

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

Injury No.: 03-084913

Employee: Roger Poor
Employer: Porta Fab Corporation (Settled)
Insurer: Amerisure Companies (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 13, 2003
Place and County of Accident: St. Louis County, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 14, 2006. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued November 14, 2006, 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 3rd day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Roger Poor

Injury No.: 03-084913

Dependents: N/A

Before the
Division of Workers'

Employer: Porta Fab Corporation (settled)

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

Additional Party: Second Injury Fund

Insurer: Amerisure Companies (settled)

Hearing Date: September 14, 2006

Checked by: KOB:tr

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: August 13, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 was lifting large, heavy wall sections when he sustained a low back injury.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back.
14. Nature and extent of any permanent disability: Permanent total disability due to a combination of disabilities.
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? \$195.14

Employee: Roger Poor

Injury No.: 03-084913

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$915.99
19. Weekly compensation rate: \$610.66 / \$347.05
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer settled its risk of liability

- 0 -

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:

weekly differential (\$263.61) payable by SIF for 80 weeks beginning
January 6, 2004 and, thereafter, the weekly sum of \$610.66 for Claimant's lifetime:

TOTAL:

Indeterminate Amount

23. Future requirements awarded: None, other than benefits as provided by law.

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: Kurt C. Hoener

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Roger Poor	Injury No.:	03-084913
Dependents:	N/A	Before the	
		Division of Workers'	
Employer:	Porta Fab Corporation	Compensation	
Additional Party:	Second Injury Fund	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Amerisure Companies	Checked by:	KOB:tr

PRELIMINARIES

The matter of Roger Poor ("Claimant") proceeded to hearing on September 14, 2006, at the Division of Workers' Compensation in the City of St. Louis. Attorney Kurt Hoener represented Claimant. Assistant Attorney General Carol Barnard represented the Second Injury Fund. The Employer, Porta Fab Corporation, and its Insurer, Amerisure Companies, previously settled their risk of liability and did not participate at hearing. This case was tried concurrently with Injury No. 03-038577.

The parties stipulated that on or about August 13, 2003, Claimant sustained an accidental injury arising out of and in the course of his employment that resulted in injury to Claimant's back. At the time, Claimant earned an average weekly wage of \$915.99, with corresponding rates of compensation of \$610.66 for total disability benefits and \$347.05 for permanent partial disability benefits. Employer paid no TTD, but did pay \$195.14 in medical expenses. Employment, notice, venue, timeliness of the claim, and coverage of the Act are not at issue. The sole issue is the liability of the Second Injury Fund. Claimant seeks permanent total disability benefits.

FINDINGS OF FACT

Based on the substantial and competent evidence, including the live testimony of witnesses at hearing that I personally observed, the deposition testimony of the experts, and the medical records, I find as follows:

1. Claimant is a 56-year-old man who has been married for sixteen years and has two minor sons. He graduated from high school in 1967, and attended a local junior college for two years, but did not earn a degree. He was in the Army Reserves from 1969 to 1971. He earned certificates from two technical schools, and had additional mechanics training. Claimant testified in a credible manner.
2. Claimant has always worked in physical jobs. Claimant worked as an auto mechanic, and in factory jobs performing labor work. He drove a thrift store pick-up truck, and did flood clean up work. Claimant started working for Employer on November 21, 1994, as a general laborer. Employer produced office walls made of drywall panels with steel laminate. His job involved heavy lifting, squatting, and bending over with significant weights. Claimant worked a great deal of overtime, up to six days a week.

3. In 1991, Claimant sustained an injury to his right shoulder at work. Dr. Hammon performed a rotator cuff tear repair, and directed therapy. Claimant improved following the first surgery, but reinjured his shoulder. On October 6, 1999, Dr. Emanuel performed surgery to repair a "massive and difficult rotator cuff" injury. As a result of the injury and two surgeries to his right shoulder, Claimant cannot lift more than ten pounds overhead or twenty pounds to the waist. He is limited to pushing no more than two hundred pounds on wheels. He has lost his strength and cannot use his right arm in any functional manner. When Claimant was working, he used his right arm for balancing the large panels but never to lift. He experiences daily pain in his right arm. Claimant is right hand dominant.
4. In 1992, Claimant experienced a twisting injury to his left ankle, which resulted in several ligament and tendon tears. Claimant's ankle was surgically repaired, but it continues to be weak and twists or sprains easily. He has difficulty walking on rough surfaces and has lost strength in his left foot, although he experiences little pain. Claimant had to be very careful when walking in the plant to avoid injury to his left ankle.
5. In the early 1990s, Claimant was diagnosed with depression. He started on Zoloft and continues to take the medication today. Although Claimant feels fine when he is on medicine, if he stops taking the medicine he experiences very bad depression.
6. On March 27, 2003, Claimant slipped and struck his left shoulder. ^[1] He reported the injury to his supervisor, but continued to work. However, Claimant's shoulder symptoms got worse and he asked for treatment. Employer authorized treatment with Dr. Kramer, who examined Claimant on April 14, 2003, and prescribed several therapy visits. Two weeks later, Claimant had an MRI, and followed up with Dr. Kramer for two injections, which provided only a small amount of relief. Claimant continued to work.
7. Claimant first noticed trouble with his low back around Wednesday, August 13, 2003, when he was running twelve-foot panels in the hot melt machine. The panels were particularly large and heavy, and required awkward handling. Claimant's back started to hurt soon after he began work, but he continued to work for two days with increasing pain. On Monday, Claimant reported his symptoms to Employer, who authorized treatment.
8. On August 18, 2003, Claimant came under the care of Dr. Polinski, who took an MRI that showed a low back disk protrusion with degenerative disk disease. Dr. Polinski referred Claimant for pain management, and administered one shot, which had little effect on Claimant's pain. Dr. Polinski performed a discectomy on October 22, 2003, and released Claimant to return to work as of January 5, 2004, with restrictions of no lifting over 30-50 pounds and avoiding repetitious bending, lifting and twisting. Claimant continues to experience aches and pain in his back, and his personal doctor, Dr. McKinney, prescribes Percocet for his back pain, which he takes every couple of days. When he increases his activity the pain level increases. He reclines or shifts his weight to relieve pain, but does not often have to lie down completely in order to get through the day. He is antsy in his seat and cannot sit still for long.
9. On February 20, 2004, Dr. Kramer performed an open left rotator cuff repair with debridement of a partial thickness biceps tear, prescribed three months of physical therapy, and discharged him on July 20, 2004. Claimant's left shoulder hurts constantly and is weak. He uses a massager on both arms and has to take Percocet frequently to relieve the pain. The pain in his left shoulder limits him, and he often has to ask his son to help with lifting over thirty pounds. He cannot work anymore due to the limitations with his shoulders.
10. Claimant is fairly active on a typical day. He takes his sons to school and does things around the house like dishes, laundry, and cleaning up. Claimant used to walk a lot, but that now aggravates his back. When he has time to himself, he piddles around the house, plays the guitar, ^[2] and performs some yard work. He picks his sons up at school and starts supper. After dinner, he watches television, and goes to bed late because he has trouble sleeping due to pain.
11. Claimant is asking for permanent total disability. He testified he could not return to work for Employer due to the restrictions, and he is physically unable to do any of the jobs he has done in the past. For example, his right arm and back prevent him from being a mechanic because he cannot reach and bend over a fender.
12. Claimant settled his August 2003 back injury with Employer for 20% of the body as a whole (Exhibit M), and his March 27, 2003 left shoulder injury for 25% of the shoulder (Exhibit L). The Second Injury Fund was not a party to either compromise lump sum settlement.
13. Dr. Bruce Schlafly examined Claimant, issued a report (Exhibit I), and testified by deposition (Exhibit J). From Claimant and the medical records he reviewed, Dr. Schlafly had a complete and accurate medical history. On exam, Dr. Schlafly noted the various surgical scars, some limited range of motion of the shoulders, mild restriction of dorsiflexion of the left ankle, difficulty walking on toes due, and 90% spinal range of motion. He diagnosed a herniated disc in the low back associated with the August 13, 2003 injury, and assigned permanent partial disability of 25% of the body as a whole.
14. With regard to preexisting injuries, Dr. Schlafly diagnosed a left rotator cuff tear caused by the March 27, 2003 work accident that was surgically repaired, and resulted permanent partial disability of 35% of the left shoulder. In addition, he felt Claimant had permanent partial disability of 45% of the right shoulder and 25% of the left ankle due to

preexisting injuries.

15. Due to the combination of all Claimant's disabilities, Dr. Schlafly assigned the following work restrictions: No repetitive overhead reaching or lifting; no lifting over 10 pounds above the shoulder; no bending over to lift more than 10 pounds; no bending or twisting of the low back; no climbing stairs or ladders; no repetitive steps; and, avoiding uneven surfaces. He felt the disabilities combined synergistically, limited Claimant to sedentary work at best, and could render him totally disabled, subject to a vocational opinion.
16. Mr. James England, a rehabilitation counselor, generated a report and testified by deposition regarding Claimant's employability in the open labor market. Based on the medical records, the social, medical and vocational histories, testing, functional restrictions imposed by the medical practitioners, and the impression Claimant gave of being emotionally unstable, Mr. England formed an opinion as to Claimant's ability to compete on the open labor market. He considered Claimant's inability to get a decent night's sleep and the fact that although he has some good days, he can become non-functional for days at a time. If the restrictions of Dr. Polinsky or Dr. Emanuel applied, there is some sort of service employment within Claimant's abilities. However, considering Dr. Schlafly's restrictions, Claimant's day-to-day functioning, and the impression he makes, Mr. England did not believe Claimant would be successful in competing for employment or sustaining it in the long run. His opinion was based on a combination of disabilities, and not the last injury alone.

RULINGS OF LAW

Based on the facts found, and the proper application of Missouri's Workers' Compensation Act, I find that Claimant has met his burden of proof. Specifically, I find Claimant is unable to compete in the open labor market on account of a combination of disabilities, and the Second Injury Fund is liable for permanent total disability benefits.

Claimant seeks permanent total disability compensation from the Second Injury Fund. "Total disability is defined as the inability to return to any employment and not merely the employment in which the [Claimant] was engaged at the time of the accident. The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this [Claimant] in his or her present physical condition." *Lorentz v. Missouri State Treasurer*, 72 S.W.3d 315, 319 (Mo.App. S.D.2002) *citing Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. 1999) (both overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. Banc 2003)). The overwhelming weight of the evidence, including Claimant's testimony, the medical evidence, and the vocational opinion, establishes Claimant is permanently and totally disabled.

In analyzing an alleged total disability case, "the first determination is the degree of disability from the last injury considered alone." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003) (overruled in part by *Hampton, supra*). If the employee's last injury in and of itself rendered him permanently and totally disabled, the SIF has no liability; the employer is responsible for the entire amount of compensation. *Landman at 248; Birdsong v. Waste Management*, 147 S.W.3d 132, 138 (Mo.App. S.D. 2004).

Second Injury Fund liability may be triggered if the employer is not responsible for total disability. In order to recover from the Second Injury Fund, a claimant must first prove a pre-existing permanent partial disability whether from a compensable injury or otherwise, pursuant to § 287.220.1. The permanent disability pre-dating the injury in question must "exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed." *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App.1999), *cited in Karoutzos v. Treasurer*, 55 S.W.3d 493, 498 (Mo.App. W.D. 2001)(both overruled on other grounds in *Hampton, supra*).

This being an alleged total disability case, the initial inquiry regarding Second Injury Fund liability is the extent of Employer's liability. Claimant has significant disability as a result of his low back injury. He underwent an L5-S1 laminectomy and microdiscectomy, and received a release to return to work as of January 5, 2004, with restrictions of no lifting over 30-50 pounds, and avoiding repetitive bending, lifting and twisting. Claimant continues to experience aches and pain in his back, takes Percocet for his back pain every few days. His pain level increases with activity and he can be rendered nonfunctional for days at a time. He reclines or shifts his weight to relieve pain, but does not often have to lie down completely in order to get through the day. He is antsy in his seat and cannot sit still for long. Based on the evidence, including Claimant's testimony, medical records, and expert opinions, I find Claimant sustained permanent partial disability of 20% of the body as a whole referable to the low back on account of his August 2003 back injury. While this injury foreclosed Claimant's ability to work in his former professions involving heavy labor, the back injury alone does not render Claimant totally disabled.

Claimant has a number of preexisting disabilities which existed at the time of the low back injury, and were of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. Claimant has a history of problems with his upper extremities. Most notably, in March 2003, he sustained a rotator cuff tear. Although the back injury caused Claimant to suspend treatment for his shoulder and he did not have surgery until after he reached MMI for the back, the left shoulder disability preexisted the final injury by months. Following two surgeries, the right shoulder had such limited functional use that Claimant merely used it as a guide. The permanent partial disability of the left and right upper extremities is of such seriousness as to constitute a hindrance or obstacle to employment and is equivalent to 25% and 35% of the left and right shoulders, respectively. His ankle injury continues to limit his abilities to walk on uneven surfaces, climb stairs and ladders, and conduct himself on a sustained basis in any physical job. The ankle injury is of such seriousness as to constitute a hindrance or obstacle to employment and is equivalent to 20% of the left lower extremity at the level of the ankle.

I find that the combination of Claimant's primary back injury and his preexisting disabilities render him permanently and totally disabled, and unable to compete on the open labor market to secure and maintain a job. I find the testimony of Mr. England on the subject to be clear, credible, and consistent with the evidence of record. Claimant's disabilities and restrictions from his back, shoulders and ankle limit him to less than a full range of sedentary work, and his overall poor functioning and presentation prevent him from realistic competition for entry level positions. Claimant is permanently and totally disabled as a result of the combination of disabilities, and the Second Injury Fund is responsible for the payment of benefits as provided by law.

CONCLUSION

The Second Injury Fund shall pay Claimant permanent, total disability benefits as provided by law. Attorney Kurt Hoener shall have a lien of up to 25% of benefits awarded herein for legal services rendered.

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

[1] Claimant had preexisting left shoulder and bilateral elbow problems and treatment, as documented by the medical records.

[2] Although he plays the guitar by himself for up to several hours at a time and occasionally jams with friends' bands, he does not belong to a band or perform on any regular basis.