dr. Striebinger indicated that the MRI of March 3, 2006, was unchanged from any prior MRI from the auto accident in 2001. He did order additional testing to rule out a subluxation or instability at L4-5. (Ex A p 808)

Kant was initially treated conservatively with physical therapy, injections, medications and water therapy.

On April 18, 2006, at the request of the employer/self-insurer, Kant was sent to Dr. John Ciccarelli. He told Dr. Ciccarelli that the baseline chronic back ache and pain with intermittent radicular symptoms worsened after the February 2006 accident. Dr. Ciccarelli, as did Dr. Striebinger, compared the MRI's of April 9, 2001 and March 3, 2006, finding no significant difference. He did not recommend surgical intervention and ordered continuation of the physical therapy and a facet block. He advised lighter work activity and prescribed anti-inflammatory medications. His conclusion was that Kant "suffered a work related lumbar strain and in the face of moderate to severe pre-existing degenerative multi-level spondylosis in the lumbar spine." (Ex A p 730) When the treatment did not significantly improve Kant's symptoms, he was referred to a physiatrist who recommended a diagnostic radio-frequency ablation and physical therapy. (Ex A p 733)

Dr. Galate ordered a lumbar radio-frequency medial branch neurolysis and Kant saw improvement in his symptoms. (Ex A p 313-315, p 738-739) Dr. Galate ordered three additional trigger point injections and work conditioning. (Ex A Tab 4; Ex A p 741)

On October 20, 2006, Kant told Dr. Galate that he still had low back and left knee pain and that the trigger point injections had calmed down some of his back pain. To follow up on the knee pain, Dr. Galate ordered an MRI which showed a tear of the medial meniscus and a grade 3-4 patella chondromalacia. Dr. Galate then referred Kant to Dr. Daniel Stechschulte for treatment. Kant disclosed the prior 1977 knee problem and indicated he was treating it conservatively until the present injury. He complained of popping, pain and giving way in the knee. Dr. Stechschulte recommended a left knee arthroscopy and returned Kant to work light duty, sitting and standing for pain control, with no kneeling, squatting, climbing, or crawling. (Ex A p 657-660) However, Kant testified that the Employer could not accommodate his restrictions and he was unable to return to work.

On December 18, 2006, Dr. Stechschulte performed an arthroscopic repair for a tear of the posterior horn of the left medial meniscus with a patella femoral chondroplasty. (Ex A p 695) This was followed by physical therapy.

The surgery did not alleviate all of the left knee problems and Dr. Stechschulte recommended injections. (Ex A p 669) Dr. Stechschulte indicated that the meniscal pathology had been appropriately addressed but Kant did have arthritic changes, some being pre-existing in the knee, which were exacerbated and aggravated by the last accident.

On March 3, 2007, Kant returned to Dr. Galate who indicated no further treatment was required on the back except for continued home exercises. (Ex A p 762-763)

Because the Employer refused all treatment on the shoulder, the Kant went to his primary care physician at the Jayhawk Primary Care Clinic on March 26, 2007, complaining of pain in the left shoulder and forearm with weakness in the left arm and occasional numbness in the entire left hand. Kant was diagnosed with a suspicious biceps tendinitis and was advised to follow up with an orthopedic consult. He was told to limit his lifting. (Ex A p 423-426)

On April 27, 2007, Kant underwent a post arthrogram MRI of the left shoulder at Alliance Radiology showing a full thickness tear of the distal anterior aspect of the supraspinatus tendon with some degenerative changes in the AC joint. (Ex A p 674) On May 4, 2007, Kant returned to Dr. Stechschulte who indicated that the left shoulder injury may or may not be work related. (Ex A p 676)

On August 30, 2007, Dr. Stechschulte declared the injured employee to be at maximum medical improvement for the knee and the back, and released Kant with permanent restrictions of alternate sitting, standing as needed for pain control, and no kneeling, squatting, climbing, or crawling. He subsequently rated Kant on October 22, 2007, at 10 percent permanent partial disability of the left knee.
(Ex A p 691; 651)

Kant has not returned to work since his February 17, 2006 injury.

Kant currently complains that he has back pain on a daily basis. He can't drive in a car for more than an hour before he needs to stop and stretch. He is limited in his ability to stand, sit and walk. Kant is limited in his ability to lift more than 5-10 pounds. Due to his knee injury, he can't kneel, squat or crawl. He now uses a cane to help with stability because of the knee injury and subsequent surgery.

Additionally, there are several activities and hobbies he can no longer perform after the February 17, 2006 work-related injury, including bowling, baling hay, working on his own truck and automobiles.

Prior to his February 17, 2006 injury, Kant was involved in a motor vehicle accident where he suffered a severe low back injury in early January of 2001. Dr. John Clough treated Kant on March 5, 2001, for severe radiating pain. A CT of the lumbar spine showed bulging at all the levels of the lumbar spine, with some impingement on the L5 nerve roots and degenerative facet changes at L3-4. (Ex A p 525) An MRI was subsequently performed on April 9, 2001, confirming bulges throughout the lumbar spine with facet hypertrophy at all the levels.
(Ex A p 523)

Clough opined that the motor vehicle accident of January 2001 exacerbated the degenerative disk disease as Kant had no significant back pain prior to the injury. He believed there might be a small herniated disk which was the source of the radicular pain, but he advised against operative treatment and advised continued physical therapy. Dr. Clough eventually returned the Kant to work in June of 2001.

On July 9, 2001, Kant returned to Dr. Clough indicating that his back pain had returned when he had returned to work and continued conservative treatment. (Ex A p 501)

Kant next sought treatment with Dr. C.M. Striebinger in July of 2003. (Ex A p 771) He told Dr. Striebinger that he was able to do most things pretty well but that all activity aggravated his back. He had some radiation to the hips and thighs but nothing past the knee. Kant underwent a lumbar facet block at the L5-S1 level (Ex A p 777) and subsequently a discogram in an effort to determine the specific cause of the pain.

On September 22, 2003, Dr. Striebinger discussed a fusion with Kant and advised him to get into less heavy work. (Ex A p 772) This was the last treatment until the primary accident of February 17, 2006, occurred.

Kant testified that he did not want surgery because he could not afford to miss work having been told by one of those doctors that he would have to miss 6-12 months if he underwent a fusion-type procedure. He also testified that he did not ask the doctors to place restrictions on him because he feared for his job.

Kant testified that when he went back to work at Bob Allen Ford, he lost his position in the shop because they hired someone else to take his place. He was given menial tasks because of the limitations from his injury. He testified that his pay was based on the complexity of the task he was to perform. Eventually, he was forced to leave Bob Allen Ford for a higher paying job because of the reduction in pay. No contradicting evidence was presented at the hearing.

There was testimony that Kant had a period of improvement from his symptoms between 2003 and 2006. However, his prior back condition did not resolve.

Dr. Pazell evaluated Kant and assessed 40 percent permanent partial disability to his body as a whole, with 10 percent permanent partial disability attributed to his 2001 prior back injury and 30 percent permanent partial disability attributed to his February 17, 2006 work-related injury. Dr. Pazell concluded, "[i]t may be noted that Kant has numerous disabilities and it is the opinion of this examiner to a reasonable degree of medical certainty that his disability exceeds the sum of the disabilities that are rated and that he is totally and permanently disabled for work as a mechanic/technician." Because this injury was not work-related, there are no records regarding percentage of disability.

Kant testified that he met with his Employer and sent him a letter asking that he be allowed to return to a position at the dealership to become employed again. (Ex. C) Employer did not offer him any position following his February 17, 2006 accident.

Kant then sought help through the Kansas Career Development Center, a part of the State Vocational Rehabilitation Service. (Ex A p 44-51) He produced a list of employers furnished by the Kansas Vocational Rehabilitation Service, which he was advised could possibly employ him. (Ex H) He testified that he applied at all of the eight auto mechanic businesses that he contacted but none got back to him.

Kant also produced the job description of a Ford Master Mechanic. (Ex D) On that list, he annotated what jobs he could not do without help. Most of the annotations involved lifting and awkward positioning of the lumbar spine.

Terry Cordray, vocational expert, concluded that because Kant could no longer perform the duties of an auto mechanic, he had to be considered an unskilled worker and was therefore moved into a sedentary work category. In this work category, Kant lost access to 96% of his labor market without even taking into consideration the need for Kant to alternate between sitting and standing. In terms of other positions Kant's experience as an auto mechanic would be transferable such as a service writer or an auto parts counter person, Cordray opines that it is unlikely any employer would hire Kant as a service writer since his former employer did not offer him that position and Kant would be physically unable to serve as an auto parts clerk.

Cordray concludes, "Given his age in combination with his multiples of medical problems, it is my opinion that no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to hire a 57 year old unskilled worker, who is restricted to sedentary sit/stand jobs, who walks with a cane, who has had surgery to his knee, had a procedure to his back and multiples of medical problems and therefore is not "placeable" in the labor market and is totally disabled."

Kant claims he is permanently and totally disabled. Section 287.020.5 RSMo. 1986 defines total disability as the inability to return to any employment and not merely...to return to the employment in which the employee was engaged at the time of the accident. The term "any employment" means "any reasonable or normal employment or occupation." Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1996); Crum v. Sachs Electric, 786 S.W.2d 131 (Mo. App. 1989); Kowalski v. M-G Metals and Sales, 631 S.W.2d 919 (Mo. App. 1992); Groce v. Pyle, 315 S.W.2d 482 (Mo.App. 1958). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that the employee be unable to compete in the open labor market. *See* Fletcher v. Second Injury Fund, Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 1173 (Mo.App. 1995); Reiner v. Treasurer, 837 S.W.2d 363 (Mo. App. 1992); Brown v. Treasurer, 795 S.W.2d 478 (Mo. App. 1990).

Missouri Courts have repeatedly held the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether an employer in the usual course of business would be reasonably expected to employ the employee in his present condition. Sullivan v. Masters Jackson Paving Company, 35 S.W.3d 879 (Mo. App. S.D. 2001). *See* Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995); Lawrence v. RV-III School District, 834 S.W.2d 789 (Mo. App.1992). Thus, a determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person

engaged in such employment. Gordon v. Tri-State Motor Transit, 908 S.W.2d 849 (Mo. App. 1995). Courts have held various factors may be considered, including claimant's physical and mental condition, age, education, job experience and skills in making a determination as to whether the claimant is permanently, totally disabled. See Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo. App. 1997); and Olds v. Treasurer, 864 S.W.2d (Mo. App. 1993).

Based on Employee's testimony, expert testimony, medical records, and reports, I find Robert Kant is permanently and totally disabled and unemployable in the open labor market.

The next step is to determine whether Kant is permanently and totally disabled due to the last accident alone or as a result of the combined effects of his prior injuries. I do not believe Kant is permanently and totally disabled as a result of his primary injury alone. I find based on Kant's testimony, medical records, reports and expert testimony, that Kant sustained 15 percent permanent partial disability to the left knee and 25 percent permanent partial disability to the body as a whole, low back.

SECOND INJURY FUND LIABILITY

The issue to be determined by this Court is what, if any, is the nature and extent of Second Injury Fund liability arising from the work accident on February 17, 2006. Kant claims he is permanently, totally disabled. I agree. I find by a preponderance of the credible evidence that Mr. Kant's pre-existing disabilities combined with the work injuries sustained on February 17, 2006, to create a synergistic effect of greater overall disability resulting in permanent total disability. Therefore, I find Mr. Kant is entitled to benefits from the Second Injury Fund.

In order to establish Second Injury Fund liability for permanent total disability benefits, Kant must prove that: (1) he has permanent disability resulting from a compensable work-related injury; (2) he has permanent disability predating the compensable work-related injury which is of "such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployed," §287.220.1 RSMo. 1993; Garibay v. Treasurer, 930 S.W.2d 57 (Mo. App. 1996); Rose v. Treasurer, 899 S.W.2d 563 (Mo. App. 1995); Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995); and Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo. App. 1995); and (3) the combined effect of the disability resulting from the work-related injury and the disability attributable to all conditions existing at the time the last injury was sustained results in permanent total disability, Boring v. Treasurer, 947 S.W.2d 483 (Mo. App. 1997); Reiner v. Treasurer, 837 S.W.2d 152 (Mo. App. 1994).

Therefore, the first issue this Court must address is whether Kant sustained permanent partial disability as a result of his work injury of February 17, 2006. I find Kant has met his burden on this issue.

Based on the testimony of Dr. Pazell, and Kant, as discussed previously, both of whom I find credible and persuasive, I find by a preponderance of the evidence that Mr. Kant's work injuries of February 17, 2006 result in permanent partial disability to Kant's low back and left knee. I find the amount of that disability is equal to 25 percent permanent partial disability to the body as a whole, low back, and 15 percent permanent partial disability to the left knee, the same

amount of disability for which he and the employer/insurer settled his claim.

Having shown that he sustained permanent partial disability as a result of his work-related injuries, in order to prevail in his claim, Kant must now establish that he had permanent disability predating the compensable work-related injury which is of "such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment." I find that he did.

Based on the evidence presented, including the Employee's testimony, I find that Kant did have permanent disability which predated the current injury, specifically a severe low back injury. Kant established that his disability is an obstacle or hindrance to his employment and/or reemployment. In making these findings, I specifically find the testimony of Dr. Pazell and Mr. Kant credible and persuasive.

In addition to Kant's testimony regarding his disability, and the medical records which corroborate his testimony, Kant presented the expert medical opinion of Dr. Pazell. In his report, Dr. Pazell provided a rating of disability for Kant's pre-existing back disability as it was prior to the February 17, 2006 work accident. Specifically, Dr. Pazell assigned 10 percent disability to the body as a whole, low back.

Finally, based on credible and competent testimony of Kant at the hearing, medical records, and the expert opinions of Dr. Pazell and Cordray, I find Kant to be permanently and totally disabled as a result of the combined effects of the February 17, 2006 injury and pre-existing disability to his low back.

I find Kant's disability became effective on August 30, 2007. The Employer/Insurer's liability for permanent partial disability was \$45,269.92 or 124 weeks of compensation beginning on that date and continued for the 124 weeks. The Second Injury Fund liability is the weekly differential of \$148.68 beginning August 30, 2007, until the 124 weeks expire. Once the 124 week time period expires, the Second Injury Fund becomes liable for \$513.76 weekly in permanent total benefits for Kant's lifetime.

The award of compensation is subject to a lien in the amount 25 percent to Jerry Kenter for necessary legal services rendered to the Claimant.

Made by: _____

Angie Robyn
Administrative Law Judge
Division of Workers' Compensation