

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

Injury No. 09-080798

Employee: Daniel Mroz
Employer: State of Missouri, Missouri State University (Settled)
Insurer: C A R O (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 8, 2014. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued April 8, 2014, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 23rd day of October 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Daniel Mroz Injury No. 09-080798

Dependents: N/A

Employer: State of Missouri, Missouri State University

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

Insurer: CARO

Hearing Date: 1/7/14

Checked by: MEH

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: 10/7/09
5. State location where accident occurred or occupational disease was contracted: GREENE COUNTY, MO
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: HELPING LIFT a 100 POUND DRAIN SNAKE ONTO a ROOF.
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: LOWER BACK
14. Nature and extent of any permanent disability: 15%
15. Compensation paid to-date for temporary disability: \$1,224.46
16. Value necessary medical aid paid to date by employer/insurer? \$17,077.02

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$632.36
- 19. Weekly compensation rate: \$421.57
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: N/A

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer (PREVIOUSLY SETTLED)

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential \$0 payable by SIF for 60 weeks, beginning 5/12/11,
and, \$421.57 thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded:

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:

JOE HOSMER

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Daniel Mroz Injury No. 09-080798
Dependents: N/A
Employer: State of Missouri, Missouri State University
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: CARO
Hearing Date: 1/7/14 Checked by: MEH

The parties appeared before the undersigned administrative law judge on January 7, 2014, for a final hearing. The claimant appeared in person represented by Joseph Hosmer. The employer and insurer did not appear as the claim against the employer and insurer was previously settled. The Second Injury Fund appeared represented by Kim Fornier.

The parties stipulated to the following facts: On or about October 7, 2009, The State of Missouri, Missouri State University, was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by CARO. On the alleged injury date of October 7, 2009, Daniel Mroz was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. The employment occurred in Greene County, Missouri. The claimant notified the employer of his injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the accident, the claimant's average weekly wage was \$632.36 sufficient to allow a compensation rate of \$421.57 for temporary and permanent total disability compensation. Temporary disability benefits have been paid by the employer and insurer to the claimant in the amount of \$1,224.46, which represents 2 6/7 weeks of benefits. The employer and insurer have paid medical benefits in the amount of \$17,077.02.

The parties agree that claimant reached maximum medical improvement on May 12, 2011. The attorney fee being sought is 25%.

ISSUES:

1. Whether the claimant sustained an accident which arose out of the course and scope of his employment.
2. The nature and extent of permanent disabilities.
3. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Claimant testified at the hearing. I find him to be a credible witness. The claimant is 57 years old. He graduated from high school in 1974. He attended community college but did not finish. He also attended Arizona State University part-time in the late 1970's, but did not finish. In 1985 he returned to Michigan and finished his associate degree in business administration from Oakland Community College. He has also received real estate training but did not obtain his license.

Claimant's past employment includes working in Arizona at Holsom Bread from 1978-1982 as a foreman. He worked at a newspaper in Los Angeles, California, for about a year and a half in the credit department. He then moved to the east coast and started a construction company in Virginia. He moved to Michigan in 1984 where he finished his associate's degree.

He worked in Michigan at a manufacturing plant where he ran a thread roller. He then started painting and was a self-employed painting contractor for about fifteen years. He then worked at a bakery for about four and a half years and continued to paint on the side. He next worked at Bass Pro as a computer operator for five years. He went to work for Missouri State University in January 2008.

Claimant worked in the maintenance department at Missouri State University. His duties included various activities involved in maintaining the buildings, such as electrical, plumbing, drywall, painting, lighting, flooring, roofing, etc.

On October 7, 2009, he and a plumber were attempting to repair a blocked drain in a building, accessing the drain on the roof. They were using a snake, a metal rope like motorized mechanism. It is put down the drain. This snake weighed approximately one hundred pounds. The claimant was assisting the plumber who was climbing up a ladder pulling the snake. The claimant was below pushing it up. As they were on the roof setting the snake down, the claimant felt a pop on the right side of his back.

The claimant testified that he did not have a lot of pain immediately. They finished and got the snake back to the ground. The claimant then felt a sharp pain in his back and he could hardly stand up. The claimant reported his injury to his foreman the same day.

The employer provided the claimant treatment at Taylor Health Center on campus. He was diagnosed with acute low back strain. Dr. Scott ordered an x-ray, prescribed medication and sent him home. Claimant was off work for one week. When he returned for a follow-up appointment he was prescribed physical therapy and placed on light duty. In November 2009, Dr. Scott felt he needed to be evaluated by a physical medicine or rehabilitation specialist or an orthopedic surgeon.

Claimant was referred to Dr. Ted Lennard, a physical medicine specialist. Dr. Lennard examined him on December 8, 2009. He found the work injury to be the prevailing factor for his current complaints, but noted preexisting spondylolisthesis at L4-5.

He ordered an MRI and sent claimant to work conditioning. The MRI showed no impingement. Dr. Lennard performed facet joint injections in December 2009 and January 2010

and imposed a 20 pound lifting restriction. Dr. Lennard released claimant to full duty on February 15, 2010.

On March 4, 2010, Dr. Lennard found claimant to be at maximum medical improvement. He rated claimant with a permanent partial disability of 8% of the body as a whole, with 3% attributed to the work related strain and 5% pre-existing.

The claimant returned to Dr. Lennard on May 3, 2010, with worsening pain. Dr. Lennard scheduled repeat lumbar facet injections, took the claimant off work and recommended a surgical consultation.

Dr. Mark Crabtree performed a surgical evaluation on May 11, 2010. He concluded the claimant was not a surgical candidate and referred the claimant to physical therapy. Claimant continued to attend physical therapy and follow-up with Dr. Lennard and Dr. Crabtree.

On July 15, 2010, Dr. Lennard ordered a functional capacity evaluation.

On February 11, 2011, Dr. Lennard recommended work conditioning/core exercise training for four weeks. On March 10, 2011, Dr Lennard returned claimant to full duty work but did state that the claimant may ultimately require a job change due to his ongoing complaints. An epidural steroid injection was performed on March 13, 2011. On April 5, 2011, Dr. Lennard imposed a thirty pound work restriction and avoid prolonged bending. On April 26, 2011, Dr. Lennard found claimant to be at maximum medical improvement and made the restrictions permanent.

On May 12, 2011, Dr. Lennard issued another rating report in which he rates claimant with permanent partial disability of 15% of the body as a whole, 5% attributable to the work injury and 10% pre-existing.

Claimant had been working on light duty. After his release he returned to work but he could not perform his duties with his permanent restrictions. He testified that he was eligible for

some continued vacation and family leave. When these ran out, he resigned and last worked on July 1, 2011. He settled his claim with the employer on April 18, 2012, for 15% of the body as a whole.

Around that time, claimant went to work for Edible Arrangements part-time as a delivery driver. The owners are friends of his. He worked an average of five hours a week, some weeks more. His duties included driving the employer owned delivery van. He would carry the fruit arrangements from the cooler and put them in the van. When he reached the customer's address he would take them out of the van and deliver them to the door. Claimant testified that this caused him pain in his back and knees. He was terminated from Edible Arrangements in June 2012 because the employer did not think he should be driving while taking Hydrocodone.

In November 2012 Missouri State University contacted the claimant and offered him a part-time computer job involving the work order system. He worked in this position from November 2012 to the end of January 2013. This position was sedentary. He worked twenty hours a week. He resigned from this job because of pain and limitations involving his low back, neck, upper back and right shoulder. He does not believe he could work a full time job.

Claimant testified that his current complaints from the October 7, 2009, injury include sharp pain in his low back, mostly on the right and radiating into his right buttock; tingling in his right leg and both feet; and numbness in both thighs. At the present time, the claimant testified that he takes Hydrocodone, muscle relaxers, anti-anxiety medication, and amitriptyline for the work injury. He also takes other medications for his stomach and asthma. He said these medications cause him memory problems, dry mouth, and difficulty sleeping.

Claimant had prior injuries before October 7, 2009. In 1979 he was involved in a motorcycle accident. He broke his pelvis. Since that time he has had ongoing low and upper back problems and a painful hip. Prior to October 7, 2009, the pain was mostly aching. He

would have problems sitting and standing, at times would need to lean to one side. He took medication periodically. These include Hydrocodone, Oxycontin, muscle relaxers and anti-anxiety medication.

In 1999 he was rear ended and suffered a whiplash injury. He was treated by Dr. Ronald Pak for neck pain. Claimant testified that he would regularly go to a chiropractor for his back and neck since the 1970's.

In 1999-2000 he had a right shoulder surgery as the result of a work-related injury. Dr. Marion Wolf performed an arthroscopic subacromial bursectomy and decompression. He settled his workers' compensation case for 25% permanent partial disability on November 1, 2000. He continued to receive conservative treatment including pain medication for his right shoulder, low back and neck.

He injured his left knee in 1984. He injured his right knee. He has had no treatment for his knees. His knees have bothered him since he injured them.

He has had two hernia repair surgeries.

He began having carpal tunnel symptoms to both wrists while working at the bakery. He has continued to experience popping and tingling in both wrists since that time. He has not had any treatment for this condition.

Claimant testified that before the injury of October 7, 2009, these conditions caused him problems gripping such things as wrenches. His low back required him to be careful how he lifted. His back ached. His upper back and shoulder caused him lots of problems with overhead work. When working on lighting he had difficulty looking up and would have to stop frequently to rest. He also had difficulty reaching overhead. He would get help when he needed to lift, approximately once or twice a week. He also had difficulty kneeling and getting back up due to knee and low back pain.

He testified that he also had difficulty performing work around his house before October 7, 2009. This included cleaning the bathtub and yard work, particularly pushing a mower. Since the work injury he now lives alone as his kids are grown. He continues to have difficulty doing a lot of housework. He will do laundry, mow his yard with a self-propelled mower, and will watch his grandson once or twice a week. This involves him sitting in a chair. He said it is very hard for him to play with his grandson or to lift him. He has difficulty leaning over the sink or stove.

Before October 7, 2009, he had difficulty sitting and standing. He could run, and said he would run/walk two to three miles a day on a track. He can no longer do this. He tries to walk about two to three miles a week now.

Dr. Robert Paul examined the claimant on September 27, 2011. He testified by deposition. Dr. Paul found that the prevailing factor in causing his current complaints to the lumbar spine was the work injury of October 7, 2009. He found claimant had developed chronic low back pain syndrome and discogenic pain at L4-5. He felt claimant would need anti-inflammatory and non-narcotic medications for two years and that he needs to wean off the Norco.

Dr. Paul imposed permanent disability ratings of 20% to the body as a whole related to the October 7, 2009, injury. He also found claimant to have prior disability of 8% to the body as a whole at the 400-week level related to spondylolisthesis of the lumbar spine; 25% of the right shoulder at the 232-week level; 13% to the body as a whole at the 400-week level related to the cervical spine; and 6% of the body as a whole at the 400-week level related to the thoracic spine.

Dr. Paul felt claimant's pre-existing disabilities constitute a hindrance or obstacle to employment. He felt a 15% load would be appropriate. In his opinion, claimant would benefit from a vocational rehabilitation evaluation to determine if he had transferrable skills. If it was

determined he did not, Dr. Paul stated claimant would be permanently and totally disabled as a result of a combination of his pre-existing disabilities and the last injury.

Phil Eldred, a certified vocational rehabilitation counselor evaluated the claimant on February 21, 2012. He testified at the hearing. Mr. Eldred interviewed the claimant and reviewed medical records. He testified that he found claimant's illnesses and injuries significant and concluded that claimant did have an impairment that was vocationally disabling and constituted a hindrance or obstacle to employment before October 7, 2009. Mr. Eldred found that the claimant was restricted to sedentary work, could no longer perform his past work, and had no transferable skills. Based on this, he concluded that as a result of claimant's pain, impairments, and vocational restrictions, as well as his use of narcotic pain medication, it is unlikely that an employer in the normal course of business would consider employing the claimant.

Mr. Eldred testified that in his opinion, the claimant is permanently and totally disabled and is unemployable in the open labor market. He continued to find that the claimant was permanently and totally disabled as a result of his pre-existing disabilities combined with the injury of October 7, 2009. He further said that when claimant attempted to return to light duty work with restrictions he was not capable of performing all the essential duties of his job. He also testified that he did not consider the job at Edible Arrangements to be productive employment in the open labor market because it was only five hours a week on the average. He also found the computer job the claimant worked at for two and a half months to only be twenty hours a week and noted claimant left due to his pain. It said it was significant to him that the claimant tried both of these jobs as he felt it showed he wanted to work.

After carefully considering all of the evidence, I make the following rulings:

1. Whether the claimant sustained an accident which arose out of the course and scope of his employment.

I find the claimant sustained an accident which arose of the course and scope of his employment on October 7, 2009, when he felt a pop and pain in his back while lifting the snake to the roof in order to help repair a pipe as part of his duties as maintenance for Missouri State University.

2. The nature and extent of permanent disabilities.

I find that claimant has sustained a permanent partial disability of 15% of the body as a whole referable to the low back, consistent with the medical records, testimony and settlement of his work-related injury of October 7, 2009.

3. The liability of the Second Injury Fund for permanent total disability.

Section 287.220.1 RSMo states that when an employee has a preexisting permanent partial disability sufficient to constitute a hindrance or obstacle to employment and subsequently sustains a compensable work injury resulting in additional disability, and these disabilities combine to create an additional permanent disability, the employer, at the time of the last injury, shall be responsible only for the degree or percentage of disability resulting from the last injury. After the disability from the last injury, standing alone, has been determined, the degree of disability attributable to all the injuries sustained is determined. The degree of disability from the last injury is deducted and the Second Injury Fund is liable for the balance. If the last injury, combined with prior injuries or disabilities, results in the claimant being unable to compete in the open labor market, and is thus permanently and totally disabled, the minimum standards for disability do not apply. If the claimant is found to be permanently and totally disabled, the Second Injury Fund is liable for benefits after the completion of payment by the employer for the disability due to the last injury.

I find that prior to October 7, 2009, claimant had injuries that constituted a hindrance or an obstacle to employment; namely, low back pain, neck pain, shoulder surgery, and knee

injuries. As a result of the last injury of October 7, 2009, he sustained an injury to his low back. The extent of disability of claimant for the last injury of the low back is 15% of the body as a whole at the 400-week level as reflected in the Stipulation for Compromise Settlement entered into by the claimant and employer and insurer.

Based upon the testimony of Dr. Paul and Mr. Eldred, I find that the claimant is unable to compete in the open labor market as a result of the combination of these prior injuries and the injury to his back that is the subject of this claim. Therefore, I find that the Second Injury Fund is liable for permanent total disability. The claimant settled his claim against the employer and insurer for a total of 60 weeks representing 15% of the low back at the 400-week level. I find that the claimant was at maximum medical improvement as of May 12, 2011. Accordingly, the Second Injury Fund shall pay no a weekly differential for 60 weeks beginning May 12, 2011, and then \$421.57 weekly for claimant's lifetime.

Attorney for the claimant, Joe Hosmer, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation