

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

Injury No.: 00-039698

Employee: Jeffrey Ross
Employer: Mike Brooke Drywall, Inc.
Insurer: Truck Insurance Exchange
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 January 14, 2010, as supplemented herein. The award and decision of Administrative Law Judge David L. Zerrer is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, decision and award.

We adopt the administrative law judge's conclusions regarding medical causation and future medical care. We also agree with administrative law judge's conclusion regarding the nature and extent of employee's permanent disability; specifically, the administrative law judge's conclusion that employee was rendered permanently and totally disabled by the April 17, 2000, work injury alone. We supplement the administrative law judge's award to fully articulate the findings underlying our conclusion that employee was rendered permanently and totally disabled as a result of the work injury.

As accurately summarized by the administrative law judge, Dr. Koprivica recommended that employee observe several physical restrictions as a result of the April 17, 2000, work injury and its sequela. Of particular note, Dr. Koprivica believes employee should avoid any activity that risks trauma to his left lower extremity due to employee's heightened risk of developing blood clots. In addition, Dr. Koprivica believes employee needs the freedom to alternate between standing and sitting and the ability to elevate his leg.

Dr. Koprivica deferred to a vocational expert on the issue of permanent total disability. He noted that if a vocational expert found employee to be unemployable in light of the restrictions Dr. Koprivica recommended as a result of the work injury, then it would be his opinion that the permanent total disability is the result of the April 17, 2000, work injury in isolation. On cross-examination by the Second Injury Fund, Dr. Koprivica reaffirmed his opinion that if a vocational expert finds employee is unemployable, Dr. Koprivica believes his unemployability is due to the disability and restrictions from the April 17, 2000, injury alone, without consideration of any prior conditions.

Employee: Jeffrey Ross

- 2 -

Mary Titterington is a vocational expert. Ms. Titterington carefully considered the restrictions imposed upon employee by the physicians who have treated and evaluated employee. Ms. Titterington believes that employee is not employable in the open labor market because there are no jobs that fit within the physical restrictions recommended as a result of the work injury. Ms. Titterington singled out employee's need to elevate his leg as a restriction an employer would not reasonably be expected to accommodate. We find the testimony of Ms. Titterington the most credible and persuasive testimony on the issue of employee's ability to compete in the open labor market.

We believe employee is unable to compete in the open labor market due to the restrictions imposed due to the April 17, 2000, work injury. We conclude that employee was rendered permanently and totally disabled by the last injury alone. Accordingly, we affirm the award and decision of the administrative law judge, as supplemented herein.

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 28th day of October 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jeffery Ross

Injury No. 00-039698

Dependents:

Employer: Mike Brooke Drywall, Inc.

Additional Party: Second Injury Fund

Insurer: Truck Insurance Exchange

Hearing Date: October 13, 2009

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

Checked by: DLZ

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: April 17, 2000
5. State location where accident occurred or occupational disease was contracted: Chillicothe, Livingston 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? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant slipped from scaffolding causing knee to twist
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 lower extremity at the knee
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$27,932.32
16. Value necessary medical aid paid to date by employer/insurer? \$68,456.14

Employee: Jeffery Ross

Injury No. 00-039698

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$883.20
- 19. Weekly compensation rate: \$578.48/303.01
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: -0-

-0- weeks of temporary total disability (or temporary partial disability)

Permanent total disability benefits from Employer beginning March 22, 2001, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

TOTAL: \$258,415.23

- 23. Future requirements awarded: As provided for in this award

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: Michael Knepper

Employee: Jeffery Ross

Injury No. 00-039698

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jeffery Ross

Injury No: 00-039698

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Mike Brooke Drywall, Inc.

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

Additional Party Second Injury Fund

Insurer: Truck Insurance Exchange

Checked by: DLZ

On October 13, 2009, the parties appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and by his attorney, Michael Knepper. The Employer appeared by attorney, Catherine Salmon. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General Jacinda Thudium.

The parties stipulated to certain facts which are not at issue in the claim as follows, to wit: On or about the 17th day of April, 2000, Mike Brooke Drywall, Inc. was an employer, operating subject to the Workers' Compensation Law; the Employer's liability was fully insured by Truck Insurance Exchange; on the alleged injury date of April 17, 2000, Jeffery Ross was an employee of the Employer; the Claimant was working subject to the Workers' Compensation Law; the parties agree that on or about April 17, 2000, Claimant sustained an accident which arose out of the course of and scope of employment; the employment occurred in Boone County, Missouri, and the parties agree that Boone County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$883.20, sufficient to allow the following compensation rates: \$578.48 for temporary total disability and permanent total disability and

Employee: Jeffery Ross

Injury No. 00-039698

\$303.01 for permanent partial disability; temporary disability benefits have been paid in the amount of \$27,932.32 prior to the date of this hearing, which represents 48-2/7 weeks of benefits; the Employer has paid medical benefits in the amount of \$68,456.14 prior to the date of this hearing; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

ISSUES

Whether the accident caused the injuries and disabilities for which benefits are now being claimed.

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injuries.

The nature and extent of any permanent disabilities.

The liability of the Second Injury Fund for permanent total disability or permanent partial disability.

DISCUSSION

A legal file was established for this hearing consisting of the following documents, to wit: Claim for Compensation filed by the Claimant with the Division; Answer to Claim for Compensation filed by the Employer with the Division; Answer to Claim for Compensation filed by the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, with the Division; Amended Claim for Compensation filed by the Claimant with the Division; Answer to Amended Claim for Compensation filed by the Employer with the Division; Answer to Amended

Employee: Jeffery Ross

Injury No. 00-039698

Claim for Compensation filed by the Treasurer with the Division; Request for Final Hearing filed by the Claimant with the Division.

Claimant offered into evidence, and there were admitted, Claimant's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, and Z. Employer offered, and there were admitted, Employer's Exhibits 1 and 2.

Jeffery Ross, claimant herein, testified on his own behalf. Claimant testified that he was 48 years of age at the date of hearing. Claimant lives in Callao, Missouri, where he has lived for about 16 years. Claimant attended 12 years of school and received a high school diploma.

Claimant testified that he was working in Chillicothe, Missouri, at the high school installing ceiling grids as part of an acoustical ceiling installation on April 17, 2000, when he inadvertently stepped off of scaffolding which was about two and one-half feet off the floor of the room where he was working. Claimant's left foot hit the floor while his right leg stayed on the scaffolding. The scaffolding was a platform on wheels. Claimant testified that he did not fall all the way to the floor, but when his left leg hit the floor, Claimant felt immediate pain in the left knee and he felt a "pop." The incident occurred about 3:20 in the afternoon near the end of the workday.

Claimant testified that the pain did not let up and that he hobbled around on the floor trying to walk off the pain but nothing worked, so Claimant then left the workplace and went to his home. Claimant testified that several other people were working in the same area when the incident occurred. Claimant testified that people came into the room where the incident occurred to see what the matter was. When Claimant left the job site, he was with Larry Close, a friend and co-worker. Claimant further testified that Larry Close had to help Claimant into Claimant's house that evening after work. The next day Larry Close picked up the Claimant for work.

Employee: Jeffery Ross

Injury No. 00-039698

Claimant testified that Larry Close had to help Claimant to the car to go to work. Upon arriving at work on April 18, 2000, Claimant contacted his supervisor, Bill Morgan, who took Claimant to the emergency room at a Chillicothe hospital.

Claimant testified that he was treated at the Chillicothe hospital with x-rays and the placement of an immobilizer on his left knee. After treatment in Chillicothe, Claimant was referred to Dr. Turnbough, in Moberly, Missouri, for follow-up treatment. Eventually, Claimant was referred to Dr. Galbraith at Columbia Orthopaedic Group for treatment.

Claimant testified that he had an MRI on April 20, 2000, on the third day after the accident. Claimant testified that on that day, he began having chest pains, his left knee was swollen and he complained of pain in his calf. Claimant further testified that the chest pain grew progressively worse and he was throwing up blood, so Claimant went back to the hospital where Claimant was told he had pneumonia. Claimant was administered medicine for pleurisy and bronchitis and was sent home. About 5 or 6 days after the diagnosis of pneumonia, Claimant continued to throw-up blood, and he again contacted the hospital. Claimant was told to come to the hospital and was admitted with a diagnosis of deep vein thrombosis (blood clots) and pulmonary embolism. Claimant was hospitalized for a period of about two weeks, at which time Claimant's treatment, among other things, was the placement of a Greenfield filter inside a major vein of Claimant's left leg.

When Claimant was released from the hospital after receiving the filter in his leg, he was on complete bed rest. For a period of two months after his hospitalization, a nurse would come to Claimant's home two times each day to administer Claimant's dosage of medication. Claimant testified that after the surgery he continued to have left leg swelling, left knee pain, and shortness of breath.

Employee: Jeffery Ross

Injury No. 00-039698

Thereafter, Claimant was released from regular treatment and discharged with a referral back to Dr. Galbraith of the Columbia Orthopaedic Group. Claimant further testified that Dr. Galbraith told him that he did not recommend surgery on Claimant's knee because of the clot which Claimant suffered after the April 17, 2000, accident.

Claimant testified that Dr. Galbraith indicated that as long as Claimant could stand the pain in his knee, Claimant should continue to go without surgery because of the danger of Claimant having another blood clot.

Claimant was found to be at maximum medical improvement and released by Dr. Galbraith. Thereafter, Claimant tried to get and keep several jobs. Claimant testified that he tried working to build screens; he worked at a landfill; and he worked reading blue prints.

Claimant testified that he went to vocational rehabilitation through the state of Missouri, where they suggested Claimant could become a farm-hand or a trash worker. Claimant testified that he did not think he could perform any of these jobs because they require standing and stooping, which gave the Claimant left knee and left hip pain.

Claimant testified that he has worked installing drywall for about 25 years. Claimant testified that he has never had to fill out a written application for a job and that he cannot write, read, or comprehend the written word very well.

Claimant testified that he can no longer climb ladders or scaffolding, and he cannot operate heavy machinery. Claimant further testified that he does not know if he has any transferable skills. He further testified that he could not be a millwright because tearing down pipes from overhead is very heavy labor. In addition, Claimant could not be a finish carpenter because he is restricted from bending, squatting, kneeling, or crawling because of his knee.

Employee: Jeffery Ross

Injury No. 00-039698

Claimant testified that he attended Bevier High School in Bevier, Missouri, where he completed high school. Claimant testified that he was not enrolled in any special education classes or any other special classes. Claimant testified that he does not read for recreation and does not believe he is capable of composing and/or writing a letter, such as a business letter.

Claimant testified that his left knee swells if he stands too long; his left knee hurts if he walks or stands too long; and he wears a compression stocking which fits from his foot to just below the knee on his left leg every day, except at night when he is sleeping. Claimant testified that he wears the compression stocking to help the venous flow of blood in his calf and to prevent ulcers in the calf. Claimant further testified that if he does not wear the compression stocking, he has increased leg pain and less stamina to do things. Claimant further testified that he elevates his leg waist high whenever he can, which helps alleviate the left leg pain.

Claimant testified that sitting more than 30 to 60 minutes makes his toes go numb and tingle, and that his left foot is always colder than his right foot. Claimant further testified that walking hurts his knee and standing exacerbates the pain in his leg more than his knee. Claimant testified that he can walk from his house to the road, which is a distance of about 60 feet. Claimant further testified that when he walks from the house to the road, he gets winded and he has to stop and rest. In addition, that walk usually causes an increase in the pain in Claimant's left knee.

Claimant testified that on a typical day he gets up and has breakfast; he sits in the recliner with his left leg up; he eats lunch; and then he takes a nap. Claimant further testified that on some days, he walks out to his shop and "piddles around." Claimant testified that prior to April 17, 2000, he used to look for arrowheads, and he would hunt for deer and mushrooms. Claimant testified that he still does some mushroom hunting but not in the same way that he did prior to

Employee: Jeffery Ross

Injury No. 00-039698

his injury. Claimant used to ride ATV's for recreation, but now he only rides on the roads.

Claimant does do some mowing, but his spouse does the majority of the mowing. Claimant does still fish, but he only fishes now where the terrain and access will allow him to not use his knee and leg too much.

Claimant testified that he understood his treating physicians have administered all the treatment they can at this point, and that he might be on Coumadin for the rest of his life, has to wear compression stockings, and is at risk for future blood clots.

Claimant testified that he has always worked heavy construction where there is constant risk of injury, and Claimant does not think his situation will improve.

Claimant testified that he has gained 120 pounds since the date of injury and that he has contracted sleep apnea since the injury which causes him to use a B-pap machine during sleep. Claimant further testified that Dr. Campbell prescribed the compression stocking for Claimant's left leg and that Claimant purchases two compression stockings each year at a cost of about \$50.00 each pair. Claimant stated that he seeks medical expense reimbursement for the compression stockings of \$800.00.

Claimant also testified that he does not know why Dr. Galbraith's treatment note would have said that Claimant refuses any surgery on his left knee, and further, that Claimant did not recall Dr. Galbraith recommending surgery or ever telling Dr. Galbraith that he refused to have surgery on his left knee.

On cross-examination by the Employer, Claimant admitted that the treating physician recommended that Claimant stay away from green vegetables because of the clotting. He further admitted that he smokes one pack of cigarettes per day and has done that for about 30 years. Claimant further admitted that for a time he smoked as much as three packs of cigarettes per day

Employee: Jeffery Ross

Injury No. 00-039698

and that all the treating physicians recommended to the Claimant that he not smoke cigarettes. Claimant admitted that he has not had surgery on his left knee since the accident of April 17, 2000.

On cross-examination by the Second Injury Fund, Claimant admitted that he had no prior medical history for blood clots before the April 17, 2000, incident and that Claimant's job history was always heavy labor. Claimant admitted that prior to his injury, he carried 4' x 12' sheets of drywall which Claimant admitted were "pretty heavy," and that Claimant would hang about 40 sheets of drywall per day which weighed, in total, about 2000 pounds. Claimant admitted that his job hanging drywall was fulltime and full duty without any restrictions, prior to April 17, 2000.

Claimant admitted that he had restrictions as a result of his treatment with Dr. Galbraith, that he never got winded prior to April 17, 2000, that he never had left leg pain or swelling prior to April 17, 2000, and that he was never required to elevate his left leg prior to April 17, 2000.

Claimant admitted that he can read, but if the reading is lengthy, he cannot comprehend or remember what he read. Claimant further admitted that he can drive a car and that he can drive from Callao to Macon, Missouri, without stopping. Claimant further admitted that his left knee pain prevents him from being able to walk in the woods and that he does not take his ATV off the road, because he is afraid of hurting his knee again if there is an accident. Claimant further admitted that he limits his recreational fishing and hunting because of left knee pain.

Lary Gene Close testified on behalf of Claimant. Mr. Close testified that he knows the Claimant through work and that he and Claimant have worked together for about 16 years. Mr. Close testified that he was working in the next room from Claimant on April 17, 2000, when he heard the scaffolding noise, and he went in to see what had happened. When he came into the

Employee: Jeffery Ross

Injury No. 00-039698

room, he saw Claimant in pain. Mr. Close drove Claimant home on that day and picked him up for work the next morning. Mr. Close testified that when he came to pick Claimant up for work, he and Claimant's wife had to help Claimant get into Mr. Close's car, and that Mr. Close drove himself and the Claimant to work.

Mr. Close testified that when they arrived at work, the foreman took Claimant to the hospital emergency room. Mr. Close testified that he and Claimant have had steady work since the year 2000 and that they earn about \$35,000.00 per year hanging drywall full time. Mr. Close testified that he and Claimant used to hunt and fish together, but now Claimant cannot hunt and when they go fishing, Claimant fishes next to the road so that he does not have to walk very far. Mr. Close further testified that he cuts wood for Claimant since the accident on April 17, 2000, and that he often sees Claimant with Claimant's left leg elevated.

Mr. Close testified that, in his opinion, Claimant can no longer hang sheet rock; cannot do finish carpentry because he would have to get down on his hands and knees and crawl around; and cannot do millwright work because it involves heavy labor.

Mr. Close testified that Claimant was always a hard working person who cared about his work and who stayed busy all the time.

On cross-examination by the Second Injury Fund, Mr. Close admitted that he never knew Claimant not to do his share of the work and that they usually worked at least 40 hours per week and some weeks they worked more than 40 hours in a week.

Debbie Ross, spouse of Claimant, testified on behalf of the Claimant. Mrs. Ross testified that Claimant was a "work-aholic" who always worked heavy labor jobs until his injury on April 17, 2000, and that Claimant has not worked since his injury except for failed attempts to return to work.

Employee: Jeffery Ross

Injury No. 00-039698

Mrs. Ross testified that since April 2000, Claimant's social life and their activities together have been curtailed. She further testified that Claimant's personality has changed in that Claimant was always the bread winner for the family, but since April 17, 2000, injury, Mrs. Ross has had to gain employment while Claimant stays home. Mrs. Ross testified that Claimant becomes discouraged and irritable because he is not able to be the "man of the house."

Mrs. Ross testified that she now does most of the mowing and she has to take care of the garden. She further testified that Claimant seldom takes his ATV out riding, but the biggest change in Claimant since the injury is that Claimant does not do much of anything, and Claimant does not go out in the night air because it affects his breathing. Mrs. Ross further testified that she and Claimant used to walk in the evening after supper, but Claimant will not walk because he cannot keep up with her.

Mrs. Ross testified that she handles the family finances, because Claimant cannot keep records, that Claimant does not write very much, and that Claimant is not a good reader.

Mrs. Ross testified concerning a physician's appointment which she attended with the Claimant in March 2001. She testified that Dr. Galbraith went over restrictions with the Claimant at the end of the treatment visit and that she and Claimant left the room. Mrs. Ross forgot her coat in the treatment room and returned to get the coat when she overheard a conversation in the treatment room between Dr. Galbraith and the case manager. Mrs. Ross testified that she heard the case manager tell Dr. Galbraith that he needed to change some of the restrictions in the written report and that the paper that was given to Claimant after the treatment visit had different restrictions than those given to the Claimant by Dr. Galbraith orally before Claimant left the treatment room.

Employee: Jeffery Ross

Injury No. 00-039698

Dr. Allan Schmidt, Ph.D. testified on behalf of the Claimant by deposition. Dr. Schmidt testified that he is a licensed psychologist. Dr. Schmidt testified that he has worked with injured workers in the past and that he has experience evaluating individuals with learning disabilities, attention deficit disorders, and other educational problems. Dr. Schmidt evaluated Claimant and authored a written report which was marked as Exhibit 2 of the deposition.

Dr. Schmidt identified the testing procedures he implemented in Claimant's evaluation and interpreted the results as set out in his report. Dr. Schmidt testified that he found that Claimant had low average intelligence. Dr. Schmidt further testified that Claimant's scores for reading, reading comprehension, spelling, written expression and oral expression were low in comparison to his IQ scores. He testified that page 2 of his report showed that Claimant was at the 4th percentile in reading comprehension, 1st percentile in spelling, 2nd percentile in written expression, and 2nd percentile in oral expression. Claimant's score in word reading was in the 13th percentile; in numerical operations he was in the 16th percentile, and in listening comprehension he was in the 19th percentile.

Dr. Schmidt testified that when all of Claimant's scores were totaled, there was a significant difference between Claimant's performance and Claimant's potential, which is indicative of a learning disability in the area of reading.

Dr. Schmidt concluded that Claimant indicated evidence of a reading and written expression learning disability, and that the Claimant's disability caused him to function at a lower rate than expected for a person with low average range intelligence. Dr. Schmidt's report further states that remediation of these types of disabilities is very difficult if possible, and that successful remediation would allow the Claimant to read at the low average intelligence level.

Employee: Jeffery Ross

Injury No. 00-039698

Dr. Schmidt further opined that Claimant's learning disability was a result of childhood and was not connected to his work-related injury.

Dr. Schmidt testified that filling in blank forms or completing partially printed forms would be difficult for Claimant unless he was specifically trained on what words belong in the blanks. He further testified that Claimant would have a very difficult time reading written directions for construction or installation of anything.

Dr. Schmidt rated Claimant's psychological disability at 20% of the body as a whole, all of which would be attributable to prior to the injury of April 17, 2000. He further testified that Claimant could not be successful in obtaining a job which required the ability to read, follow directions, write reports, or do anything in a written manner.

On cross-examination by the Second Injury Fund, Dr. Schmidt admitted that it would be very difficult for Claimant to have affected the outcome of testing by Claimant's own motivation and that the pattern of results of Claimant's particular results does not indicate results which were manipulated by Claimant, based on Claimant's school records, his history of reading problems, and the test results.

Dr. Schmidt admitted that Claimant is capable of learning new skills if Claimant is trained in those skills rather than Claimant reading about the skills and then being able to do a particular job or skill, especially if reading and comprehension are a regular part of the job. He further admitted that the difference between Claimant's reading skills and writing skills and Claimant's actual IQ is significant enough to diagnose a learning disability.

Mary Titterington testified on behalf of Claimant by deposition. Ms. Titterington testified that she is a vocational rehabilitation consultant, and has practiced in that field for 30 years. Ms. Titterington testified that she prepared a written report containing her observations,

Employee: Jeffery Ross

Injury No. 00-039698

recommendations and opinion with regard to the employability of the Claimant which was marked as Exhibit 2 for the deposition. Ms. Titterington testified as to which records she reviewed in her evaluation of the Claimant including medical records, IME reports, depositions of examining physicians, the tests she administered, and the conclusions she reached as a part of her report. She also testified that she felt Claimant gave a full effort in taking the tests administered as part of the evaluation. She further testified that if Dr. Gragnani's opinions were accepted, and Claimant had no restrictions, then Claimant would be employable in the open labor market.

Ms. Titterington testified that, in her opinion, Claimant could not perform the tasks of a finish carpenter, because Dr. Gragnani's records indicated that Claimant could not do a full squat, and any finish carpenter would be required to do a full squat from time to time. She further testified that Claimant had never done any carpenter work that required complicated math skills and precision work.

Ms. Titterington testified that, other than Dr. Gragnani, the restrictions placed on Claimant by the other physicians are consistent with what she found in her evaluation. Ms. Titterington further testified that she found Claimant's activities consistent with restrictions of Dr. Galbraith, Dr. Vail, and Dr. Koprivica, and Dr. Subbarao with regard to avoiding ladders and stairs, as well as squatting.

Ms. Titterington also testified that Claimant's test scores indicated a significant separation between Claimant's ability scores and his reading and spelling scores. She further testified that, given the restrictions of Drs. Galbraith, Vail, Koprivica, and Subbarao, Claimant could not return to his former work. She further testified that, in her opinion, Claimant did not have any transferrable skills within his restrictions.

Employee: Jeffery Ross

Injury No. 00-039698

Ms. Titterington testified that Dr. Koprivica's restriction that requires Claimant to elevate his leg during a workday would be considered an unacceptable practice for an employer to accommodate. She further testified that Dr. Vail's, Dr. Galbraith's, and Dr. Subbarao's restrictions would allow no more than a narrow opening into the labor market, without considering the necessity to elevate the leg, and these restrictions had no effect on the Claimant's mental capabilities.

Ms. Titterington testified concerning several possible jobs that Claimant might be able to perform, given his restrictions. She testified that Claimant would have a difficult time with a job that involved customer service or retail sales if he had to sit in a chair with his leg elevated. She further testified that Claimant might have the ability to be a security monitor, but he would not be able to be a security guard because of the requirement to elevate his leg. Ms. Titterington also testified that Claimant could not perform courier services, assembly and packing jobs, cashier, parking lot attendant, or night clerk at a motel, unless the positions accommodated Dr. Koprivica's restrictions with regard to elevating the leg.

Ms. Titterington admitted on cross-examination that, in her opinion, Claimant does not have the academic skills or the communication skills to perform job tasks that might be available within the restrictions set out by the physicians. She opined that Claimant was not employable in the open labor market given the restrictions of the physicians and the low academic and communication skills. She further admitted that, in her opinion, Claimant is in lower verbal IQ range rather than average, which affects Claimant's ability to learn and communicate.

Dr. Brent Koprivica testified on behalf of Claimant by deposition. Dr. Koprivica testified that he performed an independent medical evaluation upon Claimant and issued a report dated June 14, 2002, as a result of his evaluation. Dr. Koprivica identified his report which was

Employee: Jeffery Ross

Injury No. 00-039698

attached to the deposition as Deposition Exhibit 2 (August 28, 2003). Dr. Koprivica took a history from the Claimant with regard to Claimant's work history, his previous medical history, and the facts surrounding the accident which occurred April 17, 2000. Dr. Koprivica further testified that although Claimant related several injuries which occurred prior to April 17, 2000, it was Dr. Koprivica's opinion that none of the prior injuries or medical conditions was serious enough to be industrially disabling or a hindrance to employment. Dr. Koprivica testified that Claimant worked in the construction industry most of his adult life and spent the majority of his working career hanging drywall as employment.

Dr. Koprivica reviewed several treatment records as part of his evaluation of the Claimant, and the report, which is part of Exhibit T, sets out the medical records reviewed which appears to be a complete chronological listing of the treatment received by Claimant after his accident of April 17, 2000. Dr. Koprivica testified that after the injury, Claimant suffered a deep vein thrombosis in his left leg which blocked the venous system in Claimant's left leg from the calf, just below the knee, through the left thigh, and that as a result of the blood clot, Claimant also suffered a pulmonary embolism for which Claimant received treatment including hospitalization and the surgical insertion of a Greenfield Filter in the vena cava.

Dr. Koprivica testified that Claimant's left thigh was larger in circumference than the right and that the left calf was smaller than the right. He further testified that Claimant was prescribed a Jobes compression stocking for the left calf which caused compression of the left calf. Dr. Koprivica opined that the larger circumference of Claimant's left thigh was caused by swelling in the left leg, as a result of vascular damage occasioned by the blood clot history, referring to the condition as venous incompetence.

Employee: Jeffery Ross

Injury No. 00-039698

Dr. Koprivica testified that he reviewed MRI films which indicated that Claimant had a tear of the ACL of the left knee but that there was no surgery to repair the ACL because of the danger of a recurrent blood clot if the repair were to be accomplished surgically.

Dr. Koprivica testified concerning the cause and effect of blood clots in an extremity, including the possible prognosis of death if the blood clot reaches the lungs and sufficiently blocks the flow of blood into the lung to support life. Dr. Koprivica further testified that the purpose of the Greenfield filter is to “catch” blood clots from traveling up the venous system from the extremity in order to prevent a recurrence of a pulmonary embolism in the future.

Dr. Koprivica testified that a pulmonary embolism blocks the flow of blood to some part of the lung, depending on where the blockage occurs and that the effect of the blockage is that the affected part of the lung may no longer oxygenate blood which will have an impact on the lung function. The amount of impact is determined by the amount of the lung that suffered oxygen insufficiency.

Dr. Koprivica testified that recurrent blood clots are caused because an injured blood vessel is more likely to clot and also because of immobility of the affected part of the body. Dr. Koprivica opined that when Claimant’s accident occurred, it caused some damage to the ACL which caused bleeding in that area. The bleeding combined with the immobility of the knee following the accident caused the blood clot. He further testified that the increased propensity to clot if there is another injury to that part of the body is significant in determining permanent restrictions. Dr. Koprivica opined that the fall and subsequent knee injury of April 17, 2000, was a substantial factor in causing the blood clotting which Claimant suffered.

Dr. Koprivica testified that in his opinion, the risk of a blood clot is so significant that ACL reconstructive surgery would not be recommended.

Employee: Jeffery Ross

Injury No. 00-039698

Dr. Koprivica opined that Claimant had suffered a 25% permanent partial disability to the left knee at the 160-week level as a result of the accident of April 17, 2000. He further opined that Claimant had suffered a 15-20% permanent partial disability to the body as a whole as a consequence of the peripheral vascular disease with deep venous thrombosis with a pulmonary embolism, also with the placement of a Greenfield filter in the inferior vena cava.

Dr. Koprivica testified that he recommended permanent limitations for Claimant which included avoiding activities with a high likelihood of sustaining direct trauma and to avoid climbing, squatting, crawling, or kneeling. Also, he recommended standing or sitting not to exceed one-hour intervals and that Claimant be allowed to change posture if his leg swelled or was painful. In addition, Dr. Koprivica recommended that Claimant elevate his left leg to prevent excessive swelling.

Dr. Koprivica opined that he did not find any physical condition of the Claimant, which pre-dated April 17, 2000, which caused a hindrance or obstacle to Claimant's employment, and therefore, if Claimant was totally disabled, the issue would be from a vocational viewpoint rather than from a physical impairment viewpoint. He further testified that if Claimant sits for any period of time, Claimant's leg will swell, and the leg will have to be elevated to control the swelling. Dr. Koprivica testified that Claimant did not have to have his leg elevated all the time, but that it would be necessary from time to time.

On cross-examination by Employer, Dr. Koprivica admitted that the Claimant's injuries from this injury alone are not sufficient impairment to preclude Claimant from working in the future. Dr. Koprivica admitted that the medical records indicate possible alcohol abuse in Claimant's history, but that Claimant told Dr. Koprivica that he consumes alcohol occasionally. He also admitted that Claimant said that he smokes about one-half pack of cigarettes per day.

Employee: Jeffery Ross

Injury No. 00-039698

Dr. Koprivica admitted that Claimant had treatment for back pain both prior to and after Claimant's injury of April 17, 2000. Dr. Koprivica further admitted that Claimant had a tear of the left ACL as part of his injury, but that Claimant had no medical treatment for his knee injury since March 21, 2001, a period of about 15 months prior to the date of Claimant's examination by Dr. Koprivica. Dr. Koprivica further admitted that Dr. Galbraith recommended restrictions for the Claimant which included no squatting, climbing, working on ladders, or using stairs.

Dr. Koprivica admitted that Claimant was not using an assistive device to walk when the examination took place and that Claimant performed a full squat as part of the physical exam. He further admitted that he could not confirm an ACL tear of the left knee from his examination of Claimant, and that the only way to confirm an ACL tear would be to have a surgical procedure to determine for sure that the ACL is torn.

Dr. Koprivica admitted that Claimant's deep vein thrombosis was caused by trauma from the fall, or inactivity after the fall, or a combination of the trauma and the inactivity. Dr. Koprivica further admitted that a clot is a direct and natural consequence of the injury and the inactivity of Claimant's knee after the injury, the inactivity being caused by the immobilizer placed on Claimant after the initial trauma of the accident.

Dr. Koprivica admitted that Dr. Galbraith opined that the Claimant's pain was not congruent with the injury sustained by Claimant, but that, in Dr. Koprivica's opinion, the increased level of pain was caused by the blood clot forming in Claimant's leg and which was not diagnosed until May 3, 2000.

Dr. Koprivica admitted that Claimant's history of tobacco use could be a contributing factor to blood clots occurring, as well as use of a bronchial inhaler, along with the use of tobacco and other factors.

Employee: Jeffery Ross

Injury No. 00-039698

Dr. Koprivica admitted that Claimant had not suffered any further clots in his lungs since the insertion of the Greenfield filter and further, that the fact that Claimant suffered a deep vein thrombosis alone would not preclude a return to work. Dr. Koprivica admitted that his opinion as to Claimant's ability to access the open labor market was deferred to a vocational expert.

On cross-examination by the Second Injury Fund, Dr. Koprivica admitted that Claimant performed jobs prior to April 17, 2000, which required heavy physical labor, lifting, bending, stooping, and climbing on a regular basis. He further admitted that after Claimant had treatment for back pain prior to the current injury, the Claimant returned to full duty heavy physical labor. He also admitted that the cause of the Claimant's deep vein thrombosis was the trauma and subsequent immobility following the incident of April 17, 2000, and that all of the restrictions set out in his report are the result of Claimant's accident of April 17, 2000.

Claimant introduced, and there were admitted into evidence, exhibits which contain medical records documenting the treatment which Claimant received for this injury and which generally support the testimony of Claimant and Claimant's expert witnesses.

Dr. John A. Gragnani testified on behalf of Employer by deposition. Dr. Gragnani testified that he performed an examination of the Claimant at the request of Employer's attorney. Dr. Gragnani testified that he issued a report dated August 25, 2003, identified as Exhibit B of the deposition. Dr. Gragnani's report indicates that Claimant needs no further treatment to his left knee and that Claimant's left knee condition does not require any limitation to Claimant's overall activity. With regard to the blood clots in Claimant's leg and the pulmonary embolism suffered by Claimant, Dr. Gragnani testified that there are contributing factors which could have caused the clotting and subsequent embolism, such as a long history of smoking, as well as the possibility of a past history of drug abuse. Dr. Gragnani's report indicates that there is no further

Employee: Jeffery Ross

Injury No. 00-039698

treatment needed for the blood clots and that the clotting has “no residual of concern that would restrict him from being functional.”

Dr. Gragnani testified that, in his opinion, there was no information which would allow a diagnosis that the deep vein thrombosis was related to or caused by Claimant’s situation at the time of the occurrence. He further testified that, in his opinion, there was not any medical literature that allowed him to make a correlation between Claimant’s incident of April 17, 2000, being the cause for the blood clots which Claimant suffered. Dr. Gragnani further testified that the blood clots were treated and “fixed for now, the time being. That’s the end of it.”

Dr. Gragnani testified that, in his opinion, Claimant’s clotting issues have nothing to do with work environment unless the Claimant receives an injury to his leg, then Claimant could have clots again.

On cross-examination by Claimant, Dr. Gragnani admitted that Claimant had several contributors to the cause of a deep vein thrombosis, obesity and smoking, as well as a period of immobility. He further admitted that he did not know the specific timeframe between Claimant’s injury, his immobilization and the onset of chest complaints ultimately leading to a diagnosis of pulmonary embolism.

Dr. Gragnani admitted that he disagreed with the restrictions set out by Dr. Galbraith because the restrictions were open-ended and would block Claimant from doing anything. He further admitted that movement was important in the prevention of blood clots and that carpenters have to move a lot and change positions; therefore, Claimant should not have a problem working. Dr. Gragnani further admitted that squatting, bending, and stooping were not necessarily contraindicated for the Claimant. He further admitted that he agreed with Dr.

Employee: Jeffery Ross

Injury No. 00-039698

Galbraith's decision not to operate on Claimant's knee and that Claimant could function with ACL deficient ligament.

Dr. Gragnani admitted that there is a statistical probability of as much as 8% for recurrence of deep vein thrombosis for people who have suffered the condition at least one time. He further admitted that recurrence can occur because of persistent obstruction or incompetence of the venous system in the area where the deep vein thrombosis occurred initially.

Mr. James M. England testified on behalf of Employer by deposition. Mr. England testified that he is a rehabilitation counselor and that he examined the records of Claimant including medical treatment records, reports and depositions of Dr. Koprivica and Dr. Gragnani, and the deposition of Claimant. In addition, he reviewed the report of Mary Titterington.

Mr. England testified that Claimant would not be able to return to the type of work Claimant had performed in the past based on the restrictions of Drs. Galbraith and Subbarao, as well as the restrictions of Dr. Koprivica, that Claimant has a sit/stand/move around option during his job activity.

Mr. England testified that if Claimant had to elevate his leg from time to time then Claimant would have to develop some specific skills that would allow him to be accommodated in a workplace. He further testified that Claimant would need to acquire some highly marketable skills to make Claimant more attractive to a potential employer who would be motivated to accommodate Claimant's restrictions. Mr. England further testified that Claimant could be employable in several positions if the restrictions of Drs. Galbraith and Subbarao are followed.

Mr. England testified that, in his opinion, Claimant had adequate intelligence to allow Claimant to acquire new knowledge through on-the-job training or a community college program. He further testified that he did not believe the Claimant was permanently and totally

Employee: Jeffery Ross

Injury No. 00-039698

disabled. He further testified that with Dr. Galbraith and Dr. Subbarao's restrictions, Claimant would be employable and even with Dr. Koprivica's restrictions, and that Claimant would be employable if Claimant had additional skill development.

Mr. England testified that, if the restrictions of Dr. Koprivica are followed, Claimant would not be able to do entry-level sedentary jobs because employers will not accommodate elevation of the leg, and that Claimant "...needs to find a very highly-marketable skill so that the employer in the end says, hey, as long as you know how to do whether it's social service, accounting, computer programming, whatever it might be, as long as you can do the job, I'm willing to accommodate that."

On cross-examination by the Claimant, Mr. England admitted that Claimant's level of activity for work would be sedentary level and that would allow Claimant to sit primarily and to get up and move around periodically. He further admitted that sedentary job tasks would be substantially skilled in that a sedentary low-skilled level job probably won't allow for elevation of the leg periodically. Mr. England further admitted that he would recommend Claimant successfully complete some additional job training in a salable area which would place Claimant in a skilled sedentary job market.

Mr. England admitted that he did not have any breakdown of availability of high skilled sedentary jobs in the geographic area of Callao, Missouri.

On cross-examination by the Second Injury Fund, Mr. England admitted that Claimant's IQ testing scores placed him in the average range of ability and that, at that level, Claimant should be trainable for new positions.

Employee: Jeffery Ross

Injury No. 00-039698

FINDINGS OF FACT AND RULINGS OF LAW

Whether the accident caused the injuries and disabilities for which benefits are now being claimed.

In this claim, the Claimant has the burden to prove by reasonable probability that the accident is the cause for the need for Claimant's treatment and any permanent disability that may result as a consequence of the accident. The parties agree that Claimant sustained a work-related accident on April 17, 2000, which injured Claimant's left knee. The parties do not agree that the subsequent deep vein thrombosis and pulmonary embolism were caused by Claimant's accident of April 17, 2000.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant has sustained his burden of proof that Claimant's accident of April 17, 2000, was a substantial factor in the need for treatment to the left knee as well as treatment for the deep vein thrombosis and pulmonary embolism which Claimant suffered.

I further find that the credible medical evidence establishes the fact that the tearing of Claimant's ACL in combination with the immobilization of Claimant's knee after the accident were substantial factors in the resultant deep vein thrombosis which Claimant suffered. I further find that the treatment necessary to treat the deep vein thrombosis and the pulmonary embolism was a direct consequence of Claimant's injury of April 17, 2000, and therefore, is part of the injury treatment which is the responsibility of the Employer.

I find this issue in favor of the Claimant.

Employee: Jeffery Ross

Injury No. 00-039698

Whether the Claimant has sustained injuries that will require future medical care in order to cure and relieve the Claimant of the effects of the injury.

Claimant testified that he was prescribed special compression hose to wear in order to control swelling in his leg, which swelling is a consequence of the deep vein thrombosis. In addition, Claimant's blood must be tested from time to time to monitor his body's need for the medication Coumadin.

After a review of all the evidence adduced at the hearing, both oral and written, I find that Claimant's injury of April 17, 2000, is a substantial factor in the need for Claimant's ongoing treatment for the deep vein thrombosis and pulmonary embolism, as well as, the need for treatment of Claimant's torn ACL, which was not fully treated at the time of the injury because of the occurrence of the deep vein thrombosis and pulmonary embolism..

Claimant introduced evidence of shortness of breath and the diagnosis of sleep apnea and chronic obstructive pulmonary disorder. The medical opinions with regard to these conditions do not clearly set out the cause of the need for Claimant's treatment for these conditions. The physicians opined that the need for sleep apnea treatment is caused, in part by obesity, and no opinion entered into evidence placed the need for treatment for sleep apnea on the accident of April 17, 2000. In addition, the medical records are consistent for a history of long term tobacco use, which the physicians opined can be a primary cause for chronic obstructive pulmonary disorder.

Employer is hereby ordered to provide all reasonable and necessary medical treatment to the Claimant which the authorized treating physician or physicians may recommend from time to time limited to the Claimant's left knee ACL, and the deep vein thrombosis and Greenfield filter, which was placed in Claimant's venous system.

Employee: Jeffery Ross

Injury No. 00-039698

I find this issue in favor of Claimant.

The nature and extent of any permanent disabilities.

Claimant alleges that he is permanently totally disabled. Employer denies that Claimant is permanently totally disabled or in the alternative that if he is totally disabled, it is as a result of a combination of pre-existing conditions with Claimant's injury of April 17, 2000, thereby placing liability for total disability on the Second Injury Fund.

There are several expert opinions adduced at the hearing with regard to total disability. Dr. Koprivica testified that Claimant's physical condition, taken in isolation, would not render Claimant totally disabled. However, he further testified that, given Claimant's restrictions, if he could not vocationally meet the job standards of sedentary level work, Claimant could be totally disabled. Dr. Koprivica testified that his opinion with regard to total disability was deferred to a vocational expert opinion.

Two vocational experts' opinions were offered at the hearing. Mr. England rendered opinions on behalf of Employer. He opined that Claimant was not totally disabled because Claimant could perform several enumerated jobs which Mr. England identified. Mr. England admitted that these jobs would be considered skilled sedentary jobs rather than entry level sedentary positions. He testified that if Claimant had to elevate his leg from time to time, that practice would affect his employability and that Claimant would need to be retrained into a highly skilled job market in order to be successful in accessing the open job market.

Mary Titterington rendered opinions on behalf of Claimant. She opined that Claimant's academic skills were too low to allow Claimant to be retrained into a skill level for a sedentary sit/stand option. Ms. Titterington further opined that if Claimant had to elevate his leg during the work day that such a practice was generally not acceptable in the open labor market.

Employee: Jeffery Ross

Injury No. 00-039698

Ms. Titterington's report states in part: "The total restrictions from Dr. Koprivica, as well as the other examining and treating physicians, restrict Mr. Ross to sedentary or light work that allow for a sit/stand option. As an unskilled worker without sophisticated work skills, the labor market is exceedingly limited within the above restrictions. When Mr. Ross' academic skills are applied to those limited jobs, his employment base is eroded. Mr. Ross' academic skills have been assessed both in this evaluation and his evaluation through the Missouri Vocational Rehabilitation Services as falling at the elementary to junior high school level. The jobs that allow for sit/stand option include security monitor, information clerk, and cashier. These positions would require academic skills above Mr. Ross' current functioning level."

"There are no jobs in the open labor market within these restrictions. The need to elevate legs at waist level or higher is not an acceptable customary work practice. It is not reasonable to expect an employer to accommodate these restrictions. At the current time Mr. Ross is unemployable in the open labor market."

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that Claimant is permanently totally disabled as a result of the last injury alone.

Mr. England opined that Claimant could access the labor market if he increased his skill levels to a high market level. Ms. Titterington opined that Claimant had no transferable skills and was not academically capable of achieving success in retraining at a level where Claimant could successfully access the open labor market. No vocational opinion stated that Claimant's academic ability to achieve a high skill level was solely because of any learning disability. No learning disability was ever diagnosed prior to the April 17, 2000, injury. Claimant was fully employed in the construction industry up to the date of his left knee injury.

Employee: Jeffery Ross

Injury No. 00-039698

I find that Claimant is permanently totally disabled. Employer is hereby ordered to pay to Claimant the sum of \$578.48 per week, the stipulated amount of compensation rate for total disability, as and for a permanent total disability benefit. Claimant reached maximum medical improvement March 22, 2001. Employer is hereby ordered to pay to Claimant the sum of \$258,415.23 (446-5/7 weeks x \$578.48 = \$258,415.23), as and for permanent total disability benefits up to and including the date of the hearing. Employer is hereby further ordered to pay to Claimant the sum of \$578.48 each week thereafter for the remainder of Claimant's life.

The liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability.

Based on the findings and rulings set out above, I find no liability of the Second Injury Fund for permanent total disability/enhanced permanent partial disability.

Claimant's attorney requested approval of an attorney fee of 25% of the amount of any award. Claimant's attorney's fee request is hereby approved. Claimant's attorney is hereby awarded an attorney fee of 25% of the amount of this award and is further granted a lien on the proceeds of this award unless and until the attorney fee shall have been paid in full.

Date: _____

Made by: _____

David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation