

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 06-032639

Employee: James Thruston
Employer: Environmental Engineering, Inc. (Settled)
Insurer: Missouri Employers Mutual 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.¹ We have reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 18, 2011, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We agree with the administrative law judge's conclusion that employee's primary injury combined with his preexisting disabilities to cause a greater overall disability than the sum of the disabilities. However, we disagree with the administrative law judge's finding that employee's deep vein thrombosis (DVT) did not pose a hindrance or obstacle to employee's employment or reemployment and, therefore, find that the administrative law judge's award of 12.725 weeks of enhanced permanent partial disability benefits against the Second Injury Fund is insufficient.

Dr. Volarich, the only medical expert to render an opinion regarding employee's DVT, opined that employee is 15% permanently partially disabled of the body as a whole as a result of this venous condition.

Dr. Volarich testified that DVT is a condition in which veins are weakened and lose their elasticity, thus rendering them incompetent. An overarching effect of DVT is fatigue. Therefore, patients suffering from DVT typically struggle to work on their feet all day because of pain and swelling in the affected leg.

Employee testified that he had blood clots in his leg that caused multiple pulmonary embolisms, which are an inherent risk for patients suffering from DVT. Due to the blood clots, employee was prescribed Coumadin, which is an anti-coagulant he has to take for the rest of his life. Coumadin is a blood thinner, causing easy bruising and excessive bleeding, and, therefore, creating another employment risk.

In 1998 or 1999, employee was working when a piece of pipe slipped out of chains and hit his right leg. The incident caused his calf to swell due to internal bleeding. Employee had to take off work for three days to recover from the injury and his calf has never returned to its former condition. Following this injury to his calf, employee has struggled to complete ordinary tasks of his job such as climbing ladders and walking up and down stairs. While completing tasks at work, employee has to walk around frequently to keep the blood in his leg from pooling up.

¹ Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

Employee: James Thruston

Dr. Volarich opined that employee's heart valve defect combined with the DVT to have a significant effect on employee's endurance. The DVT causes employee's heart to work harder in pumping blood throughout the body. Because his DVT condition inhibits normal blood flow to the lungs, employee suffers from shortness of breath and fatigue.

The administrative law judge did not provide any support for his conclusion that employee's DVT did not and does not pose a hindrance or obstacle to employee's employment or reemployment. Based upon the aforementioned evidence, which was uncontradicted, we disagree with the administrative law judge's unsupported conclusion and find that employee's DVT does pose a hindrance or obstacle to his employment.

While we find that employee's DVT poses an actual and measurable hindrance or obstacle to his employment, we find that Dr. Volarich's rating of 15% permanent partial disability of the body as a whole is slightly excessive. We find, based upon employee's testimony, the medical evidence, and the record as a whole, that a more appropriate rating for employee's preexisting DVT is 12.5% permanent partial disability of the body as a whole.

We conclude that employee's primary injury (22.5% PPD of the right elbow, or 47.25 weeks) combined with his preexisting disabilities (20% PPD of the body as a whole referable to the aortic insufficiency, or 80 weeks and 12.5% PPD of the body as a whole referable to the DVT, or 50 weeks) to result in a permanent partial disability enhancement of 10% above the simple arithmetic sums of the separate disabilities, or 17.725 weeks of benefits ($= .10 * (47.25 + 80 + 50)$).

The Second Injury Fund is liable for employee's 17.725 weeks of enhanced permanent partial disability benefits.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, as modified herein, is attached and incorporated by 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 7th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

NOT SITTING

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: James Thruston

Injury No. 06-032639

Add'l Party: Second Injury Fund Only

Employer: Environmental Engineering, Inc. (Settled)

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

Insurer: Missouri Employers Mutual Ins. Co. (Settled)

Hearing Date: March 28, 2011

Checked by: RJD/cs

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: April 17, 2006.
5. State location where accident occurred or occupational disease was contracted: Phelps 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? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee working on a ladder when the ladder collapsed.
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: Right upper extremity.
14. Nature and extent of any permanent disability: 22.5% of the right elbow.
15. Compensation paid to-date for temporary disability: \$10,653.68.
16. Value necessary medical aid paid to date by employer/insurer? \$17,737.83.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$1,045.46.

Employee: James Thruston

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- 19. Weekly compensation rate: \$365.08.
- 20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

- 21. Second Injury Fund liability:

12.725 weeks of permanent partial disability benefits:	\$4,645.64
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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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

John B. Boyd

Employee: James Thruston

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Thruston

Injury No: 06-032639

Add'l Party: Second Injury Fund Only

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Environmental Engineering Inc. (Settled)

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

Insurer: Missouri Employers Mutual Ins. Co. (Settled)

Checked by: RJD/cs

PRELIMINARIES

On March 28, 2011, a final hearing was held in this case in Jefferson City to determine the liability, if any, of the Second Injury Fund, for permanent partial disability benefits.

The parties stipulated to the following:

1. On or about April 17, 2006, James Thruston ("Claimant") sustained an accident and injury arising out of and in the course of his employment with Environmental Engineering, Inc. ("Employer"). The accident occurred in Phelps County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Phelps County and adjoining counties; the parties agreed on the record to holding the hearing in Cole County.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The average weekly wage at the date of injury was \$1045.46, resulting in compensation rates of \$696.97 for temporary total disability, and \$365.08 for permanent partial disability.

The issue to be determined is the liability, if any, of the Second Injury Fund for permanent partial disability benefits.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled.

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Exhibits

Claimant offered the following exhibits, which were received into evidence without objection:

- A. Stipulation for Compromise Settlement in Injury No.06-03239 between Claimant and Environmental Engineering, Inc. (Employer), approved by Administrative Law Judge Vicky Ruth of the Missouri Division of Workers' Compensation on September 2, 2009.
- B. Transcript of the deposition testimony of Dr. David T. Volarich, taken on July 6, 2010, including a narrative report and *curriculum vitae*.
- C. Medical Records of Central Missouri Cardiology.
- D. Medical Records of Capital Region Health Branch West.
- E. Medical Records of Capital Region Medical Center.
- F. Medical Records of Turnbaugh Surgical Associates, Inc.
- G. Miscellaneous records (reports of injury) of the Missouri Division of Workers' Compensation.

The Second Injury Fund did not offer any additional exhibits.

Live Testimony

Claimant testified live. His testimony was credible. Claimant is a Caucasian male, age 57, having been born on August 13, 1953. He stands 5'10" in height, weighs about 190 pounds, and is married with two adult children. His principal employment has been that of a journeyman pipefitter through Local 562 for a period of about 30 years. During that time, he worked often for Environmental Engineering Company, in whose employ he sustained this injury.

On April 17, 2006, Claimant was working in an overhead area in new construction of a hospital in the Rolla, Missouri area. He was standing upon a fiberglass ladder. As he leaned, the ladder tipped, then popped and collapsed, causing Claimant to fall onto his right side. Initially, he suffered an injury to his right elbow, right hip, and neck. The most serious injury suffered was that of a displaced olecranon fracture. He underwent three separate surgeries to repair this injury to the right arm. His initial complaints to the hip and neck resolved and he made no claim for permanent disability related to those areas of the body.

Medical treatment obtained for the primary injury is summarized as follows: He was seen at Capital Region Health Branch West after his fall from a ladder, and was sent to Capital Region Medical Center Emergency Room for his right shoulder, right hip, head and neck. X-rays were taken of the cervical spine, right elbow, and right hip, and revealed a fractured right elbow, that was wrapped with an ACE wrap and placed in an arm sling. Claimant was given Darvocet and instructed to follow-up with an orthopedic surgeon.

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On April 18, 2006, Dr. Thomas Turnbaugh of Turnbaugh Surgical Associates saw Claimant for a follow-up on his right elbow. It was recommended by Dr. Turnbaugh that he undergo surgery. The following day Claimant underwent open reduction internal fixation of a displaced intra articular fracture, right olecranon at Capital Region Medical Center. The cast was taken off and the sutures removed on May 9, 2006. Claimant was instructed to start moving his elbow, and was given a restriction of ten pounds. After some therapy Dr. Turnbaugh returned the employee to light duty work with a 40 pound lifting restriction on June 6, 2006. On July 11, 2006, Claimant was released back to full duty, and was cautioned about relying on his right elbow to carry his entire body weight, such as in climbing a ladder.

On October 27, 2006, Claimant underwent removal of superficial hardware from the right olecranon.

On November 21, 2006, Dr. Turnbaugh returned Claimant to full duty with a follow-up visit scheduled for April 2007. However on March 13, 2007 Claimant returned with complaints of the wire being uncomfortable and requested it be removed, and on October 2, 2007, the remainder of the wire was surgically removed from Claimant's right elbow.

On August 14, 2008, Claimant was examined by Dr. David Volarich, who expressed various ratings of disability for the primary as well as for pre-existing conditions. Ultimately, on August 28, 2009, Claimant settled his claim with Employer, based upon a 22.5% permanent partial disability of the right arm, at the elbow or 210 week level.

Claimant was diagnosed with aortic insufficiency, pulmonary hypertension and mitral valve regurgitation, and underwent cardiac catheterization followed by an aortic valve replacement in 2001. After the surgery, Claimant had a third episode of pulmonary embolism due to a congenital protein S deficiency. It was also noted at that time that Claimant had an aneurysm of his ascending thoracic aorta. Claimant takes Coumadin on a daily basis, as well as cardiac medications.

Because of the congenital protein S deficiency, Claimant's blood is more likely to clot than is normal. This resulted in the three pulmonary emboli in 1999, 2000 and in 2001.

Due to the heart problems, Claimant has had chronic problems with fatigability and loss of endurance. Consequently, he has had to have co-workers help him with many tasks, particularly with very heavy lifting.

Dr. Volarich rated the conditions which pre-existed the accident as 15% permanent partial disability to the body as a whole for the venous vascular system abnormality. Dr. Volarich also rated a separate disability to the cardiovascular system at 25% permanent partial disability to the body as a whole. This is due to an aortic insufficiency that required open chest surgery in order for there to be an aortic valve replacement. Mr. Thruston must take anticoagulation medication to maintain the valve as well. He has had a history of ongoing difficulties with easy fatigability and loss of endurance; multiple episodes of shortness of breath (dyspnea), and shortness of breath upon exertion.

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Dr. Volarich testified these conditions posed serious risks of hindrances to maintaining employment, and to finding employment should Mr. Thruston lose his ability to work as a pipefitter. For example, he cannot work in certain occupations because of the anticoagulants: Use of knives, for example, preclude employment as a butcher, barber, police or security work, fire suppression, or that of a laborer are all precluded. If he cuts himself, then he must go to the hospital to stop the bleeding.

Dr. Volarich testified that it was his opinion that the combination of Claimant's disabilities created a substantially greater disability than the simple sum of each separate injury or illness, and that a loading factor should be added.

I find that the venous vascular abnormality did not and does not pose a hindrance or obstacle to Claimant's employment or reemployment.

I find that the aortic insufficiency did constitute a hindrance or obstacle to Claimant's employment or reemployment prior to April 17, 2006, and continues to do so, because of easy fatigability, loss of endurance, and shortness of breath.

FINDINGS OF FACT & RULINGS OF LAW

Claimant has established a right to recover from the Second Injury Fund. A claimant in a worker's compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). In order for a claimant to recover against the SIF, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008) (Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

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:

1. Claimant sustained a compensable last injury which resulted in permanent partial disability equivalent to 22.5% of the right elbow (47.25 weeks).

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2. As of the time the last injury was sustained, Claimant had a preexisting permanent partial disability of 20% of the body as a whole, referable to the aortic insufficiency (80 weeks) which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.
3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disability, causes 10% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 47.25 weeks for last injury + 80 weeks for preexisting injuries = 127.25 weeks x 10% = 12.725 weeks of overall greater disability.

CONCLUSION

The Second Injury Fund is liable to Claimant for \$4,645.64 in permanent partial disability benefits. Attorney for Claimant shall be entitled to an attorney fee of 25% of this award.

/s/Robert J. Dierkes
ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Date: April 18, 2011

/s/Naomi Pearson
Naomi Pearson
Division of Workers' Compensation