

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

Injury No.: 09-095022

Employee: Richard L. Meyer  
Employer: Cinco Development Company (Settled)  
Insurer: Amerisure Insurance Company (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 July 9, 2013. The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 9, 2013, 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 21<sup>st</sup> day of November 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

John J. Larsen, Jr., Chairman

---

James G. Avery, Jr., Member

---

Curtis E. Chick, Jr., Member

Attest:

---

Secretary

## AWARD

Employee:	Richard L. Meyer	Injury No.:	09-095022
Dependents:	N/A		Before the
Employer:	Cinco Development Company (Settled)		<b>Division of Workers'</b>
Additional Party:	Second Injury Fund		<b>Compensation</b>
Insurer:	Amerisure Insurance Company (Settled)		Department of Labor and Industrial
Hearing Date:	June 17, 2013		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	EJK/kr

### 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: March 17, 2009
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:  
The claimant, a carpenter, suffered a torn anterior cruciate ligament while lifting a plywood subfloor.
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 knee
14. Nature and extent of any permanent disability: 37 ½% permanent partial disability to the right knee
15. Compensation paid to-date for temporary disability: \$13,838.72
16. Value necessary medical aid paid to date by employer/insurer: \$63,520.16

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$794.03
- 19. Weekly compensation rate: \$529.35/\$404.66
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Settled

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:  
weekly differential (\$124.69) payable by SIF for 60 weeks beginning June 22, 2011,  
and, thereafter, \$529.35 for Claimant's lifetime Indeterminate

TOTAL: Indeterminate

- 23. Future requirements awarded: None

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: Robert J. Keefe, Esq.

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

Employee:	Richard L. Meyer	Injury No.: 09-095022
Dependents:	N/A	Before the
Employer:	Cinco Development Company (Settled)	<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Amerisure Insurance Company (Settled)	Jefferson City, Missouri Checked by: EJK/kr

This workers' compensation case requires a determination of Second Injury Fund liability arising out of a work related injury in which the claimant, a carpenter, suffered a torn anterior cruciate ligament while lifting a plywood subfloor. The sole issue for determination is Second Injury Fund liability. The evidence compels an award for the claimant for permanent total disability benefits from the Second Injury Fund.

At the hearing, the claimant testified in person and offered depositions and reports from David T. Volarich, D.O., and James M. England, two Workers' Compensation settlements, the report of injury in the instant case, correspondence from the claimant's attorney, a job search log completed by the claimant, and medical records from Orthopedic Associates, LLC. The defense offered a deposition of Terry L. Cordray, and medical records from Orthopedic Associates, LLC.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

### **SUMMARY OF FACTS**

On March 17, 2009, the claimant, a fifty-seven year old, carpenter, suffered a torn anterior cruciate ligament while lifting a 75-pound sheet of ¾ inch plywood. The employer asked him to nurse it along to get through the building season, and the claimant's treatment didn't begin until December 2009. After conservative measures failed, Dr. Haupt performed a right medial meniscectomy and debridement of chondromalacia on January 4, 2010. The post operative diagnosis was "acute and chronic tearing of the medial meniscus, grade III chondromalacia medial femoral condyle, chronic ACL deficiency, and grade III and IV chondromalacia patellofemoral joint right knee." See Exhibit F. The claimant's recovery was poor. On February 11, 2011, the claimant went to Dr. Nogalski, who performed a right knee anterior cruciate ligament reconstruction surgery. On June 22, 2011, Dr. Nogalski released the claimant at maximum medical improvement with permanent restrictions. See Exhibit III. Dr. Nogalski opined that the claimant could return to work with restrictions of no lifting over 50 pounds over shoulder level, no pushing or pulling greater than 110 pounds, and occasional kneeling, crawling, and climbing. See Exhibit III. The claimant received temporary total disability benefits until released by Dr. Nogalski in June 2011. Uncertain if he could work, but certainly in need of income, he applied for unemployment benefits and began looking for work. He testified that he earnestly and diligently sought employment during the period he received

unemployment benefits without success. When it became clear that there was no work available that he was capable of doing, he eschewed unemployment benefits and successfully applied for social security disability benefits.

The claimant testified that he continues to have pain, swelling, buckling, popping, weakness, and a limp as a result of the right knee injury. He wears an “unloader” brace and takes ibuprofen. He now avoids ladders almost entirely. Stairs are difficult, and he needs a handrail to ascend. He cannot get out of a squat without help. Increased activity causes more pain and swelling. He settled his workers’ compensation with his employer on the basis of a 37½% permanent partial disability to his right knee. See Exhibit J.

#### Prior left knee injury

The claimant injured his left knee in 2005, carrying a steel beam at work and required two surgeries. Dr. Lusardi repaired the left medial meniscus and noted a torn posterior cruciate ligament and torn anterior cruciate ligament in the first surgery. See Exhibit C, 4/11/06 office note. Some months later Dr. Nogalski performed a left ACL reconstruction using a quadruple left hamstring graft. The post-operative diagnosis was “torn anterior cruciate ligament, left knee, partial PCL tear, and chondromalacia.” See Exhibit C, op. note. After convalescence, the claimant continued to experience pain, weakness, and walked with a limp. He took ibuprofen, lifted less weight, and sought more assistance from co-workers. He avoided kneeling and was slower and more careful on ladders. Sitting for a long time made the knee stiff and sore. He settled his workers’ compensation claim with his employer on the basis of a 20% permanent partial disability to his left knee. See Exhibit D.

The claimant testified that he is 57 years old, is 5 feet, 9 inches tall, and weighs 180 pounds. He finished high school and can read, write and do basic math. During high school, at about 16 years of age, he began training as a carpenter as part of a high school work-study program. For the next 40 years he worked as a framing carpenter building houses. Before his final injury, he had no plans to retire until he was 62 years old. During his 18 years with this employer, the claimant was sometimes a “working foreman,” but that required him to do the regular duties of a framing carpenter plus the additional duties of supervising 3 or 4 workers. He never used a computer and did minimal paperwork, i.e., he sometimes filled out time sheets. As a framing carpenter the claimant did extensive bending, twisting and lifting, up to a hundred pounds or more when raising walls, carrying I-beams, headers or other lumber. He was on his feet all day, and a third of his work was overhead. Part of each workday required him to kneel. He used hand tools, saws, drills, nail guns, staplers, and other tools.

The claimant testified that after the two left knee surgeries he had to rely more on his right leg to do his work. For instance, he would put more weight on it to advance up a ladder. The claimant testified that after injuring the right leg he lost the ability to rely on the opposite leg and that he is now worse overall. He testified that his daily activities are limited. He spends some four hours each day in a recliner, which allows him to elevate his knees. He watches television and does some reading. His yard is about ¼ acre and he mows it with a self-propelled mower. He owns a treadmill and can walk about a mile before he has to stop. This takes him about 25 minutes, a rate of just over 2 miles per hour. He occasionally fishes or hunts, but he

cannot hunt quail any longer because of the amount of walking involved. He has climbed the six or seven rungs to get into a deer stand, but doing so was arduous.

The claimant testified that he would not now be able to work his former jobs. He can no longer do the required standing, squatting, kneeling, twisting, and lifting. He has looked for other jobs, and produced a partial list of his efforts. See Exhibit I. He also checked the local newspaper for job openings, but has not been able to find work that he can do. The claimant testified that he was quite familiar with the home construction industry from the point of view of a frame carpenter, having worked as one for some 40 years. The claimant testified that there are no purely supervisory jobs and that even foremen must pull their own weight.

David T. Volarich

Dr. Volarich examined the claimant on November 29, 2011, and reviewed his medical chart. He opined that the claimant suffered a 50% permanent partial disability to the right knee and a 35% pre-existing permanent partial disability to the left knee. He testified to synergy between the two injuries. See Dr. Volarich deposition, pages 9-10. Dr. Volarich testified that the claimant could not return to being a carpenter due to his knees. See Dr. Volarich deposition, page 11. He wasn't sure if the claimant could return to any work and recommended that he seek a vocational evaluation. See Dr. Volarich deposition, page 11. He advised the claimant to avoid all stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers, navigating uneven terrain, slopes, steps, ladders, and to handle weight to tolerance. See Dr. Volarich medical report, page 8.

James M. England, Jr.

Mr. James England, a licensed vocational counselor, interviewed the claimant on April 17, 2012, after reviewing the claimant's medical chart. Vocational testing revealed that the claimant scored at the 7<sup>th</sup> grade level on reading and 6<sup>th</sup> grade on math. See England deposition, page 7. His work history was limited to carpentry, which Mr. England characterized as medium to heavy work. See England deposition, page 8. Mr. England testified that if he based his opinion solely on Dr. Nogalski's restrictions, which dealt with functional limitations on lifting, stooping, and squatting, there are entry-level light work positions that the claimant could perform, though such jobs are harder to find in the vicinity of the claimant's residence in New Haven – Washington, Missouri. See England deposition, page 9. He also opined that the claimant would be unemployable given the restrictions prescribed by Dr. Volarich combined with the claimant's self-imposed limitations (putting his leg up in a reclining chair at intervals during the work day). See England deposition, page 10. But considering the restrictions listed by Dr. Volarich, which included the claimant's limitation that he cannot be on his feet for long periods and must elevate his legs throughout the day to deal with pain and swelling, the claimant is unemployable. See England deposition, pages 10, 12. He also pointed out that the unemployment rate, across the country and in Missouri, is at historical highs and that the claimant would not be employable as a supervisory foreman, because such positions usually require the supervisor to "work along with the people you're supervising" and because he cannot negotiate ladders and scaffolds. See England deposition, pages 10-11.

Mr. England admitted on cross-examination that the claimant's statement that he must elevate his legs during the day to reduce pain and swelling was an important factor in determining that employee was unemployable. He also agreed that the claimant drove to Chesterfield, Missouri, for work for many years and that there were no doctor restrictions that would prevent him from doing that in the future.

Terry Cordray

Mr. Cordray reviewed the claimant's medical chart and deposition and concluded that the claimant could find and perform regular, full-time work in the open labor market. See Cordray deposition, page 23. Mr. Cordray opined that the claimant can no longer be a carpenter but that the claimant could, under Dr. Nogalski's restrictions, be employed as a "supervisor of carpenters" and "designate the three or four others that were subordinates to do any lifting over 50 pounds over the shoulder level and do any pushing or pulling that exceeded 100 pounds." See Cordray deposition, page 21. He was unwilling to concede that Dr. Nogalski's restrictions in the 2009 case applied only to the right knee, but finally agreed that he didn't really know what Dr. Nogalski meant on that subject. See Cordray deposition, pages 37-39. He did not know the unemployment rate in Missouri or in the area where the claimant currently resides, nor did he know how many people were out of work. See Cordray deposition, page 40.

The claimant has no computer skills, has never done bidding or estimating, and never went back to work after the final surgery. He testified that he relied on data from the Bureau of Labor Statistics as part of his job, but was not familiar with the statistic that describes the ratio between available jobs and those who are actively seeking them. See Cordray deposition, page 45.

### **SECOND INJURY FUND**

Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in [a]ll cases of permanent disability where there has been previous disability. For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent, total disability is the worker's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. Id. at 48.

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability."
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Based on the entire record, the claimant suffered a compensable work related injury in 2009 resulting in a 37 ½% permanent partial disability to the right knee (60 weeks). At the time the last injury was sustained, the claimant had a 20% pre-existing permanent partial disability to the left knee (32 weeks). The permanent partial disability from the last injury combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 15%.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how he performs many activities both at home and at work due to the combination of the problems.

The critical question is whether the claimant is employable in the open labor market given his age (mid 50's), education (High School graduate), past relevant vocational history (heavy carpentry), and his restrictions and limitations from his knee conditions. In this case, the forensic experts offered strikingly different conclusions from their different perspectives. Dr. Nogalski opined that the claimant had far fewer restrictions than Dr. Volarich. One explanation for this different conclusion may be that Dr. Nogalski's restrictions relate only to the knee

condition that was the subject of his report and do not account for the claimant's restrictions relating to his pre-existing permanent partial disability to his opposite knee. Dr. Volarich clearly related his restrictions to the claimant's overall condition and did not limit them to the last injury alone. Since no clarification was provided, this is a possible explanation of how two well qualified forensic experts could differ in their conclusions. Using this reasoning, one should accord Dr. Volarich's restrictions more value in determining the claimant's overall condition in this analysis.

The vocational experts appear to agree that the claimant cannot return to his past occupation. Assuming restrictions from the claimant's knee surgeon for the most recent occurrence, the claimant could perform entry level light work, but Dr. Volarich's restrictions would limit the claimant to sedentary or light work activity.

Even using Dr. Volarich's restrictions, the two forensic vocational experts differed in their evaluation of the claimant's employability in the open labor market. Mr. Cordray opined that the claimant would be able to obtain employment in entry level positions as a parking garage cashier in downtown St. Louis or at an airport, as a bill collector in Kansas City, or as a telemarketer in St. Louis. He also opined that the claimant could secure employment as a supervisory foreman delegating heavy work to co-employees. See Cordray deposition, pages 21, 23, 24. There are several problems. First, the claimant doesn't live in St. Louis or Kansas City. Mr. England testified, "I think the problem is this guy lives out in Washington, Missouri, Franklin County. Sedentary, unskilled work is really hard to find, especially when you're fifty-five years old and you've done nothing but carpentry your entire career. In a bigger city, it's easier to find entry-level kinds of jobs that do allow you to sit down." See England deposition, page 9. To expect that the claimant would drive sixty plus miles one way to downtown St. Louis from his home in New Haven, Missouri, is not a realistic assumption. Certainly, the claimant would be more employable in North Dakota, the site of the modern oil boom. However, he lives in New Haven, Missouri, and driving over 120 miles round trip to St. Louis on a daily basis to work a near minimum wage entry level position is not a realistic assumption. Second, Mr. England opined that the claimant could not perform the duties of a supervisory foreman in the carpentry field, because "there aren't that many non-working foreman positions any more" and the positions that do exist require the supervisor to "work along with the people you're supervising." See England deposition, page 11. Third, even the ones that aren't, you are required to climb up and down ladders, to get up on scaffolds. I mean, they just can't ... sit in a truck or something and watch people. They have to get out on the construction sites, walk around on uneven ground, go up and down ladders, get up on scaffolds." See England deposition, page 11. Mr. England credibly testified with more specificity about the claimant's condition and positions actually available in the claimant's location. Mr. Cordray testified about positions that may not actually exist in the claimant's location, assumed that the claimant would drive 120 plus miles per day to perform a near minimum wage position, and is more hypothetical than Mr. England's findings. Finally, Mr. England credibly inferred that the claimant would be at a competitive disadvantage, because his vocational testing suggests that the claimant does not function as a high school graduate, given his performance at the seventh grade level on reading and sixth grade level on math on vocational testing. See England deposition, page 7. Mr. Cordray acknowledged that the claimant was a high school graduate but did not address the vocational testing results. See Cordray deposition, page 17.

In addition, the claimant testified and presented his log of his attempts to secure employment after his medical care resulting from the accident ended. See Claimant's Exhibit I. Given the claimant's unsuccessful pursuit of employment after the accident and Mr. England's credible analysis of the claimant's employability, the evidence compels a finding that the claimant is not employable in the open labor market due to a combination of his age, education, past relevant vocational history, and his restrictions and limitations from his permanent partial disability from the last injury and his pre-existing permanent partial disabilities. Based on the credible evidence in the record, the claimant is permanently and totally disabled and is awarded permanent total disability benefits from the Second Injury Fund for the reasons stated above.

### **CONCLUSION**

Based on the entire record, the Second Injury Fund is liable to the claimant for permanent total disability benefits. The attorney for the claimant is entitled to an attorney fee of 25% of this award.

Made by: \_\_\_\_\_  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*