

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

Injury No.: 07-133358

Employee: Larry Thilmony
Employer: Schwan's Foods (Settled)
Insurer: Hartford Accident & Indemnity (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This 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, read the briefs, 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 February 25, 2016. The award and decision of Administrative Law Judge Hannelore D. Fischer, dated February 25, 2016, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 15th day of December 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Larry Thilmony

Injury No.: 07-133358

Dependents: N/A

Employer: Schwan's Foods (previously settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

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

Insurer: N/A

Hearing Date: February 2, 2016

Checked by: HDF/scb

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: January 16, 2007
5. State location where accident occurred or occupational disease was contracted: Cole County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See Award
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: Left shoulder; Left hip
14. Nature and extent of any permanent disability: 10% left shoulder; 42% left hip
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Larry Thilmony

Injury No. 07-133358

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: ----
- 19. Weekly compensation rate: \$376.55 for permanent partial disability
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Employer previously settled
- 22. Second Injury Fund liability: Yes
 - 6.05% body as a whole
 - 24.2 weeks of permanent partial disability from Second Injury Fund = \$9,112.51
- 23. Future Requirements Awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to 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: Matt Uhrig.

Employee: Larry Thilmony

Injury No. 07-133358

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Larry Thilmony

Injury No: 07-133358

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Schwan's Foods (previously settled)

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

Additional Party: N/A

Insurer: N/A

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on February 2, 2016. Memoranda were due by February 19, 2016.

The parties stipulated that on or about January 16, 2007, the claimant, Larry Thilmony, was employed by Schwan's Foods. The parties stipulated that all facts relevant to the claimant's relationship with the employer/insurer are decided in the claimant's favor in his pending claim against the Second Injury Fund. The compensation rate is \$376.55 per week for permanent partial disability benefits.

The issue to be resolved by hearing is the liability of the Second Injury Fund (permanent partial disability is alleged).

The parties stipulated that the claim against the employer/insurer settled based on a permanent disability of 10 percent of the left shoulder and 42 percent of the left hip; the parties did not stipulate that the settlement percentages represent the extent of disability resulting from the January 16, 2007 accident and injury.

The parties further stipulated that a 1998 workers' compensation claim settled based on a permanent disability of 17 percent of the left knee; the parties did not stipulate that the settlement percentage represents the extent of disability resulting from the 1998 accident and injury.

FACTS

The claimant, Larry Thilmony, testified that he is 69 years old as of the date of hearing and was born on May 31, 1946. Mr. Thilmony testified that he started working with Schwan's Foods in 1986 as a driver/route salesperson. As a driver/route salesperson, Mr. Thilmony worked 12 to 14 hours a day on the route delivering food to homes and then returned to the "depot" to handle the paperwork documenting the day's sales. An average day included contact with 80 to 100 customers, according to Mr. Thilmony. Mr. Thilmony said that his workday usually began at 8:00 am and ended at 10:00 pm. Driver/route salespeople worked five to six days a week, regardless of weather, holidays or sickness. Mr. Thilmony was promoted to a sales manager position with driver/route salespeople working under him in 1990. However, in 1993

Employee: Larry Thilmony

Injury No. 07-133358

Mr. Thilmony developed heart problems and in 1994 he stepped back down to a driver/route salesperson position.

On January 16, 2007, Mr. Thilmony was returning to his truck while making a Schwan's Foods delivery to a home in Jefferson City when he fell on the ice hitting the curb, injuring his left hip and his left shoulder. Mr. Thilmony described having immediate left hip surgery to replace the ball and socket of his hip as well as surgery to repair his torn left rotator cuff on May 16, 2007.

Mr. Thilmony returned to his regular job at Schwan's Foods as a driver/route salesperson. Mr. Thilmony described ongoing pain in his left hip and left shoulder at night, keeping him from sleeping through the night. Mr. Thilmony said the left hip slowed him down getting in and out of the truck and making his deliveries. The left shoulder injury has kept Mr. Thilmony from being able to fully raise his left arm and to being able to reach behind him at belt level.

On July 21, 2009, Mr. Thilmony was injured again while climbing metal stairs with metal railings making a Schwan's Food delivery to a condominium. It was "pouring rain" and Mr. Thilmony slipped, injuring his right knee and right shoulder. Mr. Thilmony had a medial meniscus repair in his right knee performed by Dr. Beckett followed by a torn rotator cuff and biceps tear in his right shoulder by Dr. Havey.

Mr. Thilmony returned to his regular job at Schwan's Foods as a driver/route salesperson in January of 2010. Mr. Thilmony testified that his right knee and right shoulder never fully recovered after the treatment for the injuries.

Mr. Thilmony testified to a left knee injury for which he had surgery in 1998 while working for Schwan's Foods, but said that his left knee did not bother him before the 2007 accident. Mr. Thilmony also testified to two subsequent left knee arthroscopic surgeries in 2002 and 2004 after slipping on a deck in 2002. In 1991 Mr. Thilmony injured his right foot and ankle when he slipped off the side of a black top road; Mr. Thilmony missed a few weeks of work as the result of this injury. In 1993, Mr. Thilmony injured his left shoulder when the front wheels of his car hit a "wash out" and his left shoulder was hit by the steering wheel and the door. Mr. Thilmony also testified to a heart condition in 1993 that caused him to have to leave his managerial position with Schwan's Foods because of the stress involved with that position; Mr. Thilmony said that after his heart attack and bypasses he returned to Schwan's Foods as a route driver.

Mr. Thilmony stated that all of his injuries affected his ability to work and that he therefore quit working in 2010. Mr. Thilmony specifically cited difficulty getting in and out of his truck and reaching for product as work activities he found difficult as the result of his injuries. Mr. Thilmony produced a paycheck which indicated that he got paid for work at Schwan's Foods on August 12, 2010, for the period of July 25, 2010, through August 7, 2010. Mr. Thilmony testified that this was his last payment for work performed for Schwan's Foods.

Mr. Thilmony testified that he graduated from high school and had one year of education at Dakota Business College in Fargo, North Dakota, where he learned penmanship and bookkeeping. At the time, Mr. Thilmony felt this education would prepare him for a position with a bank. Mr. Thilmony left Dakota Business College after one year for a job as a night

Employee: Larry Thilmony

Injury No. 07-133358

auditor for a hotel. Mr. Thilmony next worked for a dairy producing ice cream and making deliveries. Mr. Thilmony also worked for a beer distributorship and then owned and operated a bar with his wife until it was destroyed by fire. Mr. Thilmony then began his employment with Schwan's Foods in 1986.

After Mr. Thilmony left Schwan's Foods he helped his wife run her in home day care by reading to the children, watching them play in the yard, and picking them up from school. Mr. Thilmony believed that if he had gotten another job his wife would have had to hire a replacement for him. Mrs. Thilmony quit operating the day care in 2015 due to her own health concerns.

Mr. Thilmony testified to applying for work with a gravel company after he left Schwan's Foods, for which he renewed his commercial driver's license; however, according to Mr. Thilmony, he was not hired because the owner felt he could not handle shoveling the gravel.

In his deposition testimony, Mr. Thilmony made several references to retiring in 2011 when he reached the age of 65.

Dr. David Volarich, board certified in nuclear medicine, occupational medicine and as an independent medical examiner, testified by deposition that he saw Mr. Thilmony twice, in 2009 and again in 2014. As the result of the 2007 accident, Dr. Volarich opined that Mr. Thilmony sustained a permanent disability of 40 percent of the left shoulder and 65 percent of the left hip. Preexisting the 2007 injuries, Dr. Volarich opined to a permanent disability of 25 percent of the left shoulder, 25 percent of the right shoulder, 25 percent of the body as the result of Mr. Thilmony's cardiac condition, 5 percent of the right ankle, and 50 percent of the left knee. Dr. Volarich further opined that "the combination of the disabilities creates a substantially greater disability than the simple sum or total of each separate injury or illness." (Volarich depo p32, 115-18)

As the result of the 2009 accident, Dr. Volarich opined that Mr. Thilmony sustained a permanent disability of 40 percent of the right knee and 40 percent of the right shoulder. Preexisting the 2009 injuries, Dr. Volarich opined to a permanent disability of 25 percent of the right shoulder, 70 percent of the left shoulder, 65 percent of the left hip, 25 percent of the body as the result of Mr. Thilmony's cardiac condition, 50 percent of the left knee, and 5 percent of the right ankle. Dr. Volarich further opined that "the combination of his disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness." (Volarich depo p51, 120-23) Dr. Volarich went on to say that in his opinion Mr. Thilmony is permanently and totally disabled as the result of his July 21, 2009 injuries in combination with his preexisting injuries.

Mr. Thilmony told Dr. Volarich that he retired in July of 2011 from his work at Schwan's Foods, according to Dr. Volarich, and counsel for Mr. Thilmony reiterated, "Just so we're clear, that's July of 2011?", to which Dr. Volarich replied affirmatively. (Volarich depo p38, 122-23)

James England, vocational rehabilitation counselor, testified by deposition that he reviewed Mr. Thilmony's records and issued a report based thereon on September 14, 2015. Mr. England felt that Mr. Thilmony is employable in the open labor market, even given Dr. Volarich's restrictions; in support of his position, Mr. England cited "a variety of things that he could do; some of which are related to what he's done before including sales, customer service. I mean

Employee: Larry Thilmony

Injury No. 07-133358

that's directly in line with what he's done. He's been a desk clerk at a motel before or a night clerk, night auditor. That would be something he could return to, and I think there are also alternative entry-level kinds of things like, you know, cashiering positions, security positions, things like that even under Dr. Volarich' (sic) restrictions that he would still be able to do." (England depo p30, 16-17)

Terry Cordray, vocational rehabilitation counselor, testified by deposition that prior to his 2009 injuries, Mr. Thilmony was able to perform medium work as a route driver for Schwan's Foods despite several preexisting medical problems, which Mr. Cordray described as a significant hindrance and obstacle to employment. However, after the 2009 injuries at Schwan's Foods, Mr. Thilmony was precluded from engaging in light work as the result of additional restrictions on Mr. Thilmony's ability to stand for more than 30 minutes and his inability to lift more than three pounds with the right arm away from the body and inability to engage in prolonged use of the right arm away from the body. Mr. Cordray testified that Mr. Thilmony is permanently and totally disabled as the result of the combination of his 2009 right knee and right shoulder injuries combined with his preexisting heart condition and his preexisting upper and lower extremity restrictions.

APPLICABLE LAW

RSMo Section 287.220.2. All cases of permanent disability where there has been previous disability due to injuries occurring prior to January 1, 2014, shall be compensated as provided in this subsection. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, 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. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, 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 shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury

Employee: Larry Thilmony

Injury No. 07-133358

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 the second injury fund.

AWARD

The claimant, Larry Thilmony, has sustained his burden of proof that he is entitled to benefits from the Second Injury Fund for his increased permanent partial disability as the result of the combination of his 2007 accident and injuries combined with his preexisting disabilities.

Mr. Thilmony has proven that the 2007 injuries to the left shoulder and the left hip and the preexisting disabilities to the left knee and the body resulting from his cardiac condition are each serious enough to be a hindrance or obstacle to employment. Mr. Thilmony has proven that as the result of his 2007 accident and injuries, he sustained a permanent disability of 10 percent of the left shoulder and 42 percent of the left hip. Prior to the 2007 accident and injury Mr. Thilmony sustained permanent disability of 20 percent of the left knee and 25 percent of the body attributable to his cardiac condition. Mr. Thilmony testified to no permanent disability with regard to either of his shoulders prior to 2007. Similarly, Mr. Thilmony testified to no permanent disability as the result of an ankle injury prior to 2007. The synergistic effect or permanent disability above and beyond the disabilities to the left shoulder and left hip as the result of the 2007 injuries and the preexisting disabilities is 6.05 percent of the body.

Made by: _____

HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation