



## AWARD

Employee: Robert Mahurin

Injury No.: 05-130469

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Washington University (previously settled)

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

Additional Party: Second Injury Fund (SIF)

Insurer: self c/o CCMSI (previously settled)

Hearing Date: February 1, 2012

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: December 15, 2005
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 low back 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: low back and body as a whole
14. Nature and extent of any permanent disability: 17% PPD to the low back, previously paid by Employer, and permanent and total disability benefits from the SIF beginning September 1, 2007.
15. Compensation paid to-date for temporary disability: \$3,157.71
16. Value necessary medical aid paid to date by employer/insurer? \$12,636.59

Employee: Robert Mahurin

Injury No.: 05-130469

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$525.64/\$365.08
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

68 weeks of permanent partial disability from Employer (previously paid)

22. Second Injury Fund liability: Yes Indeterminate

Permanent total disability benefits from Second Injury Fund:  
\$160.56 weekly differential payable by SIF for 68 weeks beginning  
September 1, 2007, and, \$525.64 per week thereafter, for Claimant's lifetime,  
or as long as provided by law.

TOTAL: INDETERMINATE

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 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ann Dalton

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

Employee: Robert Mahurin

Injury No.: 05-130469

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Washington University (previously settled)

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

Additional Party: Second Injury Fund

Insurer: Self c/o CCMSI (previously settled)

Checked by: KMH

A hearing was held on the above captioned matter February 1, 2012. Robert Mahurin (Claimant) was represented by attorney Ann Dalton. The SIF was represented by Assistant Attorney General Mike Finneran. 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.

Claimant alleges he is permanently and totally disabled as a result of his primary injury combined with his prior injuries and disabilities.

### **STIPULATIONS**

The parties stipulated to the following:

1. Claimant sustained an injury by accident December 15, 2005, while in the course and scope of his employment for Employer.
2. Employer's liability was self-insured.
3. Employer had notice of the injury and a claim for compensation was timely filed.
4. Claimant's rates for PTD and TTD are \$525.64. His PPD rate is \$365.08.
5. Claimant received \$3,157.71 in TTD benefits and \$12,636.59 in medical benefits.
6. Claimant and Employer settled the primary claim for 17% PPD to the low back.
7. If Claimant is permanently and totally disabled, his total disability began September 1, 2007.

## ISSUES

The parties stipulated sole issue for trial is the liability of the SIF.

## 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 70 year-old, married male. He graduated from high school in 1961. He served in the Navy from 1962-1966 when he was honorably discharged. He had some vocational training in HVAC, and worked at Wagner Electric until he was laid off in 1982. He started at Wagner in the Metal Plating Room, where he worked in a physically demanding job distributing chemicals. After a few years, he moved to Inspection. His duties involved substantial walking, reading blue prints, and troubleshooting to inspect small motors. He next worked in Quality Control where he pulled samples and inspected small motors.
2. Claimant worked for Employer from 1983 until August 31, 2007. He first worked as a Tool Crib Attendant, where he ordered parts, maintained inventory, and repaired small motors. The job required him to stand, sit, work with his hands, and lift up to 25 pounds. After about one year, he was transferred into HVAC maintenance. He maintained the heating and cooling systems and compressors throughout the Washington University campus. His job duties involved being on his feet much of the day and lifting up to 25 pounds alone or 100 pounds with help. He had to bend, kneel, squat, climb, reach, push, pull, stoop and work on ladders. He used a computer to pull up building maps and diagnose problems.
3. Claimant has a history of back problems dating back to the 1970's. He was injured when he slipped on a wet floor while working for Wagner. He complained of severe back pain radiating into his thigh, and treated with Dr. Hollocher for a few years. He had electrodiagnostic studies and extensive physical therapy. He was initially diagnosed with a lumbosacral strain and suspected herniated disc at L3-4. Studies also showed a Schmorl's node at L4-5 and minor spina bifida at S1. A lumbar myelogram in 1973 showed a disc herniation at L4-5 with a possible protrusion at L5-S1.
4. Claimant returned to work and was given a lighter job that was easier on his back. Following the injury and leading up to his 2005 injury, Claimant continued to have occasional flare-ups of back pain and often asked co-workers for help. He had to sit down frequently at work due to back pain. He took over the counter medications and missed several days of work each year due to back pain, restricted motion, inability to straighten up, and pain across his hips. In 2001 he had physical therapy for low back pain.

5. In the early 1980's, Claimant was diagnosed with diabetes, complicated by his weight. The records from Dr. Meghjee in the mid 1990's show Claimant complained of peripheral neuropathy. He was treated with numerous medications, but continued to have difficulty controlling his blood sugar levels. He began insulin injections for a few years, and continues to take oral medications. Claimant complained of constant tingling in his toes and the front of his feet prior to his 2005 injury. Claimant was given an annual note to excuse him from wearing leather boots at work, in favor of soft comfortable shoes, due to peripheral neuropathy and nail infections in his left great toe. Claimant testified he did not miss any significant time from work due to his diabetes, but was often fatigued.
6. On December 15, 2005, Claimant re-injured his low back at work. He missed a step while descending a ladder, and fell to the floor. He had immediate pain in his low back that radiated into his right buttock and leg.
7. Claimant was initially treated at BarnesCare and was diagnosed with lumbar strain, paravertebral spasm, and possible sciatica. He underwent conservative treatment with physical therapy, medications and work restrictions. His complaints worsened, and he had an MRI in January 2006. This revealed a right paracentral disc herniation at L4-5 with caudal displacement of the disc and stenosis as well as a right foraminal disc herniation at L5-S1 with diffuse disc bulging.
8. Claimant was sent to Dr. Yadava who diagnosed a lumbosacral strain, sacroiliitis, right piriformis syndrome and myofascial pain with trigger points. He continued therapy and medications and recommended injections. He took Claimant off work when his complaints increased and the injections did not provide significant relief. Dr. Yadava released Claimant to return to work with restrictions March 14, 2006.
9. Employer sent Claimant to Dr. Wayne in May 2006. He ordered EMG and nerve conduction studies which revealed right sub-acute L5 radiculopathy with evidence of proximal reinnervation, and mild sensory-motor polyneuropathy consistent with his diabetes. Dr. Wayne diagnosed low back pain with right L5 radiculopathy, chronic degenerative changes at L4-5 and L5-S1, disc herniation at L4-5, and moderate lateral recess stenosis. Dr. Wayne recommended injections and work restrictions. The injections did not provide relief, and Dr. Wayne recommended a surgical consultation.
10. Claimant saw Dr. Coyle in September 2006. He diagnosed a L4-5 disc herniation, L4-5 and L5-S1 spinal stenosis, and peripheral neuropathy. He opined Claimant might benefit from lumbar decompression at L4-5, but his prognosis was guarded due to his diabetes and chronic back problems. He noted the NCS showed peripheral neuropathy consistent with his diabetes. He noted Claimant's low back complaints and need for treatment was related equally to his 2005 work injury and his preexisting back condition. When Claimant elected to retire and not pursue further treatment, Dr. Coyle rated Claimant's disability at 5% of the back related to his 2005 injury, and 5% of the back related to his preexisting condition.
11. Claimant testified he elected not to have surgery because Dr. Coyle could not guarantee a resolution to his symptoms. He continued to work light duty with the option to sit and

stand as needed until he reached retirement age. He worked a morning shift in order to avoid rush hour traffic, which aggravated his complaints. He had problems walking at work because of leg pain. He could not perform many of his prior duties, and spent most of his time ordering parts and instructing other workers. Employer accommodated his restrictions, but Claimant still took some vacation days due to pain. He preferred to use vacation days as he felt guilty using sick time.

12. Claimant planned to work until 2012 when he reached his goal with his retirement annuity. Employer accommodated his work schedule, but Claimant had a new supervisor who wanted to eliminate the early shift. Claimant opted to retire, and last worked August 31, 2007.
13. Claimant continues to have low back and right leg pain. If he has to walk more than a few minutes, he develops leg numbness and has to sit down. He testified his is limited and can't do much walking or bending. He has a hard time maintaining a fixed position. He has difficulty climbing stairs. He has to lie down frequently to relieve his symptoms. He does light household chores, but is slower now and has to take frequent breaks. He wakes frequently at night due to pain. He is on numerous medications for his diabetes, high blood pressure, and high cholesterol. He takes Aleve for back complaints.
14. Claimant's expert, Dr. Volarich, examined him and issued a report February 26, 2008. He found Claimant had significant restricted motion in all aspects in his low back. He had right leg weakness, and his knee buckled when he put all his weight on his right leg. He was unable to fully squat. Dr. Volarich diagnosed herniated discs at L4-5 and L5-S1 causing right leg radicular symptoms, as a result of his 2005 injury. He diagnosed prior disc protrusion at L4-5 with degenerative disc disease and degenerative joint disease as well as insulin-dependent diabetes mellitus with peripheral neuropathy and retinopathy. He rated Claimant's disability from his primary injury at 35% of the body, and he rated his prior disabilities at 20% of the low back and 20% of the body related to diabetes.
15. Dr. Volarich opined the disabilities combined to create a greater overall disability, and Claimant is unable to engage in any substantial gainful activity or perform in an ongoing working capacity in the future. Claimant is permanently and totally disabled as a result of the work injury in combination with his preexisting medical conditions. He is 66 years old, has an education limited to graduation from high school, has worked in HVAC the majority of his career, and has been unable to get back to work since August 2007.
16. Claimant's vocational expert, Jim England, met with Claimant and issued a report April 28, 2009. He noted Claimant has worked most of his career as an HVAC technician. He would have skills at a light level of exertion, and could be employable assuming only Dr. Coyle's light level of restrictions. Based on Mr. England's observations of Claimant and Dr. Volarich's restrictions, Mr. England opined Claimant is not able to successfully compete for or sustain work activity. His weight, age and physical difficulties are readily observable and have a negative effect in an interview setting. He also has difficulty sleeping and has to lie down frequently to relieve pain. This would cause problems with attendance at even sedentary to light work.

17. The SIF's vocational expert, Delores Gonzalez, reviewed the records and issued a report September 21, 2010. She opined under Dr. Coyle's restrictions, Claimant would have transferable skills to sedentary and light jobs. Claimant does not have transferable skills under Dr. Volarich's restrictions that limit him to less than sedentary work, which does not exist on the open labor market. She opined Claimant's preexisting disabilities were not a hindrance or obstacle to his employment.

18. 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:

**Claimant is permanently and totally disabled as a result of the combination of his work injury and his pre-existing medical conditions.**

Claimant alleges he is permanently and totally disabled as a result of the combination of his primary injury and preexisting disabilities. Section 287.220.1 (RSMO 2005) provides that in cases of alleged permanent total disability against the Second Injury Fund there must be a determination of the following:

- The percentage of disability resulting from the last injury alone;
- That there was a preexisting permanent disability that was a hindrance or obstacle to employment or to obtaining reemployment;
- That all of the disabilities and conditions combined, including that from the last injury have resulted in the employee being permanently and totally disabled.

Claimant settled his claim with Employer prior to this hearing. Based on my review of the treating records, the medical opinions and the Claimant's complaints, I find Claimant sustained a 17% permanent partial disability of the low back as a result of his December 15, 2005 work injury.

Claimant testified that he had longstanding problems with his low back that caused him to miss work and ask for help leading up to December 15, 2005. He frequently had to sit down at work to take a break due to back pain, and had therapy as late as 2001. The studies following his 2005 injury indicate significant chronic degenerative changes. The treating physician, Dr. Coyle, and Claimant's medical expert both rated pre-existing permanent partial disability. Dr. Coyle opined Claimant may benefit from surgery, but his prognosis was guarded due to the preexisting diabetes and chronic back problems. He opined Claimant's complaints, need for treatment, and permanent disability were due equally to his work injury and his prior condition.

Claimant's diabetes was not well controlled prior to his 2005 injury. His condition was complicated by his weight. The records reveal his blood sugar levels were not well controlled by diet and medications. His medications were supplemented by insulin injections. He had constant tingling in his toes and the front of his feet with infections in his foot prior to 2005. He was given a medical excuse from wearing leather boots at work in an effort to protect his feet from further pressure and infection.

The objective medical evidence supports the pre-existing low back condition and diabetic neuropathy were a hindrance or obstacle to employment or to obtaining re-employment.

The final question is whether the combination of Claimant's injuries rendered him permanently and totally disabled.

The test for permanent total disability is whether Claimant is able to adequately compete in the open labor market given her condition. *Messex v. Sachs Elec. Co.*, 989 S.W. 2d 206, 210 (Mo. App. E.D. 1999). The pertinent consideration in this test is the determination of whether any employer in the usual course of business would reasonably be expected to employ Claimant given his or her condition. *Carlson v. Plant Farm*, 952 S.W. 2d 369, 373 (Mo. App. W.D. 1997).

Claimant's expert, Dr. Volarich, found Claimant permanently and totally disabled as a result of the work related injuries in combination with his preexisting medical conditions. He reviewed all of the relevant records, conducted a complete physical examination and took a history from Claimant before reaching his conclusions.

Claimant's vocational expert, Jim England, opined he is unable to compete for or sustain work activity on a regular basis based upon Dr. Volarich's restrictions. Claimant has worked most of his career as an HVAC technician. His weight, age and physical difficulties are readily observable and have a negative effect in an interview setting. He has difficulty sleeping and has to lie down frequently to relieve pain. This would cause problems with attendance at even sedentary to light work. Light duty would be an option based upon Dr. Coyle's restrictions but Dr. Coyle did not have all of the medical records related to the prior back condition or the pre-existing diabetes. He did not assess Claimant's complete medical picture.

The opinion from Delores Gonzalez is not persuasive. She did not meet with, talk to, or personally observe Claimant. She found Claimant's prior injuries and disabilities were not a hindrance or obstacle to his employment. However, like Mr. England, she opined there are no jobs available in the open labor market based on Dr. Volarich's restrictions, but Claimant could work sedentary and light jobs according to Dr. Coyle's restrictions.

I find the opinions of Dr. Volarich and Mr. England credible. Claimant made a respectable effort to maintain his employment as long as possible. Ultimately, given the combination of his low back conditions and his diabetes, he was simply unable to sustain employment after August 31, 2007.

Based on my observation of Claimant and his physical limitations, I find no employer in the usual course of business would reasonably be expected to employ Claimant. Claimant appears to me to be a hard-working gentleman who would prefer to work. However, there is no work in the open labor market that he could perform.

Claimant is permanently and totally disabled as a result of the combined effects of his December 15, 2005 work injury and his preexisting disabilities. I find Claimant's total disability became permanent September 1, 2007. The SIF is liable for the weekly differential of \$160.56 for 68 weeks beginning September 1, 2007, and, \$525.64 per week thereafter, for Claimant's lifetime, or as long as provided by law.

**ATTORNEY'S FEES**

This award is subject to a lien in the amount of 20% of the additional payments hereunder, in favor of Claimant's attorney, Ann G. Dalton, for necessary legal services rendered to Claimant.

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

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

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