

AWARD

Employee: John King

Injury No.: 04-120872

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Curtis-Toledo (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (SIF)

Insurer: Liberty Mutual (previously settled)

Hearing Date: October 19, 2011

Checked by: KMH

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 10, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis
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:
Claimant injured his left knee in the course and scope of his employment.
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: left knee
14. Nature and extent of any permanent disability: 15% ppd to the left knee, previously paid by Employer
15. Compensation paid to-date for temporary disability: none
16. Value necessary medical aid paid to date by employer/insurer? \$3,219.85

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$298.27/\$298.27
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

24 weeks of permanent partial disability from Employer	(previously paid)
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22. Second Injury Fund liability: Yes

28.46 weeks of permanent partial disability	\$8,488.76
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TOTAL:	\$8,488.76
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23. Future requirements awarded: n/a

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:

Rob Merlin

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John King

Injury No.: 04-120872

Dependents: n/a

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Department of Labor and Industrial
Relations of Missouri
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Additional Party: SIF (only)

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A hearing was held on the above captioned matter October 19, 2011. John King (Claimant) was represented by attorney Rob Merlin. The SIF was represented by Assistant Attorney General Mike Finneran. Curtis-Toledo (Employer) and Claimant settled the primary claim prior to hearing.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award. Any markings on the exhibits were present when admitted into evidence.

Claimant alleges he is permanently and totally disabled as a result of the combination of his primary and prior injuries and disabilities.

STIPULATIONS

The parties stipulated to the following:

1. Claimant sustained an injury by accident November 10, 2004, while in the course and scope of his employment.
2. Employer and Claimant were operating under the provisions of the Workers' Compensation law.
3. Employer's liability was fully insured by Liberty Mutual.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's average weekly wage was sufficient to yield a TTT/PTD/PPD rate of \$298.27.
6. Employer paid no TTD benefits and paid \$3,219.85 in medical benefits.
7. Employer and Claimant settled the primary injury for 15% of the left knee on May 15, 2007.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Nature and extent of PPD from the primary injury.
2. SIF liability.

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant is a married 65 year-old male who attended school through the eighth grade. In 1979 he took a 16 week training course and worked as a police officer from 1979-1985. He earned his GED in 1985. He has no other formal training. Claimant is 5'8" and weighs 205 pounds. He testified he gained ten pounds over the last few years. Claimant is right handed.
2. Claimant completed the eighth grade in 1964. He worked in food service for the next 15 years, and waited on customers, operated a cash register, and cooked. All his jobs were unskilled. He had no injuries or disabilities affecting his work during this time period.
3. In 1979, Claimant took a 16 week training course at the police academy. He passed the physical and had no physical impairments when he started working as a police officer. He worked as a police officer from 1979-1985. His duties were somewhat physical. He was on his feet approximately 4 hours of each eight hour shift. He spent the rest of each shift in his patrol car or completing paperwork. He worked a few of these years as a police chief supervising four officers.
4. After leaving the police department, he worked for Pizza Hut for approximately 18 months. This was a physical job. He was on his feet all day and spent much of his time lifting, waiting on customers, and operating the cash register.
5. He next worked for various companies as a courier. He lifted up to 100 pounds while delivering and picking up packages. He had no physical problems, accidents, or injuries working these jobs.
6. From 1991 through 2000 he worked at Puritan Bennett as a shipping clerk. This was a physical, repetitive job. He worked ten hour days and was on his feet all day. He was required to lift 50 pounds on a regular basis. His duties involved stooping, squatting, lifting, and reaching overhead all day. He had no physical complaints when he started this job.
7. In 1993 he developed numbness, tingling, reduced grip strength, and pain in his left wrist and hand. He was unable to lift many items at work, and had to ask for help so he would not drop things. He had to take frequent breaks to rest his hand. He filed a workers'

compensation claim and had a left carpal tunnel release. Claimant settled this case with Employer for 17.5% of the left hand. Claimant testified the surgery did not help much. The numbness and tingling came back and he had to continue to wear a brace for several months. He has had no additional medical treatment for his left wrist since his release from treatment in 1994.

8. He continues to have pain, numbness, and tingling in his left hand and wrist. Claimant testified this injury slowed him down at work. He had to ask for assistance with lifting, he could not lift heavy objects anymore, he had to take frequent breaks, and he got in trouble because he had to ask for too much assistance.
9. In 1996, Claimant developed chest pain and frequent shortness of breath. He had to sit down a lot at work, he had chest pain when climbing into the forklift, and he could not walk far. He had a quadruple bypass and missed four months of work. He returned to work with a permanent lifting restriction of no more than 50 pounds. Claimant had difficulty performing his duties and had to take breaks and frequently ask his co-workers for help. He continued to have slight chest pain and a slightly irregular heartbeat, for which he took medications. He had no other treatment or recurrence of his symptoms from 1996 through the time he stopped working in 2006.
10. Puritan-Bennett closed in 2000, and Claimant was unemployed for approximately four months. He testified he had difficulty finding a job because of his hand and heart conditions and restrictions.
11. Claimant began working for Employer in April 2001 as a receiving clerk. His job required him to be on his feet most of the day. He carried heavy packages and was constantly bending and stooping. He was able to lift up to 50 pounds, but got assistance from his co-workers for heavier lifting. He did not work on a computer or with the public. He operated a forklift throughout the day. He had some difficulty pulling himself up when climbing into the forklift because of decreased grip strength in his left hand. This was a dusty environment and he had difficulty breathing because of his heart condition.
12. Claimant injured his right shoulder in 2003. He had an open rotator cuff subacromial decompression with acromioplasty in August 2003. Claimant testified the pain continued, and after he returned to work, he missed about one day of work each month because of ongoing shoulder pain. He testified he felt depressed, and his supervisors got upset with him. He felt his right shoulder caused him additional problems at work. He cannot completely raise his arm up, and had to ask for help with anything overhead. He had difficulty operating the forklift controls with his right hand. He continues to have occasional pain in his shoulder and difficulty lifting and reaching overhead.
13. He has had no other treatment for his right shoulder since his release from treatment in 2004. Claimant settled this case with Employer for 25% of his right shoulder. He settled with the SIF for preexisting disabilities of 17.5% of the left wrist and 12.5% of the body as a whole referable to the heart condition.

14. In November 2004, Claimant slipped while stepping off a forklift, and twisted his left knee. He had immediate pain and swelling, and Employer sent him to Concentra. He was treated conservatively with a brace and physical therapy. An MRI revealed chondromalacia and an osteochondral injury. Claimant testified he had difficulty at work because he could not stand all day, and could not walk, stoop or squat. When his complaints continued, Claimant's primary care physician sent him to Dr. Schively. He opined a repeat MRI was similar to the 2004 MRI. The radiologist questioned whether Claimant had a torn meniscus. Dr. Schively opined Claimant might benefit from a total knee replacement. Claimant testified he was not able to have the surgery because he was caring for his sick wife.
15. After his knee injury, Claimant had increased difficulties at work. He testified he was not able to lift more than 30-40 pounds. He had difficulty climbing in and out of the forklift. He had difficulty driving the forklift because he had to operate the clutch with his left leg. He had daily pain and swelling. He could not walk for more than 30 minutes. Claimant testified he got in trouble because he had to keep asking for help after his last two injuries, and he could not complete his work without help. He was reprimanded by his supervisors. Claimant's left hand, heart, right shoulder, and left knee complaints continued until he got fired in 2005. Claimant assumes he was fired because he could no longer do the job.
16. Although he had physical problems, Claimant needed to continue working. He went to a temporary employment agency and was hired as a forklift driver. He was also required to sweep floors and load pallets. He was unable to load the pallets, and had to take frequent breaks. He testified his employer accommodated his restrictions, and allowed him to work just as a driver. He worked for this employer from February through December 2006. Claimant worked seven days a week. Other temporary employees were hired as permanent employees. Claimant testified he was not hired on a permanent basis because he could not perform all aspects of the job.
17. Claimant has applied for other jobs, but has not been hired. He believes he cannot work full time. He testified he can't work at a desk all day because of his knee. He can't stand or walk for more than 30 minutes because of all of his conditions. He continues to have pain in his knee, chest, shoulder and wrist. He takes pain killers and aspirin. He has been depressed because of his inability to find a job, monetary problems, and his wife's condition. In 2005 he was diagnosed with diabetes and diabetic neuropathy. He takes Neurontin for nerve pain in his foot related to his neuropathy. His diabetes has worsened in the last few years and affects his ability to work.
18. The Social Security Administration determined Claimant could do only sedentary work and granted him total disability benefits beginning December 14, 2006. Claimant's diabetic neuropathy was a factor in that total disability determination.
19. Claimant's expert, Dr. Berkin, examined him and issued his last report in October 2006. At that point, Claimant was working as a forklift driver. His physical examination showed a slight reduction in flexion and tenderness. Dr. Berkin diagnosed a left knee strain, partial tear of the medial meniscus, and osteochondral injury. He rated his

disability at 25% of the knee, and rated his prior injuries. He testified Claimant's injuries were all a hindrance or obstacle to his employment. He testified he did not address the question of total disability because Claimant was working at the time he saw him.

20. Claimant's vocational expert, Stephen Dolan, interviewed Claimant and issued a report in 2008. He found Claimant's WRAT scores indicated his academic abilities are comparable to one with a high school education, so he would have no problem with his skills applying for unskilled jobs. He noted Claimant has no specific vocational skill or training for a sedentary job. He opined Claimant is not employable in the open labor market due to a combination of his age, education, disabilities, diabetic neuropathy, and the Social Security Administration's determination that he is relegated to sedentary jobs for which he has no vocational skill.
21. The SIF deposed Dr. Markenson who had examined Claimant on behalf of Employer in April 2006. At that time, Dr. Markenson diagnosed a sprain of the knee on top of normal wear and chondromalacia. He opined surgery would not help because Claimant's symptoms were not severe enough, and his x-ray findings did not indicate a need for knee replacement. He rated Claimant's disability from the work related strain at 2% of the knee.
22. The SIF's vocational expert, Delores Gonzalez, reviewed the treatment records and Claimant's deposition and issued a report in March 2010. She opined the WRAT scores showed Claimant had adequate academic skills to perform any number of entry-level jobs. She opined he is able to perform sedentary and light unskilled jobs, and his preexisting injuries were not a hindrance or obstacle to his employment. No physician had opined Claimant was not able to work, and no physician imposed restrictions that precluded entry level work.
23. Claimant is credible.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Claimant's primary injury resulted in 15% PPD to his left knee.

There is no dispute Claimant injured his knee at work in November 2004. There is a question as to the extent of the injury. Claimant credibly testified to numerous complaints and restrictions regarding his knee following the accident. I find his testimony credible, and his symptoms and complaints establish he sustained 15% disability to his knee as a result of the primary injury.

2. Claimant has established a right to recover PPD benefit from the SIF in the amount of \$8,488.76.

Claimant alleges he is totally disabled as a result of the combination of his injuries. Section 287.220 RSMO provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the following:

1. the percentage of disability resulting from the last injury alone;
2. that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
3. that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant established he has 15% PPD to his left knee as a result of his 2004 work injury.

Claimant had disabilities and limitations prior to his 2004 work injury. Claimant had ongoing pain and restrictions to his left wrist, right shoulder and heart. Claimant credibly testified he missed time from work as a result of these prior injuries and treatment. Claimant required assistance from his co-workers for several years before his last work injury. Claimant's experts testified these conditions were hindrances and obstacles to his employment or re-employment.

I find Claimant's preexisting injuries and medical conditions caused a hindrance or obstacle to his employment or to obtaining re-employment. The final question is whether the combination of Claimant's injuries rendered him permanently and totally disabled. Permanent total disability is the inability to return to any employment, not just the employment in which Claimant was last working. The question is whether an employer in the usual course of business would reasonably be expected to employ Claimant in his condition.

Claimant worked for nearly two year after his primary injury. He testified his employers accommodated his restrictions, and he believes he is not employable. Since his work injury, Claimant has been diagnosed with diabetes and diabetic neuropathy. He takes Neurontin and was granted social security in part due to the neuropathy. Claimant's vocational expert determined he was not employable as a result of his age, education, work injury, prior injuries, and conditions that arose after the work injury. While I agree Claimant has limited transferable skills, I don't find sufficient evidence to establish he is not employable in the open labor market as a result of his left knee injury in combination with prior injuries and disabilities.

Claimant has established a right to recover PPD benefits from the SIF. Claimant's prior injuries were compromised with Employer and the SIF and assigned permanent partial disability percentages of 25% of the right shoulder, 12.5% of the body as a whole, and 17.5 % of the left wrist. The prior disability totals 138.62 weeks. Based on the medical evidence and Claimant's testimony, I find these percentages accurately reflect Claimant's disability prior to his 2004 work injury.

Each of these injuries meet the statutory thresholds as set forth in §287.220(1) RSMO (2000). This section of the law also provides for compensation from the SIF when a claimant's preexisting disabilities combine with his work injury to create a greater overall disability. From all the evidence presented, I find this combination is best represented by applying a 17.5% load factor. The sum of Claimant's disabilities is 162.62 weeks. Applying a 17.5% load factor yields 28.46 weeks. At Claimant's compensation rate, he is entitled to, and the SIF is hereby ordered to pay, \$8,488.76 in compensation.

Date: _____

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation