

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

Injury No.: 07-115828

Employee: Donald Steck
Employer: Bluewood, Inc. (Settled)
Insurer: Westwood Insurance Corp. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated February 1, 2010.

Preliminaries

Employee settled his claim against employer for 28% permanent partial disability of the body as a whole attributable to his November 16, 2007, back injury. In employee and employer's Stipulation for Compromise Settlement, the parties stipulated that employee had pre-existing disabilities of 15-35% permanent partial disability of the right leg rated at the right knee, 10% permanent partial disability of the body as a whole attributable to employee's hearing loss, and 10% permanent partial disability of the body as a whole attributable to employee's pulmonary function and blood disorder.

Although employee settled his claim against employer and the parties stipulated to employee's pre-existing disabilities, the Second Injury Fund was not a party to said Stipulation for Compromise Settlement. Therefore, employee proceeded to final hearing against the Second Injury Fund. The administrative law judge heard this matter on December 1, 2009, to consider what, if any, is the nature of Second Injury Fund liability.

The administrative law judge found employee to be permanently totally disabled, but solely as the result of the November 16, 2007, injury alone. The administrative law judge conceded that employee's pre-existing medical conditions "do not enhance his ability to compete in the employment market," but he found those medical conditions to be non-factors in his decision.

Therefore, the primary issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

Findings of Fact

Primary Injury

Employee sustained an accident arising out of and in the course of his employment on November 16, 2007, when he injured his back while carrying painting equipment from one area of an apartment building to another. Employee has not worked since the injury. The injury was to the lumbar area of the spine, specifically to the L3-4, L4-5, and

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L5-S1 levels. Due to prior injuries, surgery on employee's back was delayed until January 7, 2009. On January 7, 2009, employee underwent micro-decompression surgery at L3-4, L4-5, and L5-S1 with laminectomy, medial facetectomies, foraminotomies, as well as complex repair of dural erosion with spinal fluid leak at L5-S1. Employee was released from care post-surgery on February 24, 2009.

Pre-existing Disabilities

Employee injured his right knee playing high school football, and re-injured the knee several times – including, most prominently, in 1971, 1987, and 2003. The 1987 injury resulted in surgical removal of his right anterior cruciate ligament. In 2003, Dr. Michael Snyder performed a complete right knee replacement as the result of “severe degenerative arthritis.” Employee was eventually allowed to return to work. However, he continued to experience difficulties with his knee as it impeded his ability to work.

Also prior to the November 16, 2007, accident, employee had sustained some hearing loss. This occurred while employee was serving in the United States Navy. Employee testified that he had been awarded a 10% service-connected disability due to tinnitus.

Employee testified that he also suffered injuries to his feet while serving in the United States Navy. He stated that he has had bunions removed from both big toes and has “three dead spots in the bottom of his right foot.” In addition, employee testified that he has screws in both big toes, which caused pain and problems walking before the primary injury and which also affected his employment.

Lastly, employee suffers from a number of significant internal medicine issues, including chronic pancreatitis, cardiac disease, coronary artery disease, lung disease, deep vein thrombosis, and pulmonary embolisms.

Medical and Vocational Opinions

Dr. George Carr performed an independent medical evaluation of employee on May 11, 2009. Dr. Carr found that employee, despite continuing pain, had reached maximum medical improvement. Dr. Carr rated employee's primary injury, as a “30 percent permanent partial disability of the body as a whole related to the lumbosacral spine due to the disc herniation and subsequent surgery.”

Dr. Carr rated employee's right knee at “15% permanent partial disability at the 160[week] level...” due to the injury's “contribution to his chronic right knee pain with reduced range of motion and limited endurance.” Dr. Douglas Kiburz, the surgeon that performed the 1987 surgery, opined that employee sustained a 35% permanent partial disability of his right knee.

Dr. Carr did not assign a rating to employee's hearing loss, bilateral foot problems, or his internal medicine issues. Dr. Carr testified that even though he did not provide a rating for employee's internal medicine issues, it is his opinion that they are disabling to employee to some degree.

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Dr. Carr gave employee work restrictions that he “avoid repetitive bending, twisting, and lifting” and avoid “fixed positions for more than 20 minutes at a time, impact activities, and vibration.” In addition, Dr. Carr stated that employee “need[ed] to follow proper lifting techniques,” should not lift more than 20 minutes at a time, and should limit continuous walking or standing to periods of 20 minutes.

Dr. Carr testified that the primary injury was the “main factor in causing [employee’s] back problems,” but that employee’s overall disability was affected by “all those other pre-existing problems.” Specifically, Dr. Carr concluded that “[t]he combination of impairments creates a substantially greater disability than the simple total of each and a loading factor should be added.”

Mr. Phillip Eldred, a vocational rehabilitation specialist, testified on behalf of employee. Mr. Eldred personally examined employee and obtained employee’s work and educational history. Mr. Eldred also evaluated employee’s pre-existing medical conditions by reviewing his medical history, records of past medical treatment and the results of the examination by Dr. Carr. Mr. Eldred found employee’s impairments prior to November 16, 2007, were vocationally disabling and constituted a hindrance or obstacle to his employment. Mr. Eldred concluded that employee “is permanently and totally disabled as a result of his injury on November 16, 2007, combined with his pre-existing medical conditions.”

The Second Injury Fund did not offer any witnesses, expert evidence, or medical records to rebut employee’s evidence.

Conclusions of Law

Under § 287.220.1 RSMo, when an employee is permanently and totally disabled by a combination of the primary injury and pre-existing disabilities, the employer is responsible for only the disability benefits attributable to the primary injury and the remainder of the disability benefits are the responsibility of the Second Injury Fund. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000).

First, both parties agree that the November 16, 2007, accident resulted in permanent disability to employee’s body as a whole. Second, they also agree that employee is now permanently totally disabled, as defined by § 287.020.6 RSMo. Therefore, the primary issues to be determined are: 1) At the time of the November 16, 2007, accident, did employee suffer from pre-existing disabilities that posed a hindrance and obstacle to his employment or reemployment?; and 2) If employee suffered from such pre-existing disabilities, did the November 16, 2007, accidental injury, considered alone, result in employee’s permanent total disability, or was employee rendered permanently totally disabled as a result of the primary injury combining with employee’s pre-existing disabilities?

With regard to the first issue, although Dr. Carr provided ratings for employee’s pre-existing disabilities, Mr. Eldred is the only expert that provided an opinion with regard to whether the pre-existing conditions constituted a hindrance or obstacle to his employment. After personally examining employee and reviewing his medical history, records of past

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medical treatment, and the results of the examination by Dr. Carr, Mr. Eldred concluded that employee's impairments prior to November 16, 2007, were, in fact, vocationally disabling and constituted a hindrance or obstacle to his employment.

Based on Mr. Eldred's uncontradicted opinion, we find that, at the time of the November 16, 2007, accident, employee suffered from pre-existing disabilities that posed a hindrance and obstacle to his employment. Having come to this conclusion, we must now turn to precedent for guidance in evaluating cases involving pre-existing disabilities.

The court in *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) set out a step-by-step test for determining Second Injury Fund liability in cases involving pre-existing disabilities:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo. App. W.D. 1999).

In considering employer's liability in isolation, we are not bound by employee and employer's Stipulation for Compromise Settlement in which employee agreed to settle his claim against employer for 28% permanent partial disability of the body as a whole attributable to the November 16, 2007, back injury. However, said agreement does serve as relevant evidence of the nature and extent of the employee's permanent disability attributable to the primary injury. *Totten v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund*, 116 S.W.3d 624, 628 (Mo. App. 2003).

When the administrative law judge considered employer's liability in isolation, he came to the conclusion that the primary injury is solely responsible for employee's permanent total disability. In arriving at said conclusion, the administrative law judge relied heavily on his unsupported finding that employee's restrictions on standing, walking, sitting, and use of narcotic medication are all solely the result of employee's primary injury. Based on Mr. Eldred's testimony, we disagree with the administrative law judge.

Mr. Eldred specifically testified that it is a combination of both employee's back problems and knee problems that contribute to employee's restrictions on standing and

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sitting. In addition, Mr. Eldred testified that employee should not “work in extreme hot or cold, specifically based on [the] knee replacement.” Mr. Eldred went on to state that employee should not work “around vibrations and high-exposed places ... where the knee might give-way” and he could perhaps injure himself.

In finding that employee’s restrictions on standing, walking, sitting, and use of narcotic medication, are “all solely the result” of employee’s primary injury, the administrative law judge made a determination that is not supported by substantial and competent evidence. In light of Mr. Eldred’s aforementioned testimony, it is clear the administrative law judge misconstrued the evidence regarding the basis of employee’s restrictions.

While both Mr. Eldred and Dr. Carr attribute a significant portion of employee’s restrictions and limitations to the primary injury, they both came to the uncontradicted and unimpeached conclusion that employee’s overall disability is the result of the primary injury combining with his pre-existing disabilities. Mr. Eldred went one step further and specifically stated that employee “is permanently and totally disabled as a result of his injury on November 16, 2007, combined with his pre-existing medical conditions.” As previously mentioned, the Second Injury Fund did not offer any evidence to rebut said conclusions.

Therefore, in evaluating the degree or percentage of disability which resulted from the primary injury had there been no preexisting disability, we find, based on the independent medical evaluation by Dr. Carr, the vocational assessment by Mr. Eldred, and the record considered as a whole, that the 28% permanent partial disability for the primary injury, which was agreed to by employee and employer in their Stipulation for Compromise Settlement, is an accurate assessment of the percentage of disability attributable to the primary injury. For the foregoing reasons, we find that employer’s liability considered in isolation amounts to 28% permanent partial disability of the body as a whole related to the lumbosacral spine. Further, we find that employee’s pre-existing disabilities combined with the 28% permanent partial disability resulting from the last injury to render employee permanently totally disabled. In accordance with § 287.220.1 RSMo, we find the Second Injury Fund liable for employee’s permanent total disability benefits.

For the foregoing reasons, we reverse the administrative law judge’s award and find that employee is permanently and totally disabled as a direct result of the combination of his injuries.

We find that employee reached maximum medical improvement on May 11, 2009 (the date of Dr. Carr’s independent medical evaluation). Therefore, going forward from May 12, 2009, the Second Injury Fund is liable for the difference between the permanent total disability benefits and the permanent partial disability benefits (\$399.96 PTD rate - \$389.04 PPD rate) for 112 weeks (28% PPD of the body as a whole (400 weeks)). Thereafter the Second Injury Fund shall be liable for employee’s weekly permanent total disability benefit of \$399.96 for the remainder of employee’s life, or until modified by law.

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Randall O. Barnes, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee which shall constitute a lien on said compensation.

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

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued February 1, 2010, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 28th day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Donald Steck

Injury No. 07-115828

Dependents:

Employer: Bluewood, Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: Westwood Insurance Corp. (Settled)

Hearing Date: December 1, 2009

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

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No additional benefits are awarded from the Second Injury Fund.
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: November 16, 2007.
5. State location where accident occurred or occupational disease was contracted: Cole 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 was moving painting equipment when he injured his low back.
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: Low back.
14. Nature and extent of any permanent disability: Employee's claim for total disability against Employer has been settled. Employee's claim against the Second Injury Fund is denied.
15. Compensation paid to-date for temporary disability: Unknown.
16. Value necessary medical aid paid to date by employer/insurer? Unknown.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$600.00.

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19. Weekly compensation rate: \$399.96/\$389.04

20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

None.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Donald Steck

Injury No: 07-115828

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Bluewood, Inc., (Settled)

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

Additional Party: Second Injury Fund

Insurer: Westwood Insurance Corp. (Settled)

Checked by: RJD/cs

ISSUES DECIDED

The evidentiary hearing in this case was held on December 1, 2009 in Jefferson City. The hearing was held to determine the liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits. The parties requested leave to file post-hearing briefs, which leave was granted. The case was submitted on December 11, 2009. The claim for compensation against the Employer-Insurer was settled, in principle, prior to the evidentiary hearing. The settlement was approved by the undersigned administrative law judge on December 18, 2009.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue for the evidentiary hearing is proper in Cole County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant's average weekly wage was \$600.00, resulting in compensation rates of \$399.96/\$389.04;
6. That Claimant, Donald Steck, sustained an accident arising out of and in the course of his employment with Bluewood, Inc., d/b/a Broadmoor Apartments, on November 16, 2007; and

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7. The notice requirement of Section 287.420, RSMo, is not a bar to Claimant's Claim for Compensation.

EVIDENCE

The evidence consisted of the testimony of Claimant, Donald Steck; the narrative report and testimony of Phillip Eldred, a vocational rehabilitation counselor; medical records; and the narrative reports of Dr. George Carr.

DISCUSSION

Donald Steck ("Claimant"), was born on June 27, 1950. He left school during his senior year in high school. Claimant served in the U.S. Navy from June 1968 through July 1972, and again from February 1976 through January 1978. Claimant served in Vietnam during his first Navy stint. Claimant earned a GED while in the Navy. In 1972 Claimant took a position as a maintenance foreman with the Department of Corrections; he stayed in that position for two years. In 1974 Claimant took a position as a service technician for an appliance company. In 1983 Claimant obtained an A.A. Degree in Accounting from State Fair Community College.

Claimant testified that he worked in the heating, ventilation and air conditioning ("HVAC") field for much of his adult life. He worked for Sears as a Senior Service Technician for eight years and in a similar capacity for Montgomery Ward for three years. He also worked for eight years in counter sales for Schepker Supply Co., selling wholesale HVAC parts.

In 2006, Claimant began working for Employer, Bluewood, Inc., d/b/a Broadmoor Apartments as a maintenance man. As stipulated, Claimant sustained an accident arising out of and in the course of his employment on November 16, 2007, when he injured his back while carrying painting equipment from one area of an apartment building to another. Claimant has not worked since the injury. MRI showed abnormalities at L3-4, L4-5 and L5-S1, requiring surgery. Surgery was delayed because of other medical conditions. On January 7, 2009, Claimant underwent micro-decompression surgery at L3-4, L4-5 and L5-S1 with laminectomy, medial facetectomies, foraminotomies, as well as complex repair of dural erosion with spinal fluid leak at L5-S1. Claimant was released from care post-surgery on February 24, 2009, and temporary total disability payments were paid through that date. On December 18, 2009, a STIPULATION FOR COMPROMISE SETTLEMENT between Claimant and Employer/Insurer was approved by the undersigned administrative law judge; that settlement was based on a permanent partial disability of approximately 28% of the body as a whole.

Prior to the November 16, 2007 accident, Claimant had several potentially disabling conditions. Claimant had suffered work-related low back injuries in 1974 and in 1994. Both of these injuries required conservative treatment only, and Claimant was returned to work within a

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few weeks, without restrictions, on both occasions. Dr. George Carr, who testified by deposition on Claimant's behalf, testified that Claimant had no preexisting disability to his low back prior to November 16, 2007.

Prior to the November 16, 2007 accident, Claimant had a long history of right knee problems, starting at age 16. Claimant re-injured his right knee while in the Navy. Claimant sustained a work-related injury to his right knee in 1987 which required surgery. Claimant also had a pulmonary embolism post-surgery. Claimant filed a workers' compensation claim for the 1987 right knee injury, which claim was settled. Dr. Douglas Kiburz, the surgeon, opined that Claimant sustained a 35% permanent partial disability of his right knee. Dr. William Folck, Claimant's examining physician at the time, also opined that Claimant sustained a 35% permanent partial disability of the right knee, and also opined that Claimant sustained a 10% permanent partial disability of the body as a whole due to decreased pulmonary function as a result of the pulmonary embolism. Claimant underwent a total knee replacement (right) in 2003. Claimant testified that this alleviated most of his knee pain. Dr. George Carr testified that, in his opinion, Claimant's preexisting right knee disability at the time of the 11/16/07 accident was 15%.

Prior to the November 16, 2007 accident, Claimant had sustained some hearing loss. This occurred while in the Navy. Claimant testified that he had been awarded a 10% service-connected disability due to tinnitus, but had not been awarded any additional disability due to the hearing loss. Dr. Carr did assign any preexisting disability to the hearing loss.

Prior to the November 16, 2007 accident, Claimant had undergone bunion removal surgery on both feet. Claimant testified that he had screws in both big toes, and had three "dead spots" in his right foot. Dr. Carr did assign any preexisting disability to the bilateral foot problems.

Prior to the November 16, 2007 accident, Claimant had other medical conditions to which Dr. Carr did not assign any preexisting disability. Regarding those conditions, Dr. Carr testified:

Q: And Doctor, one part of your testimony I didn't understand, maybe you can help me out. You identified a variety of prior, I believe you refer to them as internal medicine-type issues, where I think you refer to chronic pancreatitis, the DVT [judge's note: deep venous thrombosis, or blood clot], the PE [judge's note: the aforementioned pulmonary embolism], the coronary artery disease, lung disease. Do you remember talking about those?

A. Yes. Yes.

Q. Now, you did not rate those conditions; is that correct?

A. Yes.

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Q. Would you – is it your opinion, within a reasonable degree of medical certainty, however, that those conditions are affecting him and his ability, his general physical state?

A. Yes.

Q. And, I mean, even though you didn't rate it, would it be your opinion that those conditions are disabling him to some degree?

A. Yes. (Exhibit 3, Carr deposition, page 27).

Claimant alleges that he is permanently and totally disabled, and is seeking an award of permanent total disability benefits from the Second Injury Fund. Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether Claimant is able to competently compete in the open labor market given his or her condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D.1999). If Claimant is disabled by a combination of the work-related event and pre-existing disabilities the responsibility for benefits lies with the Second Injury Fund. Section 287.220.1 RSMo. If the last injury in and of itself rendered Claimant permanently and totally disabled the Second Injury Fund has no liability and the employer is responsible for the entire compensation. *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

The narrative report and testimony of Phillip Eldred, the vocational rehabilitation counselor who testified on Claimant's behalf is very convincing on the issue of Claimant's inability to compete in the open market for employment in his present condition. I believe that Mr. Eldred's testimony, together with the medical evidence and Claimant's testimony, makes a compelling case for a finding of permanent total disability. However, a finding of permanent total disability is just the first step toward determining whether the Second Injury Fund may be liable for payment of permanent total disability benefits. If the injury of November 16, 2007 alone rendered Claimant permanently and totally disabled, then the Second Injury Fund has no liability.

Phillip Eldred testified that Claimant's current restriction of standing and walking of no more than two hours each day eliminates 89% of all jobs potentially available to Claimant. Eldred further testified that Claimant's current restriction of sitting no more than 20 minutes at a time rules out any "sedentary" employment, and thus eliminates the remaining 11% of potentially available jobs. Eldred also testified that Claimant's current need for narcotic medication (vicodin) also disqualifies him from most work.

Prior to November 16, 2007, Claimant had no need for narcotic medication. Prior to November 16, 2007, Claimant had absolutely no restrictions on standing, walking or sitting. Claimant testified that, immediately prior to November 16, 2007, he was able to lift fifty pounds,

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with no problems, on a regular basis. It is clear that Claimant's current restrictions on standing, walking and sitting are due to his back condition alone. While Claimant did have two back

injuries prior to November 16, 2007, Claimant testified that he recovered quite well from each, and that he was not restricted as a result of those prior back injuries. The medical records would strongly suggest that Claimant fully recovered from the prior back injuries with no permanent

restrictions or disability. Most importantly, Dr. Carr, Claimant's expert medical witness, found that Claimant had NO preexisting disability to his back.

It is also clear that Claimant's current need for narcotic medication is due to back pain from the November 16, 2007 injury.

Eldred did, indeed, testify that Claimant's current condition of permanent total disability resulted from the November 16, 2007 injury IN COMBINATION WITH his preexisting medical conditions. Certainly Claimant's pre-existing medical conditions do not enhance his ability to compete in the employment market. However, in Eldred's analysis of the reasons WHY Claimant is effectively eliminated from the job market, the right knee, hearing loss, foot problems and "internal medicine-type issues" do not play a factor. The reasons are: restrictions on standing, walking and sitting, and use of narcotic medication, all of which flow solely from the back injury of November 16, 2007.

In attempting to determine whether the injury of November 16, 2007 alone rendered Claimant permanently and totally disabled, a fairly simple question presents itself: "If, immediately prior to November 16, 2007, Claimant had normal hearing, a sound right knee, perfect feet and no 'internal medicine-type issues', would he be able to compete in the open market for employment today?" The answer to that question is clearly "NO".

FINDINGS OF FACT

In addition to those facts to which the parties stipulated, I find the following facts:

1. Claimant's work-related accident of November 16, 2007 resulted in injuries to Claimant's low back;
2. Claimant's work-related accident of November 16, 2007 was the cause of the need for January 7, 2009 surgery at the L3-4, L4-5 and L5-S1 levels;
3. Although Claimant sustained low back injuries in 1974 and in 1994, Claimant totally recovered therefrom;
4. Immediately prior to Claimant's work-related accident of November 16, 2007, Claimant had no disability to his back;

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5. Immediately prior to Claimant's work-related accident of November 16, 2007, Claimant had a disability to his right knee which constituted a hindrance or obstacle to employment or re-employment;
6. Claimant's work-related accident of November 16, 2007 has resulted in severe back pain and the need for narcotic medication;
7. Claimant's work-related accident of November 16, 2007 has resulted in Claimant's current restriction of standing and walking no more than two hours each day;
8. Claimant's work-related accident of November 16, 2007 has resulted in Claimant's current restriction of sitting for no more than 20 minutes at a time;
9. Prior to November 16, 2007, Claimant had no restrictions on lifting, standing, walking or sitting;
10. Prior to November 16, 2007, Claimant had no need for narcotic medication;
11. Claimant is not able to competently compete in the open labor market given his condition and situation, due to restrictions on standing, walking and sitting, and further due to use of narcotic medication; and
12. Claimant's claim for compensation for the work-related accident of November 16, 2007 against Bluewood, Inc., d/b/a Broadmoor Apartments, has been compromised and settled in full.

RULINGS OF LAW

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. As a result of the November 16, 2007 accident, Claimant sustained a serious and disabling back injury which constituted a hindrance or obstacle to employment or re-employment;
2. Claimant is now unable to compete in the open market for employment in his current physical condition, due to restrictions on standing, walking and sitting, and further due to use of narcotic medication;
3. Claimant is now permanently and totally disabled;
4. The November 16, 2007 accidental injury, considered alone, resulted in Claimant's permanent total disability, notwithstanding Claimant's pre-existing right knee disability;
5. The Second Injury Fund has no liability for permanent total disability benefit payments; and
6. Claimant's claim for compensation for the work-related accident of November 16, 2007 against Bluewood, Inc., d/b/a Broadmoor Apartments, has previously been compromised and settled in full.

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ORDER

Claimant's claim for compensation against the Second Injury Fund is denied.

Date: February 1, 2010

Made by: /s/Robert J. Dierkes

ROBERT J. DIERKES

*Chief Administrative Law Judge
Division of Workers' Compensation*

copy: Attest:

/s/Naomi Pearson

Naomi Pearson

Division of Workers' Compensation