

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

Injury No.: 02-131685

Employee: Leonard Slankard
Employer: J. H. Berra Construction Co., Inc. (Settled)
Insurer: Zurich North America (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 12, 2002
Place and County of Accident: 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 February 14, 2006. The award and decision of Administrative Law Judge Koren M. Mueller, issued February 14, 2006, 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 23rd day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Leonard Slankard

Injury No. 02-131685

Dependents: N/A

Employer: J.H. Berra - Previously settled

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: Previously settled

Hearing Date: July 12, 2005, formally submitted August 15, 2005

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

Checked by: KMM/lsn for bb

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: August 12, 2002
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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
slip and fall at work
12. Did accident or occupational disease cause death? No Date of death? --
13. Part(s) of body injured by accident or occupational disease: Bilateral shoulders, previously settled with Employer
14. Nature and extent of any permanent disability: 30% PPD right shoulder, 20% left shoulder previously settled
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: N/A
19. Weekly compensation rate: \$475.66/\$329.42
20. Method wages computation: by stipulation

COMPENSATION PAYABLE

22. Second Injury Fund liability: Yes No Open

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$146.24) payable by SIF for 121 3/7 weeks beginning

November 11, 2003 and, thereafter, \$475.66 for Claimant's lifetime

TOTAL:

23. Future requirements awarded:

Said payments to begin as of the date of this Award 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:

Brian Stokes

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Leonard Slankard

Injury No: 02-131685

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: J.H. Berra - Previously settled

Additional Party State Treasurer as Custodian of the Second Injury Fund

Insurer: Previously settled

Checked by: KMM/lsn for bb

PRELIMINARIES

A hearing was held on July 12, 2005 at the St. Charles Division of Workers' Compensation office. Post-hearing briefs were submitted by August 15, 2005 and therefore the claim was formally submitted on August 15, 2005. The claim was against the Second Injury Fund only because the primary case had previously settled. The parties agreed to hear this case in St. Charles although the proper venue was Jefferson County, Missouri. Leonard Slankard (hereinafter "Claimant") was represented by Brian Stokes. The Second Injury Fund was represented by Barbara L. Toepke. Mr. Stokes requested a fee of twenty-five percent of all benefits.

The parties stipulated that on or about August 12, 2002, Claimant sustained an injury by accident arising out of and in the course of employment in Jefferson County, Missouri. The parties further stipulated to the information contained in the compromise lump sum settlement of the primary injury in this claim. They stipulated specifically to a permanent total disability rate of \$475.66 and a permanent partial disability rate of \$329.42. They further stipulated to permanent partial disability of thirty percent of the right shoulder and twenty percent of the left shoulder from the primary injury in this claim. The parties stipulated that Claimant reached maximum medical improvement (MMI) on November 11, 2003 which equaled 87 weeks from MMI date to the hearing date in this matter. Claimant appeared and testified in his own behalf.

The parties agreed and stipulated that the issues for disposition in this case are as follows:

1. Nature and extent of permanent partial disability
2. Nature and extent of permanent total disability
3. Nature and extent of Second Injury Fund liability
4. Sec. 287.560 attorney fees and costs for an alleged unreasonable SIF defense

EXHIBITS

Claimant offered the following exhibits that were admitted into evidence without objection except for those objections contained within the deposition transcripts:

- Cl. Exh. A: Claim for Compensation
- Cl. Exh. B: Missouri Baptist Hospital-Sullivan medical records
- Cl. Exh. C: Healthsouth medical records
- Cl. Exh. D: Dr. Robert Poetz deposition taken March 3, 2005
- Cl. Exh. E: Stipulation for compromise settlement
- Cl. Exh. G: James Israel deposition taken March 24, 2005
- Cl. Exh. H: Claimant's demand letter dated March 24, 2004
- Cl. Exh. I: Claimant's preexisting medical records
- Cl. Exh. J: Claimant's attorney Stokes charges affidavit
- Cl. Exh. L: Claimant's attorney Friedman charges affidavit

Claimant withdrew the following exhibits and therefore they were not admitted into evidence:

- Cl. Exh. F: Temporary total disability checks
- Cl. Exh. K: Wage statement

Second Injury Fund offered the following exhibits that were admitted into evidence without objection except for those objections contained within the deposition transcripts:

- SIF Exh. I: James England deposition taken January 6, 2005

Second Injury Fund offered the following exhibit that was admitted into evidence over the objection of Claimant:

- SIF Exh. II: Claimant's deposition taken June 1, 2004

SUMMARY OF EVIDENCE

Only the evidence necessary to support this award has been summarized. Any objections not expressly ruled on in this

award are overruled. Claimant was fifty-four years old at the time of hearing. He completed ninth grade at Sullivan High School and obtained his GED as part of his Navy training. Claimant was a boatswain's mate in the Navy performing heavy manual labor beginning in 1968. He was employed over the years in manual labor including working as a heavy trash loader and truck driver and then an office worker with BFI immediately prior to his work with Employer. He switched from driving a truck at BFI to office work because he could no longer pass the DOT physical which was required to drive a truck for BFI. He worked for BFI from 1989 through 1999. Prior to this employment he worked for Lammert's and Stix, Baer and Fuller for at least eight years as a truck driver. He also worked as a police officer for the City of St. Clair. He had no other training.

Claimant was injured at work on August 12, 2002 when he slipped on a muddy embankment in the rain. He fell backwards, landed on his elbows and injured both shoulders. He sought immediate treatment for his injuries and underwent two surgeries on his right shoulder and one surgery on his left shoulder. His treating physician released Claimant on November 11, 2003 with the following permanent restrictions: no lifting above the waist, no pushing, pulling or working with heavy equipment. Claimant has not worked since August 12, 2002.

His preexisting disabilities included a 1972 work related injury while working at St. Clair Dye Casting with burns involving his face, arms and body. His most significant preexisting disability was diabetes mellitus. His diabetes mellitus resulted in visual problems. He cannot read, has blind spots and objects appear distorted much like a Salvador Dali painting. He cannot see features on people's faces. He wore glasses prior to his work with Employer, however he no longer wears glasses because they do not improve his site. He cannot drive. He suffers from diabetic neuropathy in his arms and legs. He has stinging sensations in his legs and feet and constant pressure in his legs and feet as if they are going to explode. He has a right thigh shooting pain. He has had difficulty healing, so he has to be extremely careful with his legs and feet. His hands hurt all the time and sting with use. He gets depressed and has a hard time interacting with family. He also has renal problems related to his diabetes. His application for Social Security Disability was pending at the time of the hearing.

Claimant testified that a typical day consisted of waking up and watching a large screen television at an arm's length away, talking to family, sitting outside, visiting with friends and watching television again. He cannot read, play sports, fish or walk any distance. He has not read a book in at least two years, because there are no glasses strong enough to allow him to read. When he walks or stands his legs sting. He steps carefully because stairs look like a ramp to him. The degeneration in his eyes keeps worsening. He can sit comfortable for only 30-45 minutes. He cannot lift, crouch or kneel. Bending his legs is difficult.

Claimant admitted on cross-examination that he could not recognize Ms. Toepke nor distinguish features. He also admitted that his brother was a supervisor at Employer. His brother and the grading superintendent interviewed Claimant for his position with Employer. Claimant could not hold a commercial driver's license at the time he worked for Employer. Claimant admitted on cross-examination that prior to the injury with Employer he could not drive himself to work 95% of the time. Instead he rode with his family to Employer's job site. He did not want to drive because of his sight. He was afraid to drive because he could not see quick movements, for example the movements of a child. He stopped driving in 1999-2000 because he was afraid he would hurt someone or himself. He had vision problems at the job site with Employer and did have an incident where he backed into a backhoe due to his vision problems. He had to get out of the truck at times due to pain in his legs and feet. He also had to urinate off the side of the truck due to his renal problems.

On re-direct Claimant testified that prior to 2002 no physician had told him he could no longer work. His job with Employer was not charity. Claimant testified he worked hard and was able to work successfully with Employer for three years.

Summary of Expert Testimony

Dr. Robert Poetz evaluated Claimant on his behalf on February 26, 2004. Dr. Poetz testified by deposition that Claimant suffered from bilateral shoulder injuries requiring surgery due to the August 12, 2002 work-related accident. Dr. Poetz diagnosed Claimant with preexisting diabetes type II, hypertension, obesity, visual impairment secondary to diabetes and chronic renal insufficiency secondary to diabetes. Dr. Poetz testified that these conditions all represented a hindrance or obstacle to Claimant's employment. Dr. Poetz testified (SIF objection overruled) that Claimant is permanently and totally disabled as a result of the August 12, 2002 work injury in combination with Claimant's preexisting conditions.

Vocational expert James Israel evaluated Claimant on October 19, 2004. Mr. Israel testified that Claimant was an older worker with a GED and clearly unable to return to his past work as a truck driver after his August 2002 injury and restrictions. Claimant did not have transferable vocational skills to other occupations within his current abilities. His inability to resume gainful employment is a result of his medically determined limitations for both his primary injury and

preexisting injuries and conditions. On cross-examination Mr. Israel (Claimant's objection overruled) testified that gainful employment is described as whether someone works close to a full-time standard and whether he commands a large wage.

Vocational expert James England testified for the Second Injury Fund based upon a review of records regarding Claimant. Mr. England testified that his review of the records revealed that Claimant worked with Employer as an end dump driver on a job site, making twenty-three dollars an hour. Claimant normally worked eight hours a day without much overtime. Mr. England noted most of Claimant's jobs were either warehouse or truck driving within a medium level of exertion category. He noted the skills from these jobs were not of value in finding employment because of Claimant's visual problems. Claimant's prior police work would not be of value either because of his visual problems. Mr. England testified that Claimant did not have any usable transferable skills. Mr. England opined that Claimant was not employable in the open labor market, even absent Claimant's shoulder problems. Mr. England continued that Claimant's visual problems rendered him permanently and totally disabled. On cross-examination Mr. England admitted he did not know what Claimant's visual field acuity was while he was employed at Employer.

FINDINGS OF FACT AND RULINGS OF LAW

Claimant alleges that he is permanently and totally disabled due to a combination of his preexisting disabilities and his primary injury. The Second Injury Fund disputes this contention, arguing that Claimant was permanently and totally disabled prior to his primary injury due to his diabetic condition alone. Therefore the parties and vocational experts agree that Claimant is permanently and totally disabled, the disagreement concerns whether he is disabled from his preexisting disabilities alone or whether his preexisting disabilities in combination with his primary injury render Claimant permanently and totally disabled.

Issues relating to permanent disability

Section 287.020.7 RSMo provides that the term "total disability" as used in this chapter shall mean inability to return to any employment, and not merely inability to return to the employment in which the employee was engaged in at the time of the accident. The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether any employer would reasonable by expected to hire the employee, considering the employee's current physical condition. Sutton v. Vee Jay Cement Contracting Co., 37 S.W.3d 803, 811 (Mo.App. 2000) and Reese v. Gary & Roger Link, Inc., 5 S.W.3d 522, 526 (Mo.App. 1999). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1999).

The experts in this case agree that Claimant is permanently and totally disabled. Claimant successfully worked fulltime throughout his adult life and worked at Employer from 1999 until the date of his injury in this case. He worked fulltime at Employer and there was no evidence offered that he could not perform his job duties successfully. There was no evidence of disciplinary action or that Employer paid Claimant twenty-three dollars per hour for less than fulltime work. Claimant admitted to problems with urinary frequency at work and at least one incident of an accident while driving the dump truck. I do not find Mr. England's opinion that Claimant was permanently and totally disabled while working for Employer convincing. Mr. England did not have the opportunity to evaluate Claimant and admitted he did not have knowledge of Claimant's visual acuity at the time of the accident. I find Mr. Israel and Dr. Poetz's opinions that Claimant is permanently and totally disabled as a result of a combination of his primary injury and restrictions and preexisting conditions persuasive.

Accordingly, after consideration and review of the substantial and credible evidence I find and conclude that, as a consequence of the accident of August 12, 2002, in combination with the preexisting disabilities, Claimant is permanently and totally disabled. Therefore, Claimant is awarded permanent and total disability benefits from the Second Injury Fund in the sum of \$475.66 per week for Claimant's lifetime.

The payment of permanent total disability compensation by the Second Injury Fund is effective November 11, 2003 (the stipulated date that Claimant reached MMI) and shall take into consideration the 121 3/7 weeks of permanent partial disability, which is attributed to Employer. Accordingly, the Second Injury Fund shall pay the difference between permanent total disability compensation and permanent partial disability compensation (\$146.24) for 121 3/7 weeks, and thereafter the payment of \$475.66 per week for life.

Issues relating to attorney fees and costs for unreasonable defense

Claimant seeks the assessment of costs pursuant to Sec. 287.560 against the Second Injury Fund for asserting and maintaining a defense without good cause. The Second Injury Fund argues that the testimony of vocational expert James England supports the Fund's defense. I find that the Claimant failed to prove that the defense of the Second Injury Fund was asserted and maintained without good cause. Although the experts agreed that Claimant was permanently and totally disabled, the disagreement centered on whether the Second Injury Fund was liable. There was expert opinion supporting the Second Injury Fund's defense and therefore Claimant has failed to prove he is entitled to the assessment of costs pursuant to Sec. 287.560.

Issues relating to admission of Claimant's deposition

Claimant objected to the admission of Claimant's deposition as cumulative. Claimant's objection is overruled and SIF's exhibit II is admitted into evidence for the purpose of impeachment.

CONCLUSION

In summary, Claimant is awarded permanent total disability benefits of \$475.66 from the Second Injury Fund for Claimant's lifetime. The payment of permanent total disability compensation by the Second Injury Fund is effective November 11, 2003 and shall take into consideration 121 3/7 weeks permanent partial disability attributed to Employer. The Second Injury Fund shall pay the difference between permanent total and permanent partial disability rates (\$146.24) for 121 3/7 weeks, and thereafter the payment of \$475.66 per week, for life. Claimant is denied attorney fees and costs pursuant to Sec. 287.560 for unreasonable defense as above.

This award is subject to modifications as provided by law.

This award is subject to a lien of 25% in favor of Claimant's attorney, Brian Stokes on all benefits.

Date: February 14, 2006

Made by: /s/ KOREN M. MUELLER
KOREN M. MUELLER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation