

FINAL AWARD ALLOWING COMPENSATION  
(After Mandate from the Missouri Court of Appeals for the Eastern District of Missouri)

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

#### Preliminaries

On June 3, 2008, the Missouri Court of Appeals for the Eastern District issued an opinion reversing the July 20, 2007, award and decision of the Labor and Industrial Relations Commission (Commission). *Roberts v. City of St. Louis*, 254 S.W.3d 280 (Mo. App. 2008)(ED90150). By mandate dated June 25, 2008, the Court remanded this matter to the Commission with directions to address the administrative law judge's award on employee's claim for permanent and total disability in accordance with the Court's June 3, 2008, opinion.

Pursuant to the Court's mandate, we issue this award. Having reviewed the evidence and considered the whole record, the Commission finds that the award should be modified. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated August 2, 2006. The award and decision of Administrative Law Judge Joseph E. Denigan is attached and incorporated to the extent it is not inconsistent with our findings, conclusions, decision, and award.

#### Findings of Fact

We supplement the administrative law judge's findings as necessary. Employee presented the deposition testimony of a vocational expert, Mr. England, and a medical expert, Dr. Volarich. Neither employer nor the Second Injury Fund presented expert testimony in this matter.

Dr. Volarich testified that employee sustained the following permanent partial disabilities as a result of the primary accident: 40% of the body as a whole referable to the lumbar spine; 15% of the body as a whole referable to the cervical spine; 35% at the left knee; 5% at the right elbow; and, 15% at the right knee.

A review of Dr. Volarich's report reveals a full page of recommended physical restrictions. We reprint the restrictions here.

With regard to work and other activities referable to the spine,

1. He is advised to limit repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as need basis.

2. He should not handle any weight greater than 20 pounds, and limit this task to an occasional basis assuming proper lifting techniques.
3. He should not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain.
4. He is advised to avoid remaining in a fixed position for any more than about 20-30 minutes at a time including both sitting and standing.
5. He is advised to pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking or swimming to tolerance daily.

With regard to work and other activities referable to the lower extremities,

1. He is advised to limit repetitive stooping, squatting, crawling, kneeling, pivoting, climbing, and all impact maneuvers.
2. He should be cautious navigating uneven terrain, slopes, steps, and ladders especially if he must handle weight. He can handle weight to tolerance.
3. He should limit prolonged weight bearing including standing or walking to 20-30 min or to tolerance. Additionally, if he must be on his knees for any reason, he should appropriately pad the surface upon which he is kneeling.
4. Glucosamine appears to be a useful compound to maintain articular surface cartilage and I recommend he use this supplement daily.
5. He is advised to pursue an appropriate strengthening, stretching, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking or swimming (aquatic therapy is an excellent conditioning option) to tolerance daily.

(Tr. 91Q).

Dr. Kennedy's medical records echo some of these restrictions for employee's back, including, a 20-lb lifting limit and only occasional bending, twisting, or stooping, and the need to sit or stand as tolerated. Dr. Kennedy acknowledged employee may have additional restrictions based upon his knee condition.

Dr. Volarich testified that he believes that employee is permanently and totally disabled and unable to return to the open labor market in the Greater St. Louis Region. Dr. Volarich believes employee is permanently and totally disabled as a result of the April 2002 accident standing alone.

In forming his conclusions regarding employee's vocational prospects, Mr. England considered the physical restrictions imposed by Drs. Volarich and Kennedy. He solicited employee's description of employee's day-to-day activities. He considered employee's age, weight, mobility, education and vocational history. Mr. England does not believe that an employer in the normal course of business would be interested in hiring employee. Mr. England believes that employee is likely to remain totally disabled from a vocational standpoint.

#### Discussion

The administrative law judge concluded that employee is not permanently totally disabled. An excerpt of his reasoning is reprinted below.

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.

Award p. 6.

Contrary to the administrative law judge's suggestion, Dr. Volarich and Mr. England did consider employee's July 2002 injury to his back as the incident is mentioned by both of them in their reports. The administrative law judge's assertion that the employee sustained "serious injury" from the July 16, 2002, incident is not supported by the contemporaneous medical records and is belied by employee's prompt release to regular duty on July 30, 2002.

In addition, we reject the administrative law judge's conclusion that the facts in this matter are analogous to those found in *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726 (Mo. App. 2000). In *Ransburg*, the claimant testified that he had no motivation to look for work in that employment might jeopardize his tax-free benefits from pension and social security. The *Ransburg* court held that the evidence of claimant's lack of motivation to work was relevant to the issue of permanent total disability and the Commission properly considered it along with all other evidence of employability. In *Ransburg*, the other evidence of employability included the testimony of four experts that claimant was able to work in a sedentary position.

The facts of this case are easily distinguishable from those present in *Ransburg*. In the instant case, there is no evidence that employee is not motivated to work. To the contrary, employee testified that had he not suffered the October 15, 2002, accident and its resultant injuries, he would not have retired as early. Employee testified that for insurance purposes he probably would have worked until he was 65 years old. In addition, the only experts to testify in this case testified that employee is not employable in the open labor market. We find the employee and his experts credible.

#### Conclusions of Law

The principles of law bearing on our determination of whether employee is permanently and totally disabled are summarized below.

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition."

"The 'extent and percentage of disability is a finding of fact within the special province of the Industrial Commission.'" "The Commission may consider all of the evidence, including the testimony of the claimant, and draw all reasonable inferences in arriving at the percentage of disability."

"The testimony of . . . lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence."

"The Commission is not bound by the expert's exact percentages and is free to find a disability rating higher or lower than that expressed in medical testimony." "The acceptance or rejection of medical evidence is for the Commission." "The decision to accept one of two conflicting medical opinions is a question of fact for the Commission."

*Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 233-234 (Mo. App. 2003) (citations omitted).

Based upon the testimony of employee, Dr. Volarich, and Mr. England, we find employee is unable to compete in the open labor market. Employee is permanently and totally disabled. We find employee's condition of permanent total disability is attributable solely to employee's injury of October 15, 2002.

Award

Section 287.200.1 RSMo (2000) provides, in relevant part, "[c]ompensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made..." Accordingly, employer shall pay to employee permanent total disability benefits of \$566.00 per week, from January 24, 2004, and continuing for employee's lifetime or until modified by law.

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

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

Employee's Application for Review on Ground of Change of Condition filed on or about June 6, 2007, is denied as moot.

Given at Jefferson City, State of Missouri, this 19th day of December 2008.

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

Additional Party: Second Injury Fund

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

Employee: Stanley Roberts Injury No.: 02-121517

- 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	
Employer:	City of St. Louis	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
		Department of Labor and Industrial	
		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' 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." Wuebbing 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: \_\_\_\_\_

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

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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

Employee: Stanley Roberts

Injury No.: 02-121517