

FINAL AWARD ALLOWING COMPENSATION
(Modifying the Award of the Administrative Law Judge)

Injury No.: 08-068231

Employee: Ronald Paule
Employer: Coibion Concrete (Settled)
Insurer: Acuity Mutual (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo.¹ We have read the briefs, reviewed the evidence, and considered the whole record. We find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the July 19, 2012, award and decision of the administrative law judge, as modified herein. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The administrative law judge found employee sustained an injury arising out of and in the course of his employment that resulted in a 15% permanent partial disability of the left foot at the 110-week level.

The administrative law judge found employee had preexisting permanent partial disabilities constituting hindrances or obstacles to employment as follows: 35% of the body as a whole referable to the cervical spine; 30% of the left foot at the 110-week level; and, 10% of the body as a whole referable to the low back. The administrative law judge determined that only the preexisting disabilities of the cervical spine and left foot met the minimum thresholds for inclusion in the calculation of Second Injury Fund liability for enhanced permanent partial disability.

On November 12, 2013, the Missouri Supreme Court issued its opinion in *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, No. SC92834 (Mo. banc, November 12, 2013). The Court ruled that when a claimant proves that any preexisting condition meets one of the statutory thresholds set forth in § 287.220.1 RSMo, all measurable preexisting conditions that constitute a hindrance or obstacle to employment and combine synergistically with the disability from the primary injury are properly included in the calculation of Second Injury Fund liability.

The parties have filed a Joint Motion for Resolution whereby they agree that under the holding in *Witte*, employee's preexisting low back condition should be included in the

¹ Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

Employee: Ronald Paule

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calculation of Second Injury Fund liability in this matter. The parties request that we modify the administrative law judge's award of liability, as follows:

[T]he Fund is liable for permanent partial disability benefits in the amount of \$10,710.31 representing 15% of the left foot at the 110 week level, 35% of the cervical spine, 30% of the left foot at the 110 week level, and 10% of the lumbar spine, using a 20% load factor. (16.5 weeks + 140 weeks + 33 weeks + 40 weeks = 229.5 weeks X 20% = 45.9 weeks X \$233.34 = \$10,710.31).

We agree with the parties' calculations and we modify the award as set forth above. In all other respects, we affirm the administrative law judge's award.

We further approve and affirm 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.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued July 19, 2012, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 26th 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: Ron Paule

Injury No.: 08-068231

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Coibion Concrete (previously settled)

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

Additional Party: Second Injury Fund (SIF)

Insurer: Acuity Mutual (previously settled)

Hearing Date: May 9, 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: July 22, 2008
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 foot 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 foot
14. Nature and extent of any permanent disability: 15% left foot
15. Compensation paid to-date for temporary disability: \$2,800.08
16. Value necessary medical aid paid to date by employer/insurer? \$7,865.86

Employee: Ron Paule

Injury No.: 08-068231

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$233.34
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

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

37.9 weeks of permanent partial disability from Second Injury Fund	\$8,843.59
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TOTAL:	\$8,843.59
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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:

Colleen Vetter

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ron Paule

Injury No.: 08-068231

Dependents: n/a

Before the
**Division of Workers'
Compensation**

Employer: Coibion Concrete (previously settled)

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

Additional Party: SIF (only)

Insurer: Acuity Mutual (previously settled)

Checked by: KMH

A hearing was held on the above captioned matter May 9, 2012. Ron Paule (Claimant) was represented by attorney Colleen Vetter. The Second Injury Fund (SIF) was represented by Assistant Attorney General Maria Daugherty. Coibion Concrete (Employer) and Claimant previously settled the primary claim in this matter.

STIPULATIONS

The parties stipulated to the following:

1. Claimant was injured by accident July 22, 2008, while in the course and scope of his employment for Employer.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Acuity 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 entitle him to a PPD rate of \$233.34.
6. Claimant and Employer entered into a compromise lump sum settlement on October 27, 2009. The settlement was approved by the Division and Claimant sustained 15% PPD to his left foot at the 110 week level.

ISSUES

The parties stipulated the issue to be resolved by trial is the nature and extent of SIF liability.

FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

1. Claimant is a 41 year-old male who works as a concrete laborer. On July 22, 2008, Claimant was unloading a dump truck when a heavy load of plywood crushed his left foot. He was diagnosed with minimally displaced fractures of the third, fourth, and fifth metatarsals. He was treated non-operatively with a removable boot and bone stimulator. He underwent extensive physical therapy and was released to work full duty October 14, 2008, with the recommendation to wear a supportive orthotic. He settled this case with Employer for 15% of his left foot at the 110 week level.
2. Claimant continues to have stiffness, swelling and pain in his foot. His pain is in the arch of his foot around the Achilles tendon and in his heel. He loses his balance if he walks on uneven or rough terrain. He has difficulty with stairs and avoids impact activities. He has a limp by the end of the work day. He has refused ladder and high work because he is unsteady due to left foot pain. He continues to wear orthotics.
3. Claimant also injured his left foot at work in August 1994 when his foot was pinned between a forklift and a steel rack. He treated with Dr. Strickland who diagnosed a comminuted fracture of the base of the second metatarsal and a minimally displaced and non-displaced fracture of the third and fourth metatarsal bases. He was put in a short leg cast and sent for extensive physical therapy. Dr. Strickland prescribed orthotics, which Claimant continues to wear. Claimant settled this case with Employer for 30% of the left foot and 5% of the left knee.
4. Claimant testified the 1994 foot injury left him with pain in a different area of his foot than the 2008. Following his 1994 injury, he had pain at the top of his left foot and closer to the ankle. He had swelling with extensive walking, and he had pain with weather changes. These complaints continued leading up to the primary injury. Since the primary injury, he has been unable to stand on his tip toes, and he limps at the end of a work day.
5. Claimant injured his low back at work in August 1991 when he slipped on a wet floor. He was diagnosed with a low back strain and sent for diathermy treatment. Following his treatment, he continued to have low back pain, asked for help with lifting at work, and wore a back brace at work. Claimant settled this case with Employer for 7.5% of the body referable to the low back.
6. Claimant testified his back symptoms progressively worsened over the years. He tried to avoid heavy lifting at work, and asked co-workers for help. He also tried to avoid using the jackhammer and pushing the wheelbarrow. He has not had treatment for his low back complaints since his release in 1992.
7. In 2005 Claimant was involved in a motor vehicle accident and developed neck pain, low back pain, and shoulder problems. He sought treatment with Dr. Albanna and was diagnosed with cervical spondylosis, disc degeneration, and early signs of myelopathy

with radiculopathy. Dr. Albanna performed a C3-7 fusion in February 2006. Claimant continues to have stiffness and lost motion in his neck. He has to turn his whole body to look behind him while driving. He has difficulty looking up. Lying down and sitting for more than an hour increase his symptoms. He has weakness and discomfort in his shoulders. At work, he tries to avoid using the jackhammer and wheelbarrow.

8. Claimant testified the three prior injuries together affected his work. His foot and neck bothered him every day at work. He had stiffness and was sore at the end of the day. He was able to work full time, but was slower at work and had pain. He took over the counter medications.
9. Claimant's medical expert, Dr. Volarich, reviewed the records and examined him in 1995 and 2011. He issued reports rating Claimant's disabilities and opined the combination of disabilities creates a substantially greater disability than their simple sum. He noted Claimant has loss of strength in the shoulders, atrophy in the right arm, and a loss of motion in the cervical spine due to his neck injury. His prior left foot and knee injuries have caused weakness and significant atrophy in his left leg. He had an increased loss of motion in his lumbar spine at the time of his 2011 evaluation as compared to 1995.
10. 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 is entitled to PPD benefits from the SIF.

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to

recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

Claimant's 2008 injury, the last injury, was compromised with Employer for 15% of the left foot at the 110 week level, for a total of 16.5 weeks of compensation. Based on the medical evidence and Claimant's testimony, I find this percentage accurately reflects Claimant's disability resulting from this injury.

As of the time the last injury was sustained, Claimant had preexisting permanent partial disabilities which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment. He testified to a serious injury to his left foot in 1994 that injured a different area than the primary injury. Claimant settled that case with his employer for 30% PPD of the left foot at the 110 week level, or 33 weeks. Based on the medical evidence and Claimant's ongoing complaints, I find this percentage accurately reflects Claimant's disability from his 1994 injury.

Claimant had an accident in 1991 to his lumbar spine and was diagnosed with a lumbar strain/sprain after a brief period of treatment. He settled that case with his employer for 7.5% permanent partial disability. Claimant testified credibly and the medical records show his low back pain progressed over time. In 2011 Dr. Volarich diagnosed chronic lumbar syndrome and increased his disability rating to 20% from 15% in 1995 to account for the increase in pain and loss of motion. Claimant continues to have low back pain without radicular symptoms. Dr. Volarich testified this indicates Claimant does not have nerve root impingement, disc problems or spinal stenosis. Claimant has had no treatment on his low back since 1992. While Claimant's symptoms have worsened since 1992, I find his low back condition does not meet the statutory threshold necessary to impose SIF liability. Based on Claimant's testimony and Dr. Volarich's opinion, I find Claimant had 10% PPD to his low back at the time of the last injury.

Finally, following his 4-level spinal fusion in 2006, Claimant had significant restrictions and symptoms. Based on the medical evidence and Claimant's ongoing symptoms, I find he has 35% PPD to the cervical spine, or 140 weeks, as a result of his neck injury.

I find Claimant's prior injuries were a hindrance or obstacle to his employment. The prior injuries that meet the statutory threshold total 173 weeks of disability. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 20% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 16.5 weeks for last injury + 173 weeks for preexisting injuries = 189.5 weeks x 20% = 37.9 weeks of overall greater disability. 37.9 weeks x \$233.34 = \$8,843.59.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$8,843.59 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

Made by: _____

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