

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

Injury No.: 00-122157

Employee: John Sperino
Employer: Rick Shipman Construction (Settled)
Insurer: Fremont Compensation (Settled)
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 March 17, 2010. The award and decision of Administrative Law Judge Matthew W. Murphy, issued March 17, 2010, 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 29th day of October 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Mr. John Sperino Injury No.: 00-122157
Dependents: N/A
Employer: Rick Shipman Construction (settled)
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Insurer: Fremont Compensation
Appearances: Mr. Michael Moroni and Mr. Jay Yorke on behalf of the employee
Mr. Clifton Verhines on behalf of the second injury fund
Hearing Date: January 21, 2010 Checked by: MM/rf

SUMMARY OF FINDINGS

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 3, 2000.
5. State location where accident occurred or occupational disease contracted: Holdenwahl, Tennessee.
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 happened or occupational disease was contracted: Mr. Sperino was assisting a co-employee hang a large metal door. The co-employee dropped his end of the door causing Mr. Sperino to fall. The metal door fell on top of Mr. Sperino.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Body as a whole (lumbar spine)
14. Nature and extent of any permanent disability: 50% PPD of the body as a whole due to the August 3, 2000 injury.
15. Compensation paid to date for temporary total disability: \$30,309.83 for 50 5/7 weeks of disability.
16. Value necessary medical aid paid to-date by employer-insurer: \$122,248.48.
17. Value necessary medical aid not furnished by employer-insurer: \$0.00.
18. Employee's average weekly wage: \$899.94.
19. Weekly compensation rate: \$599.96 for TTD and PTD benefits, \$314.26 for PPD benefits.
20. Method wages computation: Stipulation.
21. Amount of compensation payable: No additional compensation is due from the employer.
22. Second Injury Fund liability: Permanent total disability benefits in the amount of \$599.96 per week commencing on December 4, 2001. The second injury fund receives a credit of \$314.26 per week for 200 weeks from December 4, 2001. This equates to $(\$599.96 - \$314.26) * 200 =$ \$57,140.00 for the period of December 4, 2001 through October 4, 2005. Commencing on October 5, 2005, the second injury fund is liable to Mr. Sperino for weekly benefits in the amount of \$599.96 for the remainder of Mr. Sperino's life pursuant to RSMo. §287.200 (2000).

23. Future requirements awarded: Compensation pursuant to RSMo. §287.200 (2000).

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Attorneys Michael Moroni and Jay Yorke.

On January 21, 2010, the employee, John Sperino, appeared in person and by his attorneys, Mr. Michael Moroni and Mr. Jay Yorke, for a hearing for a final award. The Missouri State Treasurer as custodian of the second injury fund was represented by his attorney, Mr. Clifton Verhines. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. **Covered Employer** - Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law.
2. **Covered Employee** - On or about the date of the alleged accident or occupational disease, the employee was an employee of and was working under the Workers' Compensation Law.
3. **Accident** - On or about Thursday, August 03, 2000 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. **Notice** - Employer had notice of employee's accident.
5. **Statute of Limitations** - Employee's claim was filed within the time allowed by law.
6. **Average Weekly Wage and Rate** - Employee's average weekly wage rate was \$899.94. The rate of compensation for temporary total disability and permanent total disability is \$599.96. The rate for permanent partial disability is \$314.26.
7. **Medical Causation** - Employee's injury was medically causally related to the accident.
8. **Medical Aid Furnished** - Employer/Insurer has paid medical aid in the amount of \$122,248.48.
9. **Temporary Total Disability Paid** - Employer/Insurer has paid \$30,309.83 as temporary total disability benefits for 50.71 weeks of disability.
10. **Previously Incurred Medical** - There is no claim for previously incurred medical.
11. **Mileage or other medical (287.140 RSMo)** - There is no claim for mileage or other medical expenses under 287.140 RSMo.
12. **Additional or Future Medical** - There is no claim for additional or future medical aid.
13. **Additional TTD or TPD** - There is no claim for additional TTD or TPD benefits.

ISSUES

1. **Permanent Total Disability** - Employee is claiming permanent total disability benefits.
2. **Permanent Partial Disability** - Employee is claiming permanent partial disability benefits.

EXHIBITS

In addition to taking judicial notice of the entire division file relating to this matter, the following exhibits were offered and admitted into evidence:

Employee's Exhibits

Identifier	Description
A	Deposition Of Dr. Levy
B	Deposition Of Susan Shea
C	Report Of England And Company
D	Goldsmith Pharmacy Records
E	Records Dr. Robson
F	Records Dr. Feinberg
G	Records SFMC
H	Records Missouri Baptist
I	Records Southeast Missouri Hospital
J	Records Dexter Memorial Hospital
K	Records From Dr. Turner Regarding Knee Treatment
L	Records Lucy Lee Hospital
M	Records Dexter Memorial Hospital
N	Records SFMC
O	Records Memorial Hospital Of Belleville
P	Records St. John's Mercy Hospital
Q	Stipulation In Primary Case

Second Injury Fund Exhibits

No Exhibits Identified

SUMMARY OF EVIDENCE

Testimony of Mr. John Sperino

Mr. John Sperino testified on his own behalf at the hearing of this matter. Mr. Sperino was born on October 27, 1965 and currently resides in Bloomfield, Missouri. Mr. Sperino is not currently employed.

On August 3, 2000, Mr. Sperino was an employee of Rick Shipman Construction. At that time, he was working at a Wal-Mart in Tennessee. His work included hanging metal doors, concrete work, and erecting steel fencing.

On August 3, 2000, Mr. Sperino was injured while hanging a metal door. Mr. Sperino and a co-worker were attempting to hang a metal door that weighed several hundred pounds. They bent down to pick up the door and were walking with it when the co-worker dropped his end. Mr. Sperino tried to hold up his end of the door but failed to do so. Mr. Sperino slipped on the floor and the door fell on him.

Mr. Sperino reported the incident to Rick Shipman and advised that his back was hurting. He was referred to a neurosurgeon that performed a surgery. There were complications associated with this procedure including a spinal leak. Dr. Park performed a follow up surgery which provided little relief. A third surgery was performed by Dr. Robson. Mr. Sperino continued to complain of pain after this third procedure but he was released at maximum medical improvement and referred to Dr. Feinberg for pain management. Mr. Sperino continues to see Dr. Feinberg. Dr. Feinberg administers trigger point injections and medication. Mr. Sperino sees Dr. Feinberg once a month.

Mr. Sperino suffered from numerous prior injuries. In 1982, he was involved in a motor vehicle accident which resulted in injuries to his back, hip, left femur, pelvis and broken ribs. Surgery was performed on his femur which included internal fixation. Mr. Sperino suffered a back injury in the early 90s. He was injured when jumping out of a truck and landing wrong. A fusion was performed in 1991 due to this injury. Several follow up procedures were performed.

Mr. Sperino recalls settling his 1991 back injury for 30-35% of the body as a whole. In 1993, he injured his left knee when falling onto a chunk of concrete. In 1998, he injured his right knee. He believes he had surgery on his right knee. In 2003, Mr. Sperino experienced significant hip pain. At the time of the hearing of this matter, he had no complaints regarding his hip.

At the time of Mr. Sperino's August 3, 2000 injury, he was performing duties as a supervisor. He was made supervisor approximately one to one and a half years after starting with the employer. As a supervisor, Mr. Sperino had to keep up with timesheets, order supplies, make sure people were where they needed to be and perform the duties of a general laborer. Mr. Sperino estimated that 50% of his time was devoted to supervising and 50% to laboring.

Mr. Sperino resides with his wife and two daughters, ages 6 and 8, and a stepson, age 17. He spends the majority of his day in a recliner or on the couch. He testified that he sleeps approximately two hours per night. His sleeping habits are very irregular. He watches a significant amount of television and spends time on the computer at home. He is able to assist with light household duties including dishes and taking out the trash. He reports that he can walk for approximately fifteen minutes at a time. He further reports that he cannot sit for longer than one hour. He has additional discomfort when the weather turns cold.

Prior to August 3, 2000, Mr. Sperino experienced periodic back pain due to his previous back injury. He treated this pain with over-the-counter medication. He also had difficulty with his knees that required similar treatment. He testified that he was able to shift his focus to supervisory duties when he was having pain.

On cross examination, Mr. Sperino testified that he started as a general laborer and worked his way up to supervisor. He was never disciplined or demoted for missing work and was generally a good employee. Mr. Sperino worked full time with frequent overtime. He estimated approximately 60-90 hours per week. Mr. Sperino testified that he was engaged in a heavy labor position which required frequent lifting in the amount of 75-80 pounds with occasional lifting of 150 pounds. He was required to pick up dock seals, garage door panels, chain link fencing, operate a bobcat, and periodic jack hammering.

Prior to August 3, 2000, Mr. Sperino was not under the active treatment of any physician or surgeon. He was not being prescribed any medication for his back or his knees. After his surgeries in the early 90s, Mr. Sperino returned to full time employment with no physical problems performing his job.

MEDICAL EVIDENCE

Mr. Sperino saw Dr. Blair on August 24, 1991 with complaints of back pain. He had an acute onset of back pain while jumping off of a truck at work. A CT scan was performed which revealed a mild bulging of the posterior aspect of the disc at L4-5, but there was no evidence of a herniated disc.

In April of 1998, Mr. Sperino underwent a removal of loose dyes and chondroplasty of the right knee performed by Dr. Turner at Lucy Lee Hospital. A second procedure was performed on June 26, 1998 by Dr. Turner. The subsequent procedure was a diagnostic arthroscopy of the right knee, removal of loose body from the right knee, and chondroplasty of the right knee with a post operative diagnosis of chondromalacia of the later femoral condyle on the right knee and loose bodies of the right knee.

In September of 2000, Mr. Sperino was seen at Lucy Lee Hospital with complaints of low back pain. He was having pain going down his left leg. X-rays of the lumbar spine showed post operative changes and no acute lumbar fracture. The x-ray report noted that Mr. Sperino had undergone previous surgery at L5-S1. A CT/myelogram was performed on September 29, 2000 that showed a very large soft tissue defect filling the left half of the neural canal and also involving the left neural foramen, which appear to be contiguous with the joint space at L4-5. It was noted that this was causing a large impression upon the thecal sac with deviation of the sac to the right. Surgical consultation was recommended and it was noted that he had had a previous fusion at L5-S1. In March of 2001, Mr. Sperino underwent bilateral laminectomy at L4-5, repair of meningocele at L4-5, extension and fusion to L4 with pedicle screw fixation at L4-5.

EXPERT TESTIMONY

Testimony of Jerome, Levy, M.D.

Dr. Levy testified on behalf of claimant at the hearing of this matter. Dr. Levy performed an examination of Mr. Sperino and took a history. Dr. Levy also reviewed prior medical records regarding the treatment to Mr. Sperino's back since August 3, 2000 as well as medical records regarding his prior back and knee surgeries. Dr. Levy testified that Mr. Sperino suffered a 40%

permanent partial disability of the body as a whole due to the August 3, 2000 incident, had previously suffered a 30% permanent partial disability to the body as a whole due to his pre-existing back problems, and a 20% permanent partial disability of the right knee due to his prior injury. Dr. Levy further opined that the combination of the impairments created a greater disability than the simple total of each and that Mr. Sperino is permanently and totally disabled and unable to compete in the open labor market due to the combination of all of the aforementioned impairments.

Dr. Levy was cross examined by the Second Injury Fund regarding his opinions. The Second Injury Fund confirmed that Dr. Levy was aware of Mr. Sperino's work history up to and including August 3, 2000. Dr. Levy was aware of the nature of the work Mr. Sperino performed and the intensity of the labor. Dr. Levy was aware of all of these facts when giving the aforementioned opinions.

Testimony of Susan Shea, M.A.

Ms. Shea testified on behalf of the employee at the hearing of this matter. Ms. Shea is a certified rehabilitation counselor. Ms. Shea testified that it was her opinion the Mr. Sperino is unemployable in the national job market. She did not believe that a typical employer would consider him a candidate for employment.

Testimony of Timothy G. Lalk

Mr. Timothy Lalk, a vocational rehabilitation counselor, provided a report of his opinions regarding the employability of Mr. Sperino which was admitted into evidence. Mr. Lalk reviewed the medical records regarding Mr. Sperino's injuries and treatment. Mr. Lalk also took a social, educational, and vocational history from Mr. Sperino. Finally, Mr. Lalk administered reading and math tests, which were performed by Mr. Sperino. After considering all of the aforementioned information, Mr. Lalk concluded that Mr. Sperino could not successfully pursue even a sedentary position due to his ongoing complaints which require him to lie down every day. Mr. Sperino would not be able to perform even simple repetitive activities throughout a full day at a rate expected in typical production jobs. Finally, Mr. Lalk opined that based upon Mr. Sperino's skills and experience, he did not believe that any employer would be able to accommodate Mr. Sperino's need to repeatedly rest and seek relief from his symptoms including lying down.

FINDINGS OF FACT AND RULINGS OF LAW:

Issues 1 and 2: Employee's claim for permanent total disability benefits or, in the alternative, Employee's claim for permanent partial disability benefits.

...If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury

shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided...

RSMo §287.220.1 (2000)

The evidence in this matter is one sided and points to only one conclusion on these issues: Mr. Sperino is permanently and totally disabled due to a combination of his primary injury and his pre-existing disabilities.

All three experts provided the opinion that Mr. Sperino is permanently and totally disabled. There is nothing in the record that contradicts these opinions. Mr. Sperino credibly testified that he was unable to work a full day due to his physical limitations.

Dr. Levy credibly testified that Mr. Sperino is permanently and totally disabled and unemployable in the open labor market due to a combination of the August 3, 2000 injury and his previous disabilities. This opinion was given with full and accurate knowledge of Mr. Sperino's medical and work history. Dr. Levy testified that he was fully aware of Mr. Sperino's work history up to and including August 3, 2000. Dr. Levy also testified that he was aware of Mr. Sperino's prior medical history. Mr. Sperino acknowledged that he was working full time in a labor intensive capacity prior to his August 3, 2000 injury. He also testified that he was able to perform less strenuous duties in his capacity as a supervisor when his pre-existing conditions were hindering his ability to perform the labor intensive duties.

The overwhelming weight of the evidence supports the position that Mr. Sperino is permanently and totally disabled and unemployable in the open labor market due to a combination of the pre-existing disabilities and his August 3, 2000 injury. The only opinion on this issue was given by Dr. Levy, a qualified expert whose opinion was based on accurate information and histories.

Mr. Sperino settled his claim against Rick Shipman Construction for 50% of the BAW. I find that Mr. Sperino suffered a 50% permanent partial disability to the body as a whole due to the August 3, 2000 injury.

According to the evidence in the record, Mr. Sperino was released from treatment for his August 3, 2000 injury at MMI on December 4, 2001. This is stated in both Dr. Levy's report (Exhibit B to his deposition contained in Exhibit A) and Mr. Timothy Lalk's report (Exhibit C). I find that Mr. Sperino was at MMI on December 4, 2001.

Permanent total disability benefits are awarded against the second injury fund in the amount of \$599.96 per week commencing on December 4, 2001. The second injury fund receives a credit

Employee: Mr. John Sperino

Injury No.: 00-122157

of \$314.26 per week for 200 weeks from December 4, 2001. This equates to $((\$599.96 - \$314.26) * 200 =)$ \$57,140.00 for the period of December 4, 2001 through October 4, 2005. The second injury fund is liable to Mr. Sperino for weekly benefits in the amount of \$599.96 commencing on October 5, 2005 and continuing for the remainder of Mr. Sperino's life pursuant to **RSMo. §287.200 (2000)**.

ATTORNEY'S FEE

Mr. Michael Moroni and Mr. Jay Yorke, attorneys at law, are allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee to be shared between them. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Matthew W. Murphy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Date: _____