

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

Injury No.: 09-018788

Employee: Jerry Taylor
Employer: Prairie Farms Dairy, Inc. (Settled)
Insurer: Fidelity & Guaranty Insurance Co. (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 § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 4, 2012. The award and decision of Administrative Law Judge Linda J. Wenman, issued October 4, 2012, 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 28th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Jerry Taylor	Injury No.:	09-018788
Dependents:	N/A		Before the
Employer:	Prairie Farms Dairy, Inc. (settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Fidelity & Guaranty Ins. Co. (settled)		Department of Labor and Industrial
Hearing Date:	September 11, 2012		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	LJW

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: March 19, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis City, 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: While loading a milk truck, Employee fell injuring his right knee.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right knee
14. Nature and extent of any permanent disability: 25% PPD referable to the right knee and 5% BAW PPD referable to a psychiatric condition previously paid by Employer. PTD benefits from SIF.
15. Compensation paid to-date for temporary disability: \$14,896.80 previously paid by Employer.
16. Value necessary medical aid paid to date by employer/insurer? \$32,896.37 previously paid by Employer.

Employee: Jerry Taylor

Injury No.: 09-018788

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient to produce the rates listed below.
- 19. Weekly compensation rate: \$744.85 / \$404.66
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

60 weeks of permanent partial disability from Employer

Previously paid

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
Weekly differential of \$340.19 payable by SIF for 60 weeks beginning
August 7, 2009, and \$744.85 thereafter for Claimant's lifetime.

TOTAL:

TO BE DETERMINED

23. Future requirements awarded: N/A

Said payments to begin immediately 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 in favor of the following attorney for necessary legal services rendered to the claimant: Daniel Walkenhorst and Ellen Morgan

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jerry Taylor	Injury No.: 09-018788
Dependents:	N/A	Before the
Employer:	Prairie Farms Dairy, Inc. (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Fidelity & Guaranty Ins. Co. (settled)	Checked by: LJW

PRELIMINARIES

A Second Injury Fund hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on September 11, 2012. The case was taken under submission with receipt of post-trial briefs on September 25, 2012. Attorneys Ellen Morgan and Daniel Walkenhorst represented Jerry Taylor (Claimant). Assistant Attorney General Kristen Frazier represented the Second Injury Fund (SIF).

On July 6, 2011, Claimant and Prairie Farms Dairy, Inc., (Employer) reached a settlement regarding the issue of Employer's liability for permanent partial disability. The stipulation represented 25% PPD referable to the right knee, and 5% BAW PPD referable to a psychiatric condition.

Prior to the start of the hearing the parties identified the issues for disposition in this case as the liability of SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits. Claimant alleges he reached maximum medical improvement (MMI) on August 6, 2009. Claimant offered Exhibits A-P, and SIF offered Exhibits I-X. Claimant's objections to Exhibits III, VIII, and IX were sustained. The remaining exhibits were admitted into the record. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Claimant is 61 years old, attended but did not graduate high school, but later obtained a GED. Claimant did not receive any vocational or post-high school training. Claimant obtained a commercial drivers license (CDL) when he was 18, and spent his working years as a truck driver. For approximately 25 years, Claimant drove a milk delivery truck for Prairie Farms Dairy (Employer). Claimant's work duties included loading his truck with milk crates piled 6 crates high on a dolly, delivering milk in the same fashion, stacking the milk for customers, and

collecting payment. Claimant drove a “time sensitive” route that included hospitals and educational facilities in and around St. Louis, Missouri.¹ If Claimant was physically unable to “timely” deliver his load, Employer would send out an assistant to the delivery site to help.

2. On March 19, 2009, while loading his delivery truck, Claimant fell backwards twisting his right knee.² Claimant was initially provided conservative medical treatment, and when he did not improve an MRI of his right knee was obtained. The MRI demonstrated degenerative joint disease, a prominent joint effusion, and a previous lateral meniscectomy. Claimant was referred to Dr. Haupt, an orthopedic surgeon.³ Dr. Haupt continued Claimant’s conservative medical care until April 30, 2009, when Dr. Haupt opined Claimant required arthroscopic surgery. On May 1, 2009, Claimant underwent right knee surgery where extensive tearing of the lateral meniscus was found along with removal of a loose body. Dr. Haupt’s post-operative diagnoses included: extensive tearing of the right lateral meniscus; grade IV articular cartilage erosion of the entire tibial plateau; loose body formation in the medial gutter; and grade III chondromalacia of the patellofemoral joint. Post-operatively Claimant received physical therapy, and was fitted with both a knee stabilizing brace and a varus unloader brace. When Claimant completed physical therapy and work hardening a functional capacity examination (FCE) was obtained. On August 6, 2009, Dr. Haupt reviewed the FCE results and opined Claimant was at MMI. Dr. Haupt placed the following permanent work restrictions: lifting from floor to neck of no greater than 40 pounds; knuckle to shoulder lifting of no greater than 40 pounds; shoulder to overhead lifting of no greater than 40 pounds; a 40 pound restriction for carrying up and down stairs, or with use of a dolly for up or down stairs; and a 60 pound carrying limit if on a flat surface. Due to the level of his restrictions, Employer was unable to accommodate Claimant and his employment terminated. Claimant has not returned to employment after his release.

3. Prior to the primary injury, Claimant had documented and rated preexisting injuries/ conditions that included: a) his right knee; b) his left wrist; c) an anxiety disorder; and d) hypertrophic obstructive cardiomyopathy (HOCM).

a) During January 2000, Claimant twisted his right knee while walking down a ramp at work. An MRI indicated Claimant had an extensive tear of his right lateral meniscus. Surgery was recommended. At surgery Dr. Haupt noted that in addition to the lateral meniscus tear, Claimant was found to have anterior and posterior meniscus tears, and most of the anterior horn of the lateral meniscus was resected. Following post-operative care, Claimant returned to work, but found the residual injury “slowed him down,” and he continued to experience pain in the knee with bending, standing for long periods, or stepping in and out of his truck. Claimant settled his claim with Employer for 20% PPD referable to his right knee.⁴

b) During 2004, during a milk delivery, Claimant injured his left wrist. Initially, Claimant received medical treatment for a left wrist sprain, but as his condition worsened he was referred to a hand surgeon. Ultimately, Claimant underwent left wrist fusion for a SLAC wrist

¹ Due to the nature of the business conducted, “time sensitive” deliveries included most of the major St. Louis Hospitals.

² Claimant also injured his low back and left elbow, but these injuries resolved with conservative medical treatment.

³ Dr. Haupt died unexpectedly shortly after Claimant’s release from treatment, and neither party was able to depose him.

⁴ During 2000, Claimant also suffered a left elbow strain and settled his case with Employer for 7.5% PPD referable to the left elbow. Dr. Poetz did not rate this injury. During 2011 Claimant underwent a partial knee replacement.

during which bone was removed from his left iliac crest for grafting. Since surgery, Claimant has retained hardware in the wrist, is unable to bend the wrist, has limited rotation of his wrist, and is unable to lift with the wrist. Claimant is left-handed. Claimant continues to experience difficulty with writing, has left hip pain, is unable to play sports, and while working frequently required assistance to complete his "time sensitive" deliveries. Claimant settled his case with Employer for 35% PPD referable to his left wrist.

c) Claimant suffered his first anxiety attack after his first knee surgery in 2000. During that attack Claimant sought care in the emergency room and was treated with medication. During 2004 through 2008, Claimant was provided Ativan prescriptions through his internist on at least 12 occasions with each prescription giving multiple refills. Claimant testified he would have frequent feelings of being "closed in," and had problems with depression and sleeping. During August 2009,⁵ the internist placed Claimant on Celexa and Ambien after Claimant complained of being tearful, depressed, and nervous.⁶ Claimant testified his depression and sleep disturbance worsened after the March 19, 2009 knee injury (primary injury). When Claimant settled his primary injury with Employer, he was paid 5% BAW PPD referable to his psychiatric condition.

d) During October 2004, Claimant was diagnosed with HOCM that was confirmed by 2D Echocardiogram. Claimant was started on beta blocker medication and has remained on medication since diagnosis. Claimant is medically managed by his internist. Claimant testified despite medication, the disorder causes him to experience shortness of breath with exertion, palpitations, and occasional dizziness. Internal medical records document occasional complaints of these symptoms.

4. On May 24, 2010, Claimant was examined at his request by Dr. Poetz, a board certified family practice physician. Upon examination, Dr. Poetz noted the following abnormal findings: inability to flex or extend Claimant's left wrist; bilateral pretibial swelling; positive crepitus of the right knee with range of motion; decreased muscle strength right knee; hypertrophy of the right knee joint; decreased right knee range of motion; and tenderness to palpation over the left iliac crest. Dr. Poetz rated the primary injury at 35% PPD referable to the right knee, and 10% BAW PPD referable to depression/anxiety. Dr. Poetz rated Claimant's preexisting injuries/conditions as follows: 20% PPD referable to the right knee; 10% BAW PPD referable to anxiety/depression; 35% PPD referable to the left wrist; 15% BAW PPD referable to the left hip (iliac crest); and 20% BAW PPD referable to the cardiovascular system (HOCM). Dr. Poetz recommended six physical restrictions. Dr. Poetz opined Claimant was PTD due to a combination of his primary and preexisting conditions, and he is unable to engage in the open labor market.

5. On November 18, 2010, Claimant was examined at his request by Dr. Sky, a board certified psychiatrist. Upon his mental status examination, Dr. Sky noted the following abnormal findings: affect a bit anxious; mildly tangential speech; and some mild psychomotor restlessness. Dr. Sky provided a psychiatric diagnosis of anxiety disorder with panic attacks. Dr. Sky further found Claimant's underlying anxiety disorder was exacerbated by the primary injury. Dr. Sky

⁵ Post March 19, 2009 primary injury.

⁶ During Dr. Sky's deposition, the parties expressed belief the Celexa/Ambien prescription was initiated on 3/21/08; however, the internist's medication record corresponds with the 8/13/09 office visit record.

opined Claimant will continue to require management of his anxiety disorder. Dr. Sky rated Claimant's psychiatric disorder at 20% BAW PPD, with 10% BAW PPD referable to the primary injury and 10% BAW PPD referable to his underlying preexisting condition. Dr. Sky testified it is not uncommon for an internist to treat an anxiety disorder, as more than 2/3 of all anxiety disorders patients are never seen by a psychiatrist.

6. On July 1, 2010, Claimant was interviewed by Jeffrey Magrowski, Ph.D., a licensed professional counselor. After reviewing Claimant's medical records and work history, Dr. Magrowski concluded Claimant had no transferable skills. When Dr. Magrowski considered the right knee restrictions placed by Dr. Haupt, Dr. Magrowski concluded Claimant would require entry level light work similar to a chauffeur or working in car rental. Dr. Magrowski also opined Claimant would need professional assistance to locate such a job. However, when considering the restrictions placed by Dr. Poetz, which included restrictions for Claimant's preexisting conditions, Dr. Magrowski opined Claimant was unable to sustain sedentary or light work activity, and Claimant was PTD.

7. On October 17, 2011, a review of Claimant's medical records was conducted by Mr. James England, a vocational rehabilitation counselor. Following his review, Mr. England opined Claimant would be unable to return to his previous work, and he had no transferable skills. Applying the work restrictions placed by Dr. Haupt, Mr. England determined Claimant would have a "wide variety of alternative work activity." Applying the work restrictions placed by Dr. Poetz, Mr. England opined Claimant would need to sit or stand throughout the day, and avoid heavy lifting, but the requirements would not preclude all forms of employment.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues related to liability of SIF for PTD benefits

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). If the last injury standing alone did not cause the employee to become PTD, the inquiry turns to potential liability for PTD by Second Injury Fund. The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone.

§287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993). Further, §287.220.1 RSMo directs that the degree of disability be determined by “the degree or percentage of employee’s disability that is attributable to all injuries or conditions existing *at the time the last injury was sustained*” (emphasis added). See also *Garcia v. St. Louis County and Treasurer of Missouri as Custodian of Second Injury Fund*, 916 S.W.2d 263 (Mo.App.1995) quoting *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152 (Mo.App. 1993).

One medical expert, Dr. Poetz, and one vocational expert, Dr. Magrowski evaluated Claimant and issued opinions finding Claimant PTD. An additional vocational expert, Mr. England reviewed Claimant’s medical records and found Claimant was employable. Mr. England appears to discount Claimant’s left wrist, cardiac and psychiatric conditions because no formal restrictions were placed. However, Claimant testified, and his medical records support, his left wrist is physically restricted from movement, he still suffers from anxiety, and he continues to experience cardiac symptoms. I do not find Mr. England’s opinion credible.

I find the opinions of Dr. Poetz and Dr. Magrowski to be persuasive. I find Claimant’s last injury alone did not remove Claimant from the labor market. I find Claimant is PTD due to a combination of his March 19, 2009 injury and his preexisting conditions. Given Claimant’s limitations, it would be unreasonable to expect any employer to hire Claimant, or to expect Claimant to successfully perform new work duties. Claimant is permanently and totally disabled due to the combination of his last work injury and his preexisting disabling conditions measured at the time of his last work injury, and SIF shall pay PTD benefits as prescribed by law. I further find Claimant reached MMI *from the primary injury* on August 6, 2009.

CONCLUSION

Claimant is found to be permanently and totally disabled as of August 7, 2009. Employer paid 60 weeks of permanent partial disability. SIF will pay weekly differential of \$340.19 during the period of PPD. Following the 60 weeks of PPD paid by Employer, SIF shall provide Claimant with permanent and total disability benefits of \$744.85 weekly for Claimant’s lifetime. As Claimant has been found PTD, the remaining issue of SIF liability for PPD is moot. Claimant’s attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

