

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

Injury No.: 93-185904

Employee: Harold E. Seago  
Employer: Industrial Contractors & Specialty Services (Settled)  
Insurer: Liberty Mutual Insurance Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Early June of 1993  
Place and County of Accident: Arnold, Jefferson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 26, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued October 26, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8<sup>th</sup> day of April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

Attest: \_\_\_\_\_  
John J. Hickey, Member

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Harold E. Seago

Injury No. 93-185904

Dependents:

Employer: Industrial Contractors & Specialty  
Services (settled)

Add. Party: State Treasurer, as Custodian of the  
Second Injury Fund

Insurer: Liberty Mutual Insurance Co.

Hearing Date: 7/20/04; finally submitted 8/18/01

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

Checked by: KD:bb (by df)

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No
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: Early June of 1993
5. State location where accident occurred or occupational disease was contracted: Jefferson County, MO
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:  
Employee struck in right knee by 4 by 4 piece of lumber
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: Right knee
14. Nature and extent of any permanent disability: See Award
15. Compensation paid to-date for temporary disability: n/a
16. Value necessary medical aid paid to date by employer/insurer? n/a
17. Value necessary medical aid not furnished by employer/insurer? n/a
18. Employee's average weekly wages: ---
19. Weekly compensation rate: \$200.00 for permanent partial disability
20. Method wages computation: By agreement of the parties

**COMPENSATION PAYABLE**

21. Amount of compensation payable: ---
22. Second Injury Fund liability: Claim as against Second Injury Fund is denied. See Award.  
Claim for costs under 287.560 denied. See Award.

TOTAL:

23. Future requirements awarded: n/a

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Harold E. Seago

Injury No: 93-185904

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

Dependents:

Employer: Industrial Contractors & Specialty  
Services (settled)

Add. Party: State Treasurer, as Custodian of the  
Second Injury Fund

Insurer: Liberty Mutual Insurance Co.

Checked by: KD:bb (by df)

The claimant, Mr. Harold Seago, and the State Treasurer, as custodian of the Second Injury Fund, appeared at hearing by and through their counsel and entered in to certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation. Inasmuch as the primary claim as against the involved employer was previously settled, the parties agreed that the issues to be resolved as to the Second Injury Fund claim only are the following:

Medical Causation;  
Permanent partial disability; and

Liability of the Second Injury Fund.

The claimant further made a request for costs pursuant to Section 287.560 RSMo.

Mr. Seago appeared at hearing and testified on his own behalf. The claimant further submitted the deposition testimony of Dr. Alan C. Umbright.

## EXHIBITS

The Second Injury Fund declined to submit any exhibits on its behalf. The following exhibits are in evidence:

### Claimant's Exhibits

- A. Deposition of Dr. Alan C. Umbright taken on June 4, 2003
- B. Medical records of St. Joseph Hospital dated 6/16/96
- C. Medical records of St. Joseph Hospital dated 7/16/90
- D. Certified medical records of St. Mary's Health Center
- E. Certified copy of settlement in Injury Number 93-185904
- F. Contract For Legal Services
- G. Statement of Expenses
- H. Letter from Attorney Franke dated 6/25/01
- I. Letter from Attorney Mandava dated 6/27/01
- J. Facsimile copy of letter from Attorney Mandava dated 6/27/01

## FINDINGS OF FACT AND RULINGS OF LAW

In 1993 the claimant, Mr. Harold E. Seago, drove a truck as a deliverer of parts for Industrial Contractors Specialty Services (ICSS). Mr. Seago, 46 years of age as of the date of hearing in this matter, recalled that in June of 1993 a 4 by 4 was thrown and struck him in the right knee. Medical records from St. Joseph Hospital emergency department (Claimant's Exhibit B) indicate that the claimant was seen on 6/16/93, complaining of persistent right knee pain after having injured the knee several days earlier. An x-ray of the right knee was noted to be negative for fracture or malalignment, and claimant was given medication for musculoskeletal pain. The emergency room record is the only treatment record in the matter that pertains to the right knee. Mr. Seago submitted as Claimant's Exhibit E a copy of the settlement with the employer, indicating that the claimant settled for an approximate disability of 7.5% of the right leg at the knee.

Mr. Seago testified as to a history of back pain dating back to 1990. Medical records (Claimant's Exhibit D) indicate that on 8/1/90 Dr. Albanna performed a right microdiscectomy, removing herniated disc material at the level of L4 and L5.

Mr. Seago testified that he had no right knee complaints prior to his injury in June of 1993, and suffered no subsequent knee injuries thereafter. Mr. Seago alleges to have had a second back surgery in February of 1994, but offers no medical records to document that history. Claimant did, however, exhibit at hearing two scars on his back, which he attributes to the two surgeries had to his low back.

Mr. Seago made complaint that after the right knee injury, he has had difficulty climbing stairs, bending, and getting in and out of trucks. Claimant relates that he changed his gait after the injury, in order to put less pressure on the right knee.

Claimant further relates that the knee is painful, and that it has worsened over the course of time. Claimant acknowledges that back surgery took care of the pain he was experiencing, and that he was able to return to work after his back surgery, but relates that he was unable to do the "general lifting" he was doing prior to the surgery.

Dr. Alan C. Umbright met with Mr. Seago for the first time on June 9<sup>th</sup> of 1998. Dr. Umbright performed a physical examination of the right knee and concluded that claimant had developed a chondromalacia of the right patella following a contusion suffered to the knee in June of 1993. Dr. Umbright notes in his report dated 9/23/98 (Exhibit 1 to Claimant's Exhibit A) that the claimant had a laminectomy prior to the right knee injury, and provided a history of reinjury to the back due to a motor vehicle accident in 1995, leading to an L5-S1 lumbar fusion. Dr. Umbright also notes a history of left hip replacement in 1996 because of avascular necrosis of the femoral head. It is apparent that Dr. Umbright performed no physical examination of the low back, relying instead on his review of medical records. Dr. Umbright noted that the claimant suffered from a prior spondylolisthesis and disc herniation at L4-L5, and concluded that such a back condition combined with the knee injury, which limited the ability to squat, and noted "There is a combinational effect between Mr. Seago's pre-existing back injury and his knee injury in that they interact and effect one another, each putting stress on

the other" (Claimant's Exhibit 2 to Claimant's Exhibit A, page 2).

### MEDICAL CAUSATION/PERMANENT PARTIAL DISABILITY/LIABILITY OF THE SECOND INJURY FUND

Effective as of June 21, 1993, the legislature amended the law with respect to second injury fund liability, Section 287.220 RSMo, establishing thresholds of disability that the claimant must meet before the claimant can be found entitled to payment for a combination disability resulting in a greater degree of permanent and partial disability. To the extent that thresholds have been deemed substantive, they may not be applied retroactively to a claim such as that of Mr. Seago that arose before the effective date of the legislation. Smart v. Missouri State Treasurer, 916 S.W.2d 367 (Mo. App.S.D. 1996); Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo.App.W.D. 1996); Faulkner v. Chrysler Corp., 924 S.W.2d 866 (Mo. APP. E.D. 1996). Mr. Seago is not obliged to meet the minimum threshold for the primary injury, which is 15 % permanent partial disability for a major extremity such as, in the case of Mr. Seago, a knee.

However, the legislative amendment to Section 287.220 RSMo has been determined to contain both substantive and remedial provisions, and those remedial provisions may be applied retroactively to present cases. The 1993 amendment contained a remedial provision that replaced the old judicially created "industrial disability" standard for determining whether a preexisting injury is serious enough to trigger fund liability. As of June 21, 1993, the amendment to Section 287.220.1 RSMo provides, in pertinent part, that the preexisting injury must be "of such seriousness to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed". This new standard for preexisting disabilities is to be applied retroactively, and applies to the claim made by Mr. Seago. Leutinger v. Treasurer of Missouri, 895 S.W.2d 591 (Mo.App. E.D. 1995).

The first question is whether Mr. Seago suffered from a preexisting injury that constitutes "a hindrance or obstacle to employment". "If the Second Injury Fund is to fulfill its acknowledged purpose, the proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the *potential* that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition." Wuebbling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

However, the claimant must not only show that that the preexisting disability constitutes a hindrance or obstacle to employment; the claimant must be able to persuade as to the percentage of disability that existed prior to the last injury. The statute requires, in part, as follows:

After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

The only condition preexisting the work injury to the right knee complained of by Mr. Seago at hearing was as to the low back. Mr. Seago acknowledged at hearing that he had two surgeries to the low back; one before and one after the work injury to the right knee. In his report dated 9/23/98, Dr. Umbright acknowledges "He did have a second surgery on his back in early 1995, stating that he had a re-injury to his back resulting in a laminectomy associated with an L5-S1 lumbar fusion."

In a case where the claimant suffers injury to the same part of the body both prior to and after the fact of the involved work injury, it is incumbent on the claimant, who has the burden of proof, to persuade what, if any, permanent partial disability is attributable to the condition preexisting the work injury, and what is attributable to injury suffered after the work injury. The Second Injury Fund is only liable for those injuries that preexist the work injury. Proof of permanency of injury requires reasonable certainty. Griggs v. A. B. Chance Company, 503 S.W.2d 697 (Mo. App.).

The testimony of Dr. Umbright fails to persuade, as a matter of reasonable certainty, as to the nature and extent of permanent partial disability to the low back preexisting the right knee injury. Dr. Umbright did not perform any kind of clinical examination of the low back; did not elicit a history of back complaint from Mr. Seago in an attempt to distinguish or assign percentages of disability; and when asked about the medical records reviewed, it becomes apparent that Dr. Umbright had the benefit of the records from the later back surgery, but did not have the records from St. Mary's Hospital for the surgery in 1991. At pages 17 & 18 of his deposition, the following exchange occurred during cross-examination by the Second Injury Fund:

Q: At the time of your June of 1998 exam, you mentioned a 1991 back injury requiring surgery, correct?

A: Correct.

Q: Now, I know you stated earlier that you had the records of that surgery, are you sure that you actually had them, because I'm looking at your report and it looks like you talk about the 1995 surgery, but I'm not sure if you have the 1991?

A: That may have been the '95. Let me read my report too.

Mr. Franke: The bottom of page 1 you talk about a surgery occurring, a 1991 laminectomy?

A: I don't remember now, because I don't have these records in front of me. If somebody can show me the records, maybe I could refresh my memory.

By Ms. Wagner:

Q: As far as you know, you didn't have any St. Mary's records, is that correct? At least per your report you list whose records you had?

A: I didn't list that, so I probably didn't have them.

It is not possible to determine fund liability for a combination disability under Section 287.220.1 RSMO in the absence of expert medical testimony that persuades, as a matter of reasonable certainty, the extent of preexisting disability. The claim as against the Second Injury Fund for a combination disability must be denied.

**COSTS PER SECTION 287.560 RSMO**

Claimant argues that the Second Injury Fund should be liable under Section 287.560 for failure to defend without reasonable ground. The findings of fact and rulings of law herein suggest that Second Injury Fund reluctance to make an offer of settlement is supported by the law, inasmuch as the claimant failed in its burden of proof. The issue as to costs is found in favor of the Second Injury Fund.

Date: \_\_\_\_\_

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

KEVIN DINWIDDIE  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Gary Estenson  
*Director*  
*Division of Workers' Compensation*