

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

Injury No.: 02-155590

Employee: Ricky Tyson  
Employer: Midwest Transit (Settled)  
Insurer: Zurich North America Insurance Co. (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: December 21, 2002  
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 21, 2007, as supplemented herein.

The administrative law judge concluded that employee was entitled to 29.4 weeks of permanent partial disability benefits based on the synergistic effect of employee's work injury and preexisting cardiac condition. We agree with this conclusion. However, we offer this supplemental opinion to address issues raised by employee in his brief.

Dr. Wade was deposed on November 2, 2007. At that deposition, Dr. Wade gave his opinion regarding employee's extent of disability and the effect of the combination of employee's work injury and preexisting conditions. This evidence was not in his medical records or reports. The Second Injury Fund made a 7-day Rule objection to this evidence, but did not postpone or request a continuance of the deposition. Instead, the Second Injury Fund continued with the deposition and questioned Dr. Wade. In her award, the administrative law judge sustained the Second Injury Fund's objection despite the lack of a request for relief.

We believe that the 7-day Rule objection should have been overruled and that Dr. Wade's testimony should have been admitted into evidence. "When a party does not receive a medical report before a deposition, he has at least two options. First, he can cross-examine the doctor immediately after direct examination. He is free to schedule further cross-examination if he decides it's necessary. Second, he could postpone all cross-examination until he has had an opportunity to review the testimony and prepare." *Goodwin v. Farmers Elevator and Exch.*, 933 S.W.2d 926, 929 (Mo.App. 1996) (internal citations omitted).

While the Second Injury Fund raised a 7-day Rule objection, it failed to preserve the objection by requesting relief as described in *Goodwin*. Counsel for the Second Injury Fund cross-examined Dr. Wade without requesting a postponement or continuance. Since the Second Injury Fund cross-examined Dr. Wade, it will

not be prejudiced by the admittance of his opinions regarding employee's disability. Therefore, in reviewing this matter, the Commission has taken into consideration Dr. Wade's testimony in its entirety.

After reviewing all the evidence on the record, including the medical evidence provided by Dr. Wade, the Commission still agrees with the ultimate conclusion reached by the administrative law judge that employee is entitled to permanent partial disability benefits from the Second Injury Fund for 29.4 weeks based on the synergistic effect of employee's work injury and preexisting cardiac condition.

The award and decision of Administrative Law Judge Linda J. Wenman, issued December 21, 2007, is affirmed, and is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of July 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**AWARD**

Employee:	Ricky Tyson	Injury No.:	02-155590
Dependents:	N/A	Before the	
Employer:	Midwest Transit (settled)	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund	<b>Compensation</b>	
Insurer:	Zurich North America Insurance Co. (settled)	Department of Labor and Industrial	
Hearing Date:	December 4, 2007	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	LJW

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes
- 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

- Date of accident or onset of occupational disease: December 21, 2002
- 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

- 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 unloading a mail delivery, Claimant fell on the dock stairs injuring his left knee.

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Bilateral knees

- Nature and extent of any permanent disability: 55% PPD referable to the left knee, and 17.5% PPD referable to the right knee, paid by employer/insurer.

15. Compensation paid to-date for temporary disability: \$27,569.48 representing 42 weeks.

16. Value necessary medical aid paid to date by employer/insurer? \$65,551.76

Employee: Ricky Tyson

Injury No.: 02-155590

17. Value necessary medical aid not furnished by employer/insurer? None

- Employee's average weekly wages: Sufficient for maximum rates.

19. Weekly compensation rate: \$649.32 / \$340.12

20. Method wages computation: Stipulated

#### COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

29.4 weeks of permanent partial disability from Second Injury Fund \$9,999.53

Total: \$9,999.53

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 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: James Guirl

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Ricky Tyson	Injury No.: 02-155590
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Midwest Transit, Inc. (settled)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Zurich North American Ins. Co. (settled)	Checked by: LJW

### **PRELIMINARIES**

A hearing for final award was held regarding the Second Injury Fund portion of the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on December 4, 2007. The parties were given until December 18, 2007 to submit post-trial memorandums if they desired. The case was submitted on December 18, 2007 without receipt of post-trial memorandums. Attorney James Guirl represented Ricky Tyson (Claimant). Assistant Attorney General Toni Camp represented the Second Injury Fund (SIF).

Prior to the start of the hearing the parties identified the issue for disposition in this case as the liability of SIF for permanent total disability (PTD), or permanent partial disability (PPD) benefits. Claimant offered Exhibits A-O. Only deposition objections were preserved, and the exhibits were admitted into the record without further objection. In Exhibit L, SIF objected to any opinions rendered by Dr. Wade regarding Claimant's permanent total disability status or his employability, as prior to the deposition Dr. Wade had never rendered such an opinion. Dr. Wade's medical records were not placed in evidence at deposition or trial. No physicians report or medical records of Dr. Wade exist. SIF's objections contained in Exhibit L are sustained.

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 reviewed and summarized.

1. Claimant is 53 years old, completed the 10th grade, and later obtained a GED. Claimant has not received additional educational or vocational training. Claimant has worked in various jobs as a construction truck driver since completing his education. Since 1999, Claimant has worked as a truck driver for several companies hauling U.S. mail.
2. On December 21, 2002, Claimant was working for Employer hauling U.S. mail, and while delivering mail he fell on the dock steps striking his left knee. Claimant received initial care from orthopedist, Dr. Stein, who diagnosed a medial meniscus tear and degenerative arthritis. Left knee surgery was recommended and performed. Post-operatively, Claimant continued to experience left knee pain, and came under the care of Dr. Strickland, an orthopedist.
3. Ultimately, Dr. Strickland performed a left total knee replacement on September 19, 2005. Post-operatively, Claimant developed right knee pain due to overcompensation. Dr. Strickland found Claimant to be at maximum medical improvement on April 17, 2006, and recommended Claimant avoid squatting and kneeling. Dr. Strickland opined Claimant was able to return to work as a truck driver.
4. On November 27, 2007, Claimant and Employer reached a compromise lump sum settlement that represented PPD of 55% referable to Claimant's left knee, and 17.5% referable to Claimant's right knee due to the December 21, 2002 injury. Claimant's current knee complaints include: constant pain in both knees; inability to bend his left knee; difficulty climbing stairs; rare to no use of ladders; difficulty standing after 15-20 minutes; difficulty walking after ½ block; limits lifting to 50 pounds; frequent use of ice and heat during the day; and the need to elevate his knees to control pain and swelling.
5. Claimant has a history of coronary artery disease (CAD) with the following medical history leading up to the December 21, 2002 injury, and documented by certified medical records:

2/19/90 – Claimant suffered an anteroseptal myocardial infarction (MI ). He was hospitalized at St. Elizabeth's Hospital, received intravenous TPA, and underwent a cardiac catheterization. The cardiac catheterization demonstrated a 75% lesion of Claimant's left proximal anterior descending (LAD) coronary artery, and mild obstruction of the right coronary artery (RCA) and circumflex. It was recommended Claimant consider angioplasty.

3/14/90 – Following recurrent chest pain, Claimant underwent an angioplasty at Jewish Hospital. Following the procedure, Claimant's 75% LAD lesion was reduced to a 20% lesion.

8/31/90 – Following recurrent chest pain, Claimant underwent a cardiac catheterization at St. Elizabeth's Hospital. The catheterization demonstrated a 60% lesion of the proximal LAD, a 50% lesion of the mid LAD, plaque formation of the distal RCA, and plaque formation at the distal circumflex. The physician's final diagnosis was "single vessel CAD with borderline stenosis of the proximal LAD coronary artery at the site of the previous angioplasty, and normal hemodynamics."

9/23/92 – Claimant underwent a thallium stress test. The treadmill portion of the test was negative for myocardial ischemia, and the thallium scan was suggestive of peri-infarct ischemia in the inferoseptal region of the left ventricular myocardium.

3/4/93 – Due to complaints of recurrent chest pain, Claimant underwent an echocardiogram, and repeat thallium stress test. The echocardiogram demonstrated decreased left ventricular compliance, the treadmill portion of the stress test was negative for myocardial ischemia, the thallium scan was normal, and it was noted the peri-infarct ischemia previously seen was no longer present.

9/13/93 – 6/26/94 – Claimant's stress tests remained unchanged.

1/28/97 – Claimant complained of recurrent chest pain, was hospitalized, and underwent another cardiac catheterization. The catheterization revealed the following: a 70% lesion of the proximal LAD; a 90% lesion of the LAD distal to the 1st diagonal branch; a 50% lesion of the mid LAD; a 50% lesion of the distal RCA; and a 30% lesion of the mid proximal circumflex. On this study, Claimant had an estimated ejection fraction of 70%, which was considered normal.

2/3/97 – Due to the findings on his catheterization, Claimant was taken to surgery for coronary artery bypass grafting (CABG), and three bypasses were performed. Claimant also underwent a transesophageal echocardiogram that demonstrated “overall normal left ventricular function with mild septal hypokinesis, and hyperdynamic left ventricular function post bypass.”

10/97 – Claimant developed a deep vein thrombosis of his left leg, and was placed on Coumadin therapy.

9/24/98 – A stress echocardiogram was negative for myocardial ischemia, but demonstrated resting septal hypokinesis with exercise.

11/17/98 – 11/19/98 – Claimant was hospitalized with complaints of chest pain. A cardiac doppler study demonstrated no stenosis, and an echocardiogram demonstrated unchanged left ventricle findings. A cardiac stress test was performed that was negative for myocardial ischemia, and post stress test perfusion imaging revealed a cardiac ejection fraction of 50% with continued septal hypokinesis and remaining normal wall motion.

10/24/99 – 10/25/99 – Claimant was hospitalized after complaining of chest pain. A medical work-up demonstrated no changes in Claimant's EKG, a stress echocardiogram was negative for myocardial ischemia, and Claimant's cardiac isoenzymes were negative.

1/28/00 – At an office visit Claimant's cardiologist, Dr. Vakassi, noted Claimant is “stable,” denies chest pain, shortness of breath or palpitations. Claimant was to return in six months.

6/23/00 - During an office visit with Dr. Vakassi, Claimant denied chest pain, shortness of breath or palpitations. Dr. Vakassi noted Claimant was stable, and should return in six months.

12/29/00 – On this office visit to Dr. Vakassi, Claimant denied chest pain, shortness of breath or palpitations. Dr. Vakassi noted “stable CAD,” and Claimant should return in six months.

6/29/01 – 10/1/01 Claimant did not appear for his appointments due to work conflicts.

10/2/01 – Claimant returned for an office visit with Dr. Vakassi. Claimant denied chest pain, shortness of breath or palpitations. Dr. Vakassi found Claimant to be stable, and indicated he should return in six months.

4/02 – Claimant did not appear for scheduled appointments.

2/5/03 – Claimant returned for an office visit with Dr. Vakassi. Dr. Vakassi noted Claimant's work related

left knee injury. Claimant denied chest pain, shortness of breath or palpitations. Dr. Vakassi found Claimant to be stable, and noted Claimant wanted to use Viagra.

6. Per records of Dr. Vakassi, Claimant remained cardiac stable without chest pain, shortness of breath or palpitations until August 12, 2004, when he developed chest tightness with physical exertion. A repeat cardiac catheterization was performed that demonstrated a significant increase in his CAD involving his RCA and circumflex. Cardiac stents were placed at the lesion sites in the RCA and circumflex. In January 2007, Claimant again underwent cardiac catheterization with successful angioplasty to the distal branch of the RCA after a failed attempt at stent placement. During the 2007 catheterization, Claimant was noted to have increased left ventricular end-diastolic pressure, and Claimant's ejection fraction was noted to be greater than 40%.

7. Following his 1992 angioplasty, Claimant did not work for 11 months due to fatigue. In 1993 Claimant attempted to sell insurance door to door, but quit due to chest pain, shortness of breath and exhaustion. Claimant finally returned to employment in 1999 performing lighter mail delivery work. Following his December 21, 2002 knee injury, despite continued knee pain Claimant returned to work as a mail hauler in March 2003, and worked until he was advised by his cardiologist in August 2004 to cease employment. Following his left knee replacement, when released to return to work by Dr. Strickland on February 13, 2006, Claimant did not return to work.

8. Claimant was examined at his request by Dr. Musich on several occasions. In addition to examining and rating Claimant's knees, Dr. Musich evaluated Claimant's CAD. On November 12, 2004, Dr. Musich noted Claimant "has suffered severe coronary artery disease including numerous myocardial infarctions requiring extensive cardiovascular evaluation and treatment." Dr. Musich noted Claimant's August 2004 angioplasty and stent placement, and persistent complaints of chest pain. In regard to Claimant's coronary status, Dr. Musich opined Claimant had experienced unstable angina since 1990, and rated Claimant's coronary disability at 70% BAW PPD, and testified this rating reflected all cardiac treatment Claimant had received up to Dr. Musich's evaluation on November 12, 2004. Dr. Musich further opined the combination of Claimant's December 21, 2002, knee injury and Claimant's severe CAD rendered Claimant PTD.

9. Vocational rehabilitation counselor, James England, interviewed Claimant on November 27, 2006. In addition to his interview, Mr. England reviewed Claimant's medical records and administered the Wide-Range Achievement Test. The test revealed Claimant's ability to read at a high school level, and Claimant tested at a 4th grade level in math. After reviewing Claimant's prior work history, Mr. England concluded Claimant did not possess skills that would transfer to a sedentary job. If Mr. England applied the work restrictions imposed by Dr. Strickland, Mr. England indicated Claimant would be capable of performing truck driving. However, when Mr. England applied the restrictions placed by Dr. Musich, and factored in Claimant's description of his daily functioning, Mr. England opined Claimant was PTD and unable to find or perform work in the open labor market. Mr. England opined, "taking into consideration this man's overall medical problems it appears that he was limited at this time to less than what would be needed to sustain even sedentary work on a consistent, day-to-day basis."

### **RULINGS OF 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:

#### **Issues related to SIF liability for PTD benefits**

Claimant seeks permanent total disability benefits from SIF. 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).

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).

Claimant's medical and vocational experts have found Claimant PTD, and unable to be employed in the open labor market, due to a combination of his last injury and his preexisting cardiac condition. Mr. England's PTD opinion relies on Dr. Musich's reports, but Dr. Musich's reports are flawed. Dr. Musich opined Claimant has suffered "numerous myocardial infarctions or heart attacks." Claimant's medical records simply do not support such an assertion. A thorough review of Claimant's medical records demonstrated Claimant suffered one heart attack, an anteroseptal MI in February 1990. All hospitalizations subsequent to the initial February 1990 hospitalization ruled out any new heart attacks. All remaining cardiac intervention was done to *prevent* another MI from occurring, not to treat a new MI.

Further, both Dr. Musich and Mr. England measured the degree of Claimant's cardiac condition on the date he was examined, and not on the date of injury. Section 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). Claimant's last work related injury was sustained on December 21, 2002. The degree of Claimant's preexisting disability due to his cardiac condition must be measured as it stood on December 21, 2002, the date of his left knee injury. At the time of that injury, Claimant's cardiac condition was stable, and according to his cardiologist had been stable since January 2000. Claimant's ejection fraction remained within acceptable limits. Claimant worked before and after his December 21, 2002 injury. Claimant's cardiologist advised Claimant to stop working after Claimant developed further cardiac problems in 2004. Based on the competent evidence presented, I do not find SIF liable for PTD benefits due to a combination of Claimant's preexisting and last work related injury that occurred on December 21, 2002. Clearly, Claimant's CAD later progressed and worsened, but not until August 2004, well after his last work injury.

### **Issues related to SIF liability for PPD benefits**

Section 287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and preexisting conditions must produce additional disability greater than the last injury standing alone. Employer and Claimant entered into a compromise PPD settlement of 55% referable to Claimant's left knee, and 17.5% referable to Claimant's right knee. I find these percentages appropriate and supported by the competent evidence, and I adopt the percentages when considering Claimant's SIF claim.

I also find Claimant's cardiac condition prior to December 21, 2002, to have been a hindrance or obstacle to his employment. Claimant's cardiac condition was not work related and must be assigned a percentage of disability when considering possible SIF liability. Dr. Musich rated Claimant's preexisting disability at 70% BAW, however, as discussed previously, Dr. Musich rated the condition as it presented on the date of his examination. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App.1983) (overruled on other grounds). Based on the evidence presented, I find Claimant to have a preexisting 20% BAW PPD referable to his cardiac condition as it presented on December 21, 2002, which when combined with his work related knee injuries synergistically produces a disability greater than the simple sum. Applying a 15% load factor, I find SIF to be liable for 29.4 weeks of PPD disability or \$9,999.53.

## CONCLUSION

Claimant's work at Employer was a substantial factor in causing injury to his knees. Claimant is entitled to PPD benefits from SIF. Claimant's preexisting cardiac condition met the statutory threshold for SIF liability. Claimant's preexisting condition was a hindrance or obstacle to his employment. SIF is liable for 29.4 weeks of additional PPD benefits. Claimant's attorney is entitled to a 25% lien.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

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

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker  
*Director*  
*Division of Workers' Compensation*

Commonly known as a heart attack

A clot dissolving agent

The ejection fraction is a measure of the left ventricle's pumping ability. Failure of the left ventricle's ability to pump properly can result in congestive heart failure and pulmonary edema. An ejection fraction is considered normal if it ranges from 50% - 75% per internet literature supplied by Barnes Jewish Hospital (50-75%) and Mayo Clinic.(55-70%). *Barnes-Jewish Hospital Cardiology & Cardiac Surgery: Understanding Ejection Fraction*, <<http://www.barnesjewish.org/groups>>; *Mayo Clinic Cardiology Staff: Ejection Fraction, What does it measure?*, (Sept. 19, 2006) <<http://www.mayoclinic.com/health/ejection-fraction>>.

Isoenzymes are released in the bloodstream when cell death occurs. Elevated cardiac isoenzymes are present when heart cells die after a myocardial infarction occurs. *Quest Diagnostic Laboratory*, <<http://questdiagnostics.com>>.