

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

Injury No.: 05-043545

Employee: Jerry Sheets

Employer: Power Maintenance & Constructors (Settled)

Insurer: Hartford Insurance Company (Settled)

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: May 2, 2005

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 18, 2008. The award and decision of Administrative Law Judge Margaret Landolt, issued June 18, 2008, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 25th day of November 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

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

\_\_\_\_\_  
Secretary

## AWARD

Employee: Jerry Sheets

Injury No.: 05-043545

Dependents: N/A  
the

Employer: Power Maintenance & Constructors (Settled)

Additional Party: Second Injury Fund (Only)

Insurer: Hartford Insurance Co. (Settled)

Hearing Date: April 8, 2008

Before  
Division of Workers'  
Compensation  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: MDL

### 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: May 2, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:  
Employee fell while walking across ductwork and carrying equipment
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 37-1/2% Body as a whole – low back previously paid by Employer
15. Compensation paid to-date for temporary disability: \$24,718.63
16. Value necessary medical aid paid to date by employer/insurer? \$83,562.05
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$675.90/\$354.05

20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: Weekly differential (321.85) payable by SIF for 150 weeks beginning January 13, 2006 until November 28, 2009, and thereafter, \$675.90 per week for Claimant's lifetime.

Total: \*

23. Future requirements awarded: None

\* Denotes an indeterminate lifetime amount

Said payments to begin 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: Mr. D. Andrew Weigley

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jerry Sheets

Injury No.: 05-043545

Dependents: N/A

Before the  
**Division of Workers' Compensation**

Employer: Power Maintenance & Constructors (Settled)

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

Additional Party: Second Injury Fund (Only)

Insurer: Hartford Insurance Co. (Settled)

Checked by: MDL

### Preliminaries

A hearing was held on April 8, 2008, at the Division of Workers' Compensation in the City of St. Louis. Jerry Sheets ("Claimant") was represented by Mr. D. Andrew Weigley. Power Maintenance & Constructors and its insurer, Hartford Insurance Co., previously settled its liability with Claimant, and this case proceeded to a hearing against the Second Injury Fund ("SIF"), which was represented by Assistant Attorney General Kristin Frazier. Mr. Weigley requested a fee of 25% of Claimant's award.

The parties stipulated that on or about May 2, 2005, Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated to compensation rates of \$675.90 for permanent total disability ("PTD") benefits, and \$354.05 for permanent partial disability benefits ("PPD") benefits. The parties also stipulated if Claimant is found to be permanently and totally disabled, benefits should commence on January 13, 2006.

The issues for determination by hearing are: nature and extent of permanent disability; and liability of the SIF.

### Summary of Evidence

Claimant is a 66 year old man with a 7th grade education. Claimant worked as an usher at Lowe's theatre, and

entered the Navy at age 17. While in the Navy, Claimant obtained his GED, and was honorably discharged in 1963. After the Navy, Claimant went to work for Carter Carburetor as a milling machine operator.

His job involved picking up heavy pans of carburetor parts. Claimant developed significant back pain, treated for a short time with a chiropractor, and was referred to Dr. Graul. Claimant testified he underwent surgery at Christian Hospital, and missed approximately four months of work. Although the surgery helped, and Claimant was able to function at work, he still had pain in his back. Claimant left his job at Carter in 1965, and worked as an apprentice boilermaker until 1969, when he became a journeyman boilermaker. As a boilermaker, Claimant worked primarily as a welder.

In the early 1970's Claimant injured his low back while working. Claimant was walking on a catwalk, and tripped on a cable. As he was falling, he grabbed a handrail and twisted his back. He suffered from low back and right leg pain, and he returned to Dr. Graul. Following a course of conservative treatment, he underwent a second back surgery. After his surgery Claimant missed at least six months' work. Although he was able to return to work after his second surgery, Claimant had to be selective with respect to the tasks he performed to avoid further pain or injury.

In 1988 Claimant left the boilermaker's trade and started working for Mac Tools as a self-employed distributor. He drove a truck throughout the St. Louis metropolitan area selling tools to car repair facilities and other shops. Claimant left work as a boilermaker because work was slow in the late 1980's, his back was bothering him, and the job with Mac Tools was less physical.

In the mid 1990's, Claimant's low back pain worsened. Records from Orthopedic and Sports Medicine report an office visit of September 26, 1995. The records reveal Claimant complained of the gradual onset of pain in his back and right lower extremity for approximately one month. The records reference an MRI performed on September 18, 1995, which was positive for degenerative spondylosis at L-5 and S-1, and post surgical changes at L4-5 with possible spinal stenosis at L4-5. Claimant was referred to Dr. Feinberg for epidural steroid injections. On January 29, 1996, after a series of injections, Dr. Feinberg performed a surgical procedure to implant a temporary dorsal column stimulator. Claimant's diagnosis was post laminectomy syndrome, lumbar spine, and lumbar radiculopathy. Dr. Feinberg removed the stimulator after one week.

In February 1997, Claimant again had severe back pain. He underwent surgery, and had a permanent dorsal column stimulator implanted. He had it replaced three or four years ago, and it is still in place today. Claimant has used the stimulator to control and alleviate his low back and leg pain symptoms since 1997. Today he uses the stimulator every two to three months for a day or two to control his symptoms.

During the return of his low back pain in the 1990s, Claimant's work was affected. He missed some work because of back pain, and he took pain pills prescribed by his personal physician. He had difficulty performing his job for Mac Tools, and had to obtain his wife's help to fully perform his job duties. He had difficulty walking, and his wife had to accompany him and go inside businesses to collect his accounts. Claimant left his job at Mac Tools in 2002, because the business was less profitable, and returned to the boilermaking trade.

On May 2, 2005, Claimant was working for Employer at a power house in Arnold, Missouri. He fell while carrying a fifty pound come along on his shoulder, and twisted his back. Claimant was initially treated at St. Anthony's Medical Center, and SSM Corporate Health. Eventually Claimant was referred to Dr. Park, a neurosurgeon, who ordered a lumbar myelogram and post-myelogram CT scan that revealed disc degeneration with anterior osteophytes at all lumbar levels. At L4-5 and L5-S1 there was significant right sided foraminal stenosis due to hypertrophic facets causing compression of the right L4 and L5 nerve roots in the foramen. Dr. Park noted in his review of the myelogram and post-myelogram CT scan report dated May 24, 2005 that there was also evidence of previous laminectomy at both of those levels.

Dr. Park performed an L4-5, L5-S1 bilateral laminotomy and microdiscectomy, redo laminotomy and microdiscectomy with microdissection, an L4-5, L5-S1 posterior lumbar interbody fusion and placement of Tetris PEEK interbody spacers, two per level both levels, an L4-5, L5-S1 posterior lateral intertransverse fusion and posterior

segmental fixation using Vertebrom PSS system; and a right iliac crest bone graft harvest through separate fascial incision on July 18, 2005. Following surgery, Claimant underwent a course of physical therapy, and was released at MMI on January 11, 2006, with a permanent work restriction of lifting up to twenty pounds on an occasional basis.

Claimant has not worked since his 2005 work injury. Claimant testified he can not work, can not lift anything, and has a hard time bending. He uses a 36 inch tool to pick up items, because he is unable to bend. He is unable to put on his socks without assistance. He has pain in his lower back and right leg. He has used his dorsal column stimulator three to four times in the past six months. He no longer drives longer distances, and for the most part depends on his wife for transportation. He has difficulty sitting in the car, and has to recline in his car seat. He can sit for one to one and one-half hours, and then must move around for ten to fifteen minutes at a time. He is unable to stand for long periods of time. In a typical day he watches a lot of television. He sweeps and occasionally runs the vacuum cleaner.

There were times after Claimant returned to work as a boilermaker, and before the primary injury, when Claimant was unable to lift, and he told his supervisors, who accommodated him. Claimant testified it is an unwritten rule that the younger boilermakers help the older workers with the heavy lifting.

Dr. Thomas Musich testified on behalf of Claimant. Dr. Musich examined Claimant on April 25, 2006. Dr. Musich reviewed Claimant's medical records, took a history, performed a physical examination, and opined Claimant had a 75% PPD referable to his lumbosacral pathology, sacroiliac joint dysfunction, and bilateral lower extremity radiculopathy. Of that 75%, 30% preexisted the May 2, 2005 primary injury. Dr. Musich concluded Claimant is permanently and totally disabled due to a combination of the primary injury and preexisting disability, as well as his limited work training, job experience, and his advanced work age of 64.

Dr. Musich opined Claimant should observe the permanent restriction imposed upon him by his treating physicians, and, in addition, should not perform any activities that require prolonged lumbar positioning, and should not perform any above or below ground work, or operating power equipment.

Mr. James, Israel, a vocational counselor testified on behalf of Claimant. He testified Claimant had a substantial vocational impairment which preexisted the May 2, 2005 injury, and impeded Claimant from performing the essential and marginal duties of any occupation for which he would otherwise be qualified by education and experience. He testified Claimant's inability to resume substantial gainful activity is the result of medically determined limitations from both primary and preexisting industrial injuries or conditions. In his opinion, Claimant's diminished capabilities make it quite unlikely he could secure and sustain any substantial gainful or full time job.

Mr. Israel testified the cumulative effect of Claimant's physical condition, advanced age of 64; education, work background, and special work sites accommodations required of prospective employers have placed him at a very substantial disadvantage in securing employment. Employers in the usual course of selecting job applicants would avoid hiring an individual with Claimant's overall profile in favor of those who are work ready, and are more able and younger. Mr. Israel testified Claimant remains entirely vocationally unprepared and very substantially disadvantaged to compete in the open labor market.

Ms. Delores Gonzalez, a vocational rehabilitation counselor testified on behalf of SIF. She testified Claimant is employable in at least the unskilled sedentary level. She testified Claimant could perform jobs such as surveillance system monitor, order clerk or call-out operator.

### **FINDINGS OF FACT AND RULINGS OF LAW**

Based upon my observations of Claimant at hearing, a comprehensive review of the evidence and the application of Missouri law I find:

Claimant testified in a credible and truthful manner.

Under Mo. rev. Stat. Section 287.020.7, "total disability" is defined as "the inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W. 2d 173 (Mo. App. 1995).

Claimant is permanently and totally disabled. Claimant credibly described the continuing pain and problems he has had with his back for over forty years. Based upon the totality of the evidence, I find the opinions of Dr. Musich and Mr. Israel to be credible and supported by the medical evidence. I am not persuaded by the opinion of Ms. Gonzales that Claimant could compete for work in the open labor market. Claimant's age, lack of job skills, and his level of pain complaints would preclude him from sustaining employment in the open labor market.

Section 287.220.0, Mo. Rev. Stat. (2000) provides that where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in permanent and total disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200; *Grant v. Neal*, 281 S.W.2d 838, 840 (Mo. 1964); *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W. 2d 173, 177-178 (Mo. App. 1995); *Reiner v. Treasurer of State of MO*; 837 S.W. 2d 363, 366 (Mo. App. 1992); *Brown v. Treasurer of Missouri*; 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with subsequent compensable injury to result in total and permanent disability. Claimant has met his burden.

As a result of the primary injury of May 2, 2005, Claimant sustained PPD of 37-1/2% PPD of the body as a whole. Claimant settled his claim with employer for that amount, and the medical evidence, as well as Claimant's testimony supports that level of disability. Claimant's permanent total disability is a result of the combination of the primary injury and his preexisting injuries, and therefore SIF is liable for permanent total disability benefits.

Claimant's back complaints date back to the mid 1960's. He was hospitalized and had back surgery in the 1960's and again in the 1970's. He missed a considerable amount of work on both occasions. When his back complaints worsened in the 1990's, he treated with Dr. Kennedy, Dr. Feinberg, and Dr. Henderson. He ultimately had a dorsal column stimulator permanently implanted in his back to control his severe back pain. Between the 1990's and the primary injury, Claimant had intermittent bouts of back pain which caused him to miss time from work, and he controlled his symptoms by using the dorsal column stimulator.

The parties stipulated if Claimant were found to be permanently and totally disabled, benefits would commence as of January 13, 2006. I find SIF is responsible for PTD benefits commencing on January 13, 2006.

This award is subject to an attorney's lien of 25% in favor of Claimant's attorney Mr. D. Andrew Weigley.

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

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

MARGARET D. LANDOLT  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker  
Director

