

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

Injury No.: 05-135548

Employee: Charles Pierce
Employer: Dynaquip Controls Corp. (Settled)
Insurer: St. Paul Travelers (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 section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 15, 2011. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued March 15, 2011, 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 29th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Charles Pierce

Injury No. 05-135548

Dependents: None

Employer: Dynaquip Controls Corp. (settled)

Additional Party: Second Injury Fund

Insurer: (settled)

Hearing Date: December 6, 2010

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: GCG/ln

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 1, 2005
5. State location where accident occurred or occupational disease was contracted: Franklin 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? Not Applicable
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant slipped and fell injuring his right hip and leg in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right lower extremity
14. Nature and extent of any permanent disability: 45% of right hip, 15% right knee, 4% right ankle.
15. Compensation paid to-date for temporary disability: Unknown
16. Value necessary medical aid paid to date by employer/insurer? Unknown

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- 17. Value necessary medical aid not furnished by employer/insurer? \$0
- 18. Employee's average weekly wages: Undetermined
- 19. Weekly compensation rate: \$494.40 total disability benefits/\$365.08 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: (settled)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
Weekly differential (\$129.32) payable by SIF for 123 2/7 weeks beginning
June 6, 2006 and, thereafter, beginning October 15, 2008
the weekly benefit of \$494.40 for Claimant's lifetime.

TOTAL: SEE AWARD

23. Future requirements awarded: None

Said payments to begin as of the date of this award 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:

Thomas O'Driscoll

Employee: Charles Pierce

Injury No. 05-135548

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles Pierce

Injury No: 05-135548

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Dynaquip Controls Corp. (settled)

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

Additional Party Second Injury Fund

Insurer: (settled)

Checked by: GCG/ln

PRELIMINARY STATEMENT

The parties appeared before the undersigned Administrative Law Judge on December 6, 2010 for a final hearing in Franklin County, Missouri to determine the liability of the Second Injury Fund in the matter of Charles Pierce (Claimant). Attorney Thomas O'Driscoll represented Claimant. Assistant Attorney General Jennifer Sommers represented the Second Injury Fund. Employer and Insurer previously settled with Claimant and did not participate in the hearing. Mr. O'Driscoll requested a fee in the amount of 25%. The parties submitted post-trial briefs.

The parties stipulated to the following:

1. On or about November 1, 2005, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant. The accident occurred in Franklin County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Franklin County.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The applicable rates of compensation are \$494.4 for total disability benefits, and \$365.08 for permanent partial disability (PPD) benefits.
7. The parties made additional fact stipulations contained in Exhibit L, which was received into evidence.

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The sole issue to be determined is:

1. Liability of the Second Injury Fund

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this Award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Claimant offered Exhibits A through L which were received into evidence without objection.

The Second Injury Fund offered Exhibit I which was received into evidence without objection.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

1. Claimant sustained compensable injury to his right hip, right knee, and right ankle while working for Dynaquip Controls Corp., Inc. on November 1, 2005 resulting in a 45% permanent partial disability of the right hip (207 week level), 15% permanent partial disability of the right knee, and 4% permanent partial disability of the right ankle.
2. Prior to the November 1, 2005 work injury, Claimant had sustained injury to his neck requiring surgical fusion with instrumentation resulting in permanent disability of 27.5% of the body as a whole which was a hindrance or obstacle to employment.
3. Prior to the November 1, 2005 work injury, Claimant suffered from pulmonary disease resulting in permanent disability of 12.5% of the body as a whole which was a hindrance or obstacle to employment.
4. As a result of the combination of his work-related and pre-existing neck injuries, Claimant has been rendered permanently and totally disabled.

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5. The Second Injury Fund is obligated to pay wage differential benefits in the amount of \$129.32 per week for a period of 123.35 weeks beginning June 6, 2006, and thereafter \$494.40 weekly for Claimant's lifetime.

ANALYSIS

Claimant testified at hearing. His testimony was credible. He testified he slipped and fell while trying to tighten a fitting on a screw machine. The floor was oily and slippery, and because he has trouble with his hands, he lost his grip on the wrench and slipped and fell onto the concrete floor. As a result of the fall, Claimant broke his hip, requiring surgical placement of hardware to repair. He also suffered injuries to his right knee and ankle.

After he completed treatment for these injuries, he continued to have problems with his right lower extremity. As a result of the injury of November 1, 2005, Claimant can't squat or kneel. He can't sit or stand for very long; he has to move around at times to keep his leg comfortable. He walks more carefully. He has limited use of the right leg.

Claimant testified he was in a serious car accident in October or November 2004. As a result of this accident, he suffered some broken bones in his neck. He described the surgery as having donor bones fused in his neck and held in place with hardware. The hardware made it hard to swallow and he lost a significant amount of weight. He returned to work in January of 2005. He needed some help at work because after the neck injury he had numbness in some of the fingers in both hands which affected his ability to work. He also had pain in his neck, and he lost significant range of motion in his neck.

Claimant also testified that prior to the November 1, 2005 injury he had bronchitis and emphysema. Claimant testified that he sometimes becomes tired and has coughing spells as a result of his pulmonary disease. He testified the pulmonary disease affected him at work because he would at times have to take breaks due to fatigue and coughing spells.

Dr. David Volarich conducted a medical examination of Claimant. Dr. Volarich performed a physical examination, obtained a medical history, and reviewed medical records. Dr. Volarich gave the following opinions regarding permanent partial disability of Claimant from the work injury of November 1, 2005:

1 There is a 65% permanent partial disability of the right lower extremity rated at the hip due to the comminuted intertrochanteric fracture that required open reduction internal fixation. The rating accounts for ongoing pain, lost motion, atrophy, weakness, and limp involving the right lower extremity.

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2. There is a 20% permanent partial disability of the right lower extremity rated at the knee due to the strain injury and aggravation of degenerative arthritis with symptoms of pes anserine bursa irritation. The rating accounts for lost motion and weakness as well as crepitus in this joint.

3. There is a 20% permanent partial disability of the right lower extremity rated at the ankle due to the strain injury and aggravation of underlying arthritis. The rating accounts for pain, lost motion, and swelling in this joint.

Dr. Volarich's opinions regarding Claimant's pre-existing disabilities are as follows:

1. With regard to pre-existing disabilities referable to the cervical spine pre-existing his November 1, 2005 work accident, it is my opinion that there should be a 27.5% permanent partial disability of the body as a whole rated at the cervical spine due to the anterior and posterior fusions required at the C6-7 level that continue to cause ongoing neck stiffness, lost motion, and difficulty with swallowing.

2. There is a 20% permanent partial disability of the body as a whole rated at the pulmonary system due to his COPD causing some intermittent fatigue and occasional shortness of breath as well as recurrent cough.

Dr. Volarich further opines Claimant is permanently and totally disabled as a direct result of the work related injury of November 1, 2005 in combination with his pre-existing medical conditions.

Claimant was evaluated by Mr. James England, a vocational counselor. Mr. England found Claimant was permanently and totally disabled due to the combination of his injuries. Mr. England testified that based on the restrictions placed on Claimant for the primary injury alone by the treating physician, Dr. Johnson, and the evaluating physician, Dr. Volarich, Claimant would still be employable in certain sedentary positions. During cross-examination, he could not give a specific example of such a job.

Section 287.220.1 Mo.Rev.Stat. (2000) provides that where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself, and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo.App. 1990). The employee must prove that a prior permanent partial disability, whether

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from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

Section 287.020.7 Mo.Rev.Stat. (2000) defines total disability as the "inability to return to any employment and not merely ...[the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." Id. at 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989); "[W]orking very limited hours at rudimentary tasks [is not] reasonable or normal employment." Grgic v. P & G Const., 904 S.W.2d 46, 466 (Mo.App. 1995). The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo.App. 1992); Talley v. Runny Mead Estates, Ltd., 831 S.W.2d 692, 694 (Mo.App. 1992); Brown v. Treasurer of Missouri, at 483; Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo.App. 1990); Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo.App. 1989). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. Reiner at 367; Brown at 483; Fischer at 199. A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo.App. 1995).

The finder of fact can also take into consideration the claimant's age in determining whether she was permanently and totally disabled. Reves v. Kindells Mercantile Co., Inc., 793 S.W.2d 917 (Mo.App. 1990).

The opinion of Dr. Volarich is credible regarding Claimant's medical condition and that Claimant is permanently and totally disabled. Mr. England's testimony is credible. The fact that he could not give a specific example of a job for which Claimant could perform based on the limitations imposed by the primary injury alone does not impeach his credible testimony and opinions. Mr. England's analysis of the type of positions that would have been available is still persuasive.

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Claimant has met his burden of proof. It is reasonably certain that he is permanently and totally disabled due to a combination of the injuries sustained in the November 1, 2005 work injury and his preexisting injuries and conditions. The Second Injury Fund is liable for Permanent Total Disability benefits. Beginning June 6, 2006, the Second Injury Fund shall pay the differential between the permanent partial disability rate and the permanent total disability rate, or \$129.32 a week, for 123 2/7ths weeks. Thereafter, beginning October 15, 2008, the Second Injury Fund shall pay Claimant the weekly permanent total disability benefit of \$494.40 as provided by the Missouri Workers' Compensation Law.

Attorney Thomas O'Driscoll is granted a lien in the amount of 25% of this Award as attorney fees for necessary legal services provided.

Made by: /s/ Grant C. Gorman
Grant C. Gorman
Chief Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to this 15th day of March, 2011.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation