

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

Injury No.: 02-121517

Employee: Stanley Roberts  
Employer: City of St. Louis  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: October 15, 2002  
Place and County of Accident: City of St. Louis

#### Introduction

On August 2, 2006, the administrative law judge issued an award on the above-referenced claim. On August 17, 2006, employee, through counsel, filed an Application for Review seeking review of the award pursuant to §287.480 RSMo.

On September 22, 2006, we remanded this matter to the Division of Workers' Compensation to conduct an evidentiary hearing regarding the allegations in the Application for Review pertaining to the alleged oral agreement. The chief administrative law judge conducted an evidentiary hearing on December 6, 2006.

We have reviewed the evidence, read the briefs, and heard the oral arguments of the parties. We modify the award of the administrative law judge as set forth herein. The August 2, 2006, award and decision of Administrative Law Judge Joseph E. Denigan is attached hereto and incorporated solely as it relates to Second Injury Fund liability.

#### Principles of Law

Our determination in this matter is governed by the principles and guidance set forth in *Highley v. Martin*, 784 S.W.2d 612 (Mo. App. 1989). Nothing in § 287.390 RSMo (Cum. Supp. 2006) requires settlement agreements in workers' compensation cases to be in writing and signed by the parties. *Id.* at 616. In reviewing this award, we must first determine whether a settlement agreement was made by the parties. *Id.* at 617. If we find that a settlement agreement was made by the parties, we must find what its terms were. We must then decide whether to approve the agreement per § 287.390. *Id.* at 618. If we decide to approve it, we shall enter an award that takes the agreement into account in spelling out the employer's liability to employee. *Id.*

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Section 287.390.1 RSMo (Cum. Supp. 2005) provides:

Parties to claims hereunder may enter into voluntary agreements in settlement thereof, but no agreement by an employee or his or her dependents to waive his or her rights under this chapter shall be valid, nor shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by an administrative law judge or the commission, nor shall an administrative law judge or the commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter. No such agreement shall be valid unless made after seven days from the date of the injury or death. An administrative law judge, or the commission, shall approve a settlement agreement as valid and enforceable as long as the settlement is not the result of undue influence or fraud, the employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement.

### Findings

On April 25, 2006, the parties tried this matter before an administrative law judge. Shortly thereafter, employee and employer agreed to settle this matter. The parties could not reduce the agreement to writing because they needed to determine the amount necessary to fund a Medicare set aside trust. Counsel for employee, counsel for employer and counsel for the Second Injury Fund all appeared before the administrative law judge. Counsel advised the administrative law judge that employer and employee had entered into an agreement to fully resolve employee's claim against employer but additional time was needed to determine the Medicare set aside trust funding requirement. The administrative law judge agreed to delay ruling on the claim.

In the meantime, employer contacted Medicare <sup>[1]</sup> to inquire about the set aside funding requirement. Medicare informed employer an updated medical report was necessary. Employer set up an appointment with Dr. Kennedy, which appointment employee attended. Dr. Kennedy provided an updated medical report. Employer forwarded the updated report to Medicare for consideration of the set aside trust funding requirements. Medicare informed employer that \$44,000.00 was necessary to fund the set aside trust. Employer believed Medicare misunderstood Dr. Kennedy's medical report. Dr. Kennedy provided a clarification to his report, which employer sent to Medicare for consideration.

On August 2, 2006, without warning to the parties, the administrative law judge issued an award. The administrative law judge awarded permanent partial disability in the amount of \$55,779.68 against the employer. The administrative law judge awarded enhanced permanent partial disability of \$5,441.92 against the Second Injury Fund. Employee filed an Application for Review alleging that employee and employer had an enforceable agreement and the administrative law judge erred in issuing the August 2, 2006, award, as regards employer's liability. Neither employer nor the Second Injury Fund filed Applications for

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Review. The Second Injury Fund urges that the administrative law judge's award against the Second Injury Fund is supported by competent and substantial evidence.

Counsel for employee and counsel for employer testified that the parties had reached a settlement after the trial of this claim and before the administrative law judge issued his award. We conclude, therefore, that the parties entered into a settlement agreement.

Having determined there was a settlement agreement, we must now find the terms of the agreement. Employee alleges that the parties agreed to settle the matter for \$200,000.00 plus the amount necessary to establish a Medicare set aside trust. Employer alleges the parties agreed to settle this matter for \$200,000.00, inclusive of the amount necessary to establish a Medicare set aside trust.

If, as employer asserts, the parties agreed that employer would pay \$200,000.00, inclusive of the set aside trust, employer should have no interest in the amount necessary to fund the trust so long as it is less than \$200,000.00. As the above discussion indicates, employer had more than a passing interest in the funding requirement. Employer set up an employee appointment with its physician to get an updated medical report. When Medicare identified that \$44,000.00 was needed to fund the set aside trust, employer contacted Dr. Kennedy for a clarification so employer could convince Medicare that the amount necessary to fund the set aside trust was less than Medicare determined. Employer's efforts only make sense if employer agreed to fund the Medicare set aside trust *in addition* to paying the lump sum of \$200,000.00.

Based upon the foregoing, we find that the employee and employer agreed to the following terms to fully resolve this claim.

1. Employer will pay to employee \$200,000.00.
2. Employer will fund a Medicare set aside trust in an amount approved by Medicare.

### Conclusions

Having identified the terms of the agreement made by the parties, we must determine whether to approve the settlement. Section 287.390 mandates that we approve the settlement so long as it is not the result of undue influence or fraud, employee fully understands his rights and benefits, and employee voluntarily agrees to accept the terms of the agreement. The record contains no evidence to suggest that that agreement was the result of undue influence or fraud. Employee is represented by counsel. Absent evidence to the contrary, we presume employee's counsel explained to employee his rights and benefits under the Workers' Compensation Law and under the agreement and that employee's counsel has ensured that employee's agreement is voluntary. We approve the settlement agreement entered into between employer and employee.

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### Award

We have found that employee and employer entered into a settlement agreement. We have identified the terms of the agreement. We have approved the settlement agreement pursuant to §287.390 RSMo. We must now enter an award in accordance with the settlement agreement. We modify the award against employer to the following:

Employer shall pay to employee the lump sum of \$200,000.00.

Employer shall fund a Medicare set aside trust in an amount approved by Medicare.

We affirm the administrative law judge's award of \$5,441.92, from the Second Injury Fund to employee.

On or about June 5, 2007, employee filed a Motion for Change of Condition. Employer opposes the Motion for Change of Condition. Because we find that employee settled his claim against employer, we deny employee's Motion for Change of Condition.

The compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments ordered in favor of attorney Timothy O'Mara, for necessary legal services rendered to employee.

Given at Jefferson City, State of Missouri, this 20<sup>th</sup> day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

AWARD

Employee: Stanley Roberts Injury No.: 02-121517

Dependents: N/A Before the  
Division of Workers'

Employer: City of St. Louis Compensation

Additional Party: Second Injury Fund Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Insurer: Self-Insured

Hearing Date: April 25, 2006 Checked by: JED: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: October 15, 2002
5. State location where accident occurred or occupational disease was contracted: City of 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 was passenger in large truck rollover accident.
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: low back , neck right shoulder and right elbow
14. Nature and extent of any permanent disability: 33% PPD of low back, 20% PPD of left knee; SIF liability of 16 weeks
15. Compensation paid to-date for temporary disability: \$18,678.00
16. Value necessary medical aid paid to date by employer/insurer? \$97,211.34

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17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$566.00/\$340.12
20. Method wages computation: Stipulation

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

164 weeks permanent partial disability benefits from Employer \$55,779.68

22. Second Injury Fund liability:

16 weeks from the SIF 5,441.92

TOTAL: \$61,221.60

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:

Timothy O'Mara

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Stanley Roberts

Injury No.: 02-121517

Dependents: N/A

Before the  
Division of Workers'

Employer: City of St. Louis

Compensation  
Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Self-Insured

Checked by: JED

This case involves a compensable low back and left knee injury, each of which required surgery, resulting to Claimant with the reported accident date October 15, 2002. Employer admits Claimant was employed on said date and that any liability is self-insured. The Second Injury Fund ("SIF") remains a party to this Claim. All parties are represented by counsel.

Claimant seeks permanent total disability benefits. Section 287.200. RSMo (2000).

## FINDINGS OF FACT

### ***Claimant's Testimony***

1. Claimant is 59 years old; his youngest child is 25 years old. He is recently remarried.
2. Claimant worked for Employer for 29 years as an ironworker and crew chief.
3. Claimant was confident and followed examination easily at trial.
4. Claimant's reported motor vehicle accident was dynamic, including rollover of the truck, but no overnight admission to a hospital.
5. Claimant initially injured his low back, shoulder, neck and elbow in the reported accident.
6. Treatment highlights include low back MRI diagnostics despite the absence of leg symptoms and lumbar fusion by Dr. Kennedy six months post accident in April 2003.
7. Claimant developed left knee symptoms post-surgery which were treated with injections, physical therapy and arthroscopic surgery.
8. Claimant now weighs 325 pounds and was 280 pounds on the reported accident date. Claimant is 6'2" in height.
9. In response to leading questions, Claimant acknowledged depression as associated with curtailed recreation (which testimony is uncorroborated by treatment).
10. Claimant testified that he believes he retired early and had intended to work until age 65 to retire. On cross-examination Claimant was reminded of his deposition testimony to the contrary. In response to employment search questions, Claimant stated he receives pension benefits and social security benefits.
11. Claimant offered expert evidence that contains an incorrect body habitus description by Dr. Volarich raising doubt about which patient Dr. Volarich contemplated while drafting his report. This clinical information is rudimentary to any orthopedic evaluation of the spine. In addition, his testimony lacks attribution for the ladder fall onto concrete approximately sixty days prior to the reported injury.

12. Claimant denied his heavy body weight slowed him down on the job prior to the reported injury.
13. Claimant admitted he has not searched for any employment and receives SSD payments.

#### Prior Injury

14. Claimant sustained a 1997 right knee injury and surgery after which he returned to work full duty and entered a twenty-seven and one-half percent PPD settlement thereof. Right knee symptoms increased subsequent to the reported injury in conjunction with his left knee symptoms.

15. On cross-examination, Claimant admitted he had fallen a few months before the current injury but specified that he did not injure his low back for which body part he, subsequently, underwent fusion surgery herein.

16. On July 16, 2002, Claimant fell eight feet off a ladder onto concrete. The patient statement and the history of that date from Concentra read as follows:

“[I] was pulling a fence, my hand slipped and I fell off a ladder and hurt my back.”

“The mechanism of injury was a fall from a height of 8 feet, landing on the upper portion of the upper thoracic and the back. Patient states he was helping to erect a chainlink fence and he jerked too hard on the coil and lost his balance and fell. He states he landed on concrete and gravel and the ladder was tangled in his legs.” (Group Exhibit C.)

17. Significant positive clinical findings from the ladder fall included decreased range of motion of the lumbar spine, tenderness at L1, L2 and L3 and positive crossed leg raising bilaterally. Transcription of Dr. Allen included: Assessment: abrasion back 911.0, contusion of the thorax 922.1, lumbar strain 847.2. Injury/Illness Flowsheet indicate diagnosis of “922.3 Back Contusion” and “724.2 Lumbar Pain.” Physical Therapy Prescription diagnosis indicates (in hand writing): “contusion back, L shoulder” and “L-S strain.” Claimant was referred to Pro Rehab for physical therapy: “3 times per week for 2 weeks.” X-rays read the next day by Dr. Salimi were described as “lumbar spine.” (among others). These types of entries may be noted on July 17, 22, 25, 30, and August 2. It is not reasonable for Claimant to deny injury and symptoms of the low back from the ladder fall. Six doctor visits plus physical therapy seems noteworthy.

18. On direct examination, Claimant stated he performed full duty prior to the reported accident (T. p. 30). Claimant’s expert, James England, vocational rehabilitation counselor, testified that Claimant told him his excess weight “did slow him down in his functioning on the job.” (Exhibit B, pp. 7-8.) Mr. England found Claimant unemployable.

#### Treatment Record & Opinion Evidence

19. In January 2004, Dr. Kennedy placed Claimant at MMI and rated his low back PPD at twenty-five percent. This PPD rating, while substantial, was accompanied by more severe restrictions including employment where Claimant can sit and stand as needed, no lifting over twenty pounds and only occasional bending twisting or stooping. Dr. Kennedy acknowledged the possibility of additional restrictions relative to knee symptoms.

20. In October 2004 Dr. Gross assigned a ten percent PPD of the left knee subsequent to surgery that included partial menisectomy but extensive chondroplasty for pervasive degenerative changes. Claimant apparently had no prior left knee treatment or surgery. Dr. Gross stated the advanced degenerative changes are not completely caused by the reported accident but did not attempt attribution.

21. MRI findings of the left knee on August 22, 2003 (ten months post-accident) included "joint effusion" and "bone bruise" with no history of recent accident and no findings of effusion by Dr. Gross immediately before and after the MRI.

22. Claimant offered the opinion evidence of Dr. David Volarich who assigned a forty percent current PPD of the spine and a seven and one-half percent pre-existing PPD of the spine. He assigned a thirty-five percent PPD of the left knee.

23. Overall, Dr. Volarich stated Claimant was unable to work in the open labor market because he could not sustain a forty-hour week and he could not return to the same or similar work. Dr. Volarich admitted he did not know why Claimant did not return to work

## RULINGS OF LAW

### Nature and Extent of Permanent Disability

The diagnosis in this case is clear in that Claimant was injured on the reported accident date and, subsequently, underwent fusion surgery and left knee surgery. Claimant admits not applying for any employment, and, inferentially, alternative employment with Employer. The credibility of Claimant's testimony regarding physical limitation is undercut by his inexplicable denial of prior lumbar injury just sixty days prior to the reported injury. He also contradicted his own (vocational) expert regarding productivity immediately preceding the accident. This renders his testimony generally much less reliable with regard to evaluating whether he can sustain regular hours in the open labor market. It also makes questionable his representations to his examining experts who must rely in significant part on his representations. Again, Claimant ambulated somewhat slowly but freely in the courtroom and exhibited only mild discomfort after an extended seated position. While his medical record is very significant and, ultimately determinative here of permanent disability, Claimant's motivation is relevant to a determination of *employability*.

Based solely upon the primary work injury of October 2002, Claimant is not permanently and totally disabled. Claimant had significant treatment and underwent fusion surgery. Claimant has not since treated and ambulated smoothly into the courtroom without assistance. He freely admitted he had not applied for any employment since the accident. Claimant's injuries are serious and the record suggests a very significant PPD award.

As to evidentiary matters, the record does not permit an award of permanent total disability because both of Claimant's experts failed to contemplate serious injury to the same body part just sixty days beforehand. While Claimant's vocational expert is not responsible for a medical causation/attribution analysis, he nevertheless, relied on Dr. Volarich's ultimate opinions regarding total disability thereby undercutting the probative value of his ultimate opinions on employability. Moreover, Claimant's own

statement is juxtaposed against his own expert and the plain language of the treatment record underlying the low back injury that occurred sixty days beforehand.

Claimant testified he can only sit for 30 to 40 minutes at a time and must lie down a couple of times per day. This normally valuable evidence is less reliable here since the record also juxtaposes a difference of opinion on whether he was performing full duty prior to the reported accident. Claimant also denied his weight slowed him down even when his expert's testimony to the contrary was quoted to him. Accordingly, this type of testimony cannot be said to meet minimum standards of reliability.

Consistent with this analysis is a recent holding in by the Court of Appeals in Ransburg v. Great Plains Drilling, 22 S.W.3d 726 (Mo.App. 2000). In that case, a 60 year old construction worker fell and required both neck and shoulder surgery. The record included evidence that the employee was capable of sedentary work and received both social security benefits and pension benefits. The employee admitted not having sought alternative employment. The court held employee's testimony itself was sufficient to find he had no motivation to return to work.

Ransburg is analogous. Here, Claimant sustained a knee injury requiring surgery not previously treated and a lumbar fusion. Also, like the worker in Ransburg, Claimant is receiving both pension benefits and social security benefits. These facts, coupled with the admission about no job applications since the accident provide a substantial basis to conclude Claimant is not motivated to return to work. Contradiction of his testimony contributes to doubt about Claimant's application for permanent total disability benefits.

## Liability of the SIF

The liability of the SIF is set out in Section 287.220 RSMo (2000). The SIF is only liable for permanent total benefits when a "prior injury combines with a later, on-the-job injury so as to produce permanent and total disability that would not have resulted in the absence of the prior disability or condition." Wuebbling v. West County Drywall, 898 S.W.2d 615, 616-617 (Mo.App. 1995). The first step in determining SIF liability is to determine the amount of disability caused by the last accident alone. Roller v. Treasurer of Missouri, 935 S.W.2d 739, 741 (Mo. App. 1996); Vaught v. Vaught, Inc., 938 S.W.2d 931, 938-9 (Mo. App. 1997).

Here the Claimant offered evidence of a pre-existing twenty-seven and one-half percent PPD of the right knee which is presumed to continue undiminished. Both upper body-lower body synergy and opposite extremity synergy obtain here. Here, Claimant's overall disability appears to be in the range of almost one-half of the body as a whole.

## Conclusion

On the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained a thirty-three percent PPD referable to the low back (132 weeks) and twenty percent PPD of the left knee referable to the left knee (32 weeks). Separately, as a result of the combination of the primary injuries with the pre-existing PPD, Claimant is found to have sustained *increased overall disability* of forty-five percent of the body as a whole (or 180 weeks) resulting in liability against the SIF of 16 weeks.

Date: \_\_\_\_\_  
Joseph E. Denigan

Made by: \_\_\_\_\_

*Administrative Law Judge  
Division of Workers' Compensation*

A true copy: Attest:

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Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*

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[\[1\]](#) Presumably, the Centers for Medicare Services but we refer simply to "Medicare" as did the parties.