

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

Injury No.: 05-139313

Employee: Larry Voidanoff
Employer: United Samsco Associates, Inc. (Settled)
Insurer: Continental Casualty 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 June 26, 2013. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued June 26, 2013, 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 10th day of January 2014.

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 Voidanoff**

Injury No. **05-139313**

Dependents:

Employer: **United Samsco Associates, Inc. (settled)**

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: **Second Injury Fund**

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

Insurer: **Continental Casualty Co. (settled)**

Hearing Date: **May 16, 2013**

Checked by: RJD/njp

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: **May 19, 2005**
5. State location where accident occurred or occupational disease was contracted: **Camden 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 was on a ladder stocking shelves, he turned to descend when his shoe caught in the grate on the ladder's platform, causing injury to Employee's left knee and calf where his lower extremity articulated with his leg prosthesis.**
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 lower extremity.**
14. Nature and extent of any permanent disability: **75% permanent partial disability of the body as a whole; permanent total disability assessed against the Second Injury Fund.**
15. Compensation paid to-date for temporary disability: **Unknown.**
16. Value necessary medical aid paid to date by employer/insurer? **Unknown.**

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17. Value necessary medical aid not furnished by employer/insurer? **Unknown.**
18. Employee's average weekly wages: **\$300.00**
19. Weekly compensation rate: **\$200.00 for permanent total disability benefits; \$200.00 for permanent partial disability benefits.**
20. Method wages computation: **Based upon evidence adduced.**

COMPENSATION PAYABLE

21. Second Injury Fund liability:

Permanent total disability benefits of \$200.00 per week, beginning February 18, 2015, for Claimant's lifetime.

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:

Thomas E. Loraine

Employee: Larry Voidanoff

Injury No. 05-139313

FINDINGS OF FACT and RULINGS OF LAW:

Employee: **Larry Voidanoff**

Injury No. **05-139313**

Dependents:

Employer: **United Samsco Associates, Inc. (settled)**

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

Additional Party: **Second Injury Fund**

Insurer: **Continental Casualty Co. (settled)**

Hearing Date: **May 16, 2013**

Checked by: RJD/njp

ISSUES DECIDED

The evidentiary hearing in this case was held on May 16, 2013 in Osage Beach, Camden County, on Claimant's claim against the Second Injury Fund. Claimant's claim for compensation against United Samsco Associates, Inc. ("Employer") and Continental Casualty Company ("Insurer") was previously settled by stipulation. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on June 11, 2013. The hearing was held to determine the following issues:

1. Whether Larry Voidanoff ("Claimant") sustained an accident and injury arising out of and in the course of his employment with United Samsco Associates, Inc. ("Employer") on May 19, 2005;
2. Employee's average weekly wage and resultant compensation rate; and
3. The liability, if any, of the Second Injury Fund for permanent partial disability benefits.

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 Camden County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo; and
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Larry Voidanoff, and the following exhibits.

Employee's Exhibit 1: transcript of the deposition testimony of Wilbur Swearingin dated July 30, 2012 and attached exhibits.

Employee's Exhibit 2: transcript of the deposition testimony of Dr. David T. Volarich dated December 12, 2011 and attached exhibits.

Second Injury Fund's Exhibit A: transcript of the deposition testimony of Larry Voidanoff, dated September 16, 2008.

Court's Exhibit 1, consisting of records of the Missouri Division of Workers' Compensation.

DISCUSSION

Larry Voidanoff ("Claimant") was born on September 27, 1958. He is 54 years old and stayed through the 11th grade in high school. He has some difficulty reading and writing and has few computer skills. Claimant's work history is in fast food retail as well as in stocking shelves with produce and hardware. He worked for three employers in the 6 years leading up to his work injury: Walmart, Captain D's and United Samsco, Inc. He worked for United Samsco in two Home Depot stores stocking the shelves. In all positions he worked physically demanding jobs where he was on his feet all shift carrying items. He was a full-time store manager of eight employees at Captain D's. He was the produce manager at Walmart where he stocked shelves and did all aspects the job required. Employee testified he worked for both Walmart and Captain D's at the same time for five years between approximately 2000 and 2005. He began his employment with United Samsco Inc in February 2005.

Claimant testified that while he worked for United Samsco, it was United Samsco which directed and controlled his work; however, he physically worked at two Home Depot stores, one in Osage Beach, Missouri and the other in Columbia, Missouri. The parties stipulated that Claimant was an employee of United Samsco and that United Samsco was subject to the Missouri Workers' Compensation Act.

Claimant testified regarding conditions he had prior to the injury of May 19, 2005. He testified that in 1981 while in the military he suffered a gunshot wound to his left ankle, but he had no permanent disability or ongoing problems from that condition. Claimant testified that in March 1996 he sustained an injury to his left ankle when he fell down some stairs shattering his talus bone. Following a failed fusion Claimant had the option of either living with the pain from his left ankle or having a below knee amputation. Claimant decided on the below knee amputation, which he had done in December 1996. He was fitted with a prosthetic and returned to the work force in 2000, working for both Walmart and Captain D's. Claimant described that with the prosthesis he wore special shoes which had extra grip on them. They gave him a little more stability but looked and performed like normal tennis shoes.

After returning back to the work force in 2000, Claimant worked two full-time jobs. He worked for Walmart as the produce manager, ten hours a day, 5-6 days a week, which Claimant described as a manual job. His shift ended about 12:30 a.m. or 1:00 a.m. He described lifting boxes which were fifty to sixty pounds all day long. During this time he also worked for Captain D's as the daytime manager working 8 hours a day usually about 5:30 a.m. to 1:00 p.m., Monday to Friday. At Captain D's he frequently lifted boxes weighing fifty pounds. In both jobs Claimant was on his feet most of the time. He testified he was able to do everything required of him at these jobs, and needed no accommodations or help to perform his work. Claimant stated at the hearing "Nobody gave any accommodations to help with anything I have done" when referring to his abilities before 2005.

In February 2005 Claimant began working for United Samsco ("Employer") stocking shelves in two Home Depot stores. He quit his jobs at Walmart and Captain D's to work for Employer. He worked 7 am to 3 pm, five days a week, Monday through Friday, two days in Osage Beach and three days in Columbia. He testified he occasionally worked overtime. At the Home Depot stores he was constantly on his feet stocking shelves, carrying items up and down ladders, carrying hardware, tools, lumber, etc. Claimant continued to climb ladders even with his prosthesis and that, indeed, at the time of the May 19, 2005, injury Claimant was on a ladder. Claimant described the ladders he used at Home Depot. They were platform ladders with wide steps, a platform measuring about two feet by three feet on the top, handrails on each side, a railing at the top, and metal grips on the steps and platform. He used these ladders daily while working for United Samsco at the Home Depot stores.

Claimant testified regarding the injury of May 19, 2005. He was on a ladder stocking some shelves. He turned to descend and his left foot caught on the grate at the top of the ladder. In particular he stated it was the special shoe on his prosthesis which caught on the ladder. He turned but his foot did not which caused the muscle to pull from the bone at the site of the amputation, right where the prosthetic met his leg. He reported the injury and went home where he discovered the prosthesis had broken piercing the back of his knee. A posttraumatic popliteal cyst developed, he eventually had an irrigation and debridement and was fitted for a new prosthesis. He had physical therapy for his episodes of low back pain in July 2005. An infection developed and he had a second irrigation and debridement. Continued infection led to an excision of the popliteal cyst in August 2005, and a second excision of the popliteal cyst in September 2005. By this time Claimant had not yet received his new prosthesis and was walking on crutches. Use of crutches led to pain in his low back and left elbow. Claimant eventually was referred to Dr. Matthew Concannon for continuing problems. In April 2006, Dr. Concannon performed an excision at the amputation site and covered it with a material called Integra. Once the Integra became fully incorporated the wound would be covered with a skin graft. Claimant has had no treatment since this procedure.

Claimant testified that since finishing treatment for his 2005 work injury he has ongoing pain management with several medications. He takes Tramadol every 8 hours, Gabapentin every 3 to 4 hours, Aspirin in the morning, and Amitriptyline to sleep at night. He testified that he did not take these medications before the May 19, 2005, work injury. Claimant testified he no longer

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drive, and has not been able to since the May 19, 2005, injury. He cannot drive his motorcycle now. He rarely leaves the house. He mostly just lies down now, not sleeping, just resting.

Claimant testified regarding activities prior to May 19, 2005. This included hunting, fishing and riding his motorcycle. He hunted deer for up to 8 hours over rocky areas with hills, even when it was rainy, or hot, or humid. He also hunted squirrel, rabbit and turkey. To hunt turkey he would sometimes be outside in below freezing weather for up to 3 hours. He went both fly-fishing and bait fishing on weekends. He would ride his motorcycle all the time on nice days. Claimant continued to ride his motorcycle after his below knee amputation and before the injury on May 19, 2005. He testified he would ride his motorcycle an hour and forty minutes to work at the Home Depot in Columbia, from his home in Osage Beach. These were all activities Claimant testified he enjoyed after his below knee amputation and before the May 2005 injury.

Claimant testified that currently his days are spent doing very little. He stays home, lies down, checks email, and might do a few things around the house. Claimant testified specifically he does not believe he can work because of the 2005 work injury and the pain and problems that come with it. He lives with a close friend and the friend's "lady friend," and that they assist him with activities of daily living. Claimant testified he walks with a limp and has done so ever since the May 2005 injury. The 2005 injury causes much pain in his left leg which causes pain in his low back. The combined pain in his leg and low back make it difficult for him to walk upright and he walks hunching over his cane. Claimant stated he walks like that all the time since the 2005 injury. He stated he did not have a limp before 2005.

On cross-examination by the Second Injury Fund, Claimant testified he can only walk one block. He said his leg pain from the May 2005 injury made his back pain worse, and the only back pain he has is from the May 2005 injury. Claimant now requires his back brace every day, six hours on 2 hours off. He uses a cane all the time, a wheelchair occasionally and crutches sometimes. He stated he can only lift a coffee cup now. Claimant further testified on cross-examination that before the 2005 injury he could walk all day, and that he never had problems before the accident in 2005. Claimant stated he could pretty much do whatever he wanted, and that there was "nothing that he couldn't do".

Was there a compensable accident and injury? Section 287.020.2, RSMo, defines "accident"; it states, in pertinent part:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

Claimant clearly sustained a specific unexpected traumatic event which was identifiable by time and place; it occurred during a single work shift and the traumatic event immediately produced objective symptoms of injury. There is no question that Claimant sustained an "accident".

Section 287.020.3, RSMo, defines "injury". That section states, in pertinent part:

- (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
- (2) An injury shall be deemed to arise out of and in the course of employment only if:
 - (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
 - (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.
- (3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

The Second Injury Fund argues that the “prevailing factor” in the cause of Claimant’s injury was Claimant’s shoe, and not the grated surface on the ladder in which Claimant’s shoe became caught. I believe the Fund has mischaracterized its argument. The term “prevailing factor” in the statute is used in conjunction with “accident”, and not with a particular item of equipment or item of clothing or footwear. Claimant clearly sustained an “accident”, and the “accident” was clearly the prevailing factor (indeed the only factor) in causing both the medical condition and disability. The Fund’s argument, I believe, is only pertinent in the context of 287.020.3(2)(b) “hazard or risk unrelated to the employment”. I believe the Fund’s argument is that Claimant’s shoe (allegedly unrelated to the employment) was the hazard or risk which caused the injury. First of all, I question the premise that Claimant’s shoe was a “hazard or risk”? A hazard or risk for what? Second, I question the premise that Claimant’s shoe was “unrelated to the employment”; Claimant clearly was required to wear shoes to work; there was no evidence that a particular type of shoe was either mandated or prohibited. Claimant was wearing shoes which were exactly like “normal tennis shoes”, with “extra grip” on the bottom. The shoe on his prosthetic left leg caught on the grated surface of the ladder. A “normal tennis shoe” could have done the same thing. I find that the May 19, 2005 accident was clearly the prevailing factor in causing the “injury”, i.e., in causing both the medical condition and disability, and that the injury did not come from a hazard or risk unrelated to the employment.

What is the average weekly wage? Claimant testified that his average weekly wage was \$335.75. Court’s Exhibit 1 contained several documents that could potentially shed some light on this issue. The STIPULATION FOR COMPROMISE SETTLEMENT between Claimant and Employer/Insurer recites a compensation rate of \$223.83, which would translate into an average weekly wage of \$335.75. However, the settlement amount of \$65,000 was based on a permanent partial disability of 75% of the body as a whole (i.e., 300 weeks). When \$65,000 is divided by 300, the resultant compensation rate is \$216.67, which translates into an average weekly wage of \$325.00. The NOTICE OF COMMENCEMENT/TERMINATION OF COMPENSATION form dated 5/27/2009 notes an average weekly wage of \$257.18, which would make the compensation rate \$171.45; however that document also states that 208 weeks of TTD benefits, totaling \$37,454.11 had been paid. \$37,454.11 divided by 208 yields a compensation rate of \$180.07 and an average weekly wage of \$270.10. The CLAIM FOR COMPENSATION alleges an average

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weekly wage of \$300.00 and the REPORT OF INJURY alleges an average weekly wage of \$257.18.

Obviously, the evidence is inconsistent on the issue of Claimant's average weekly wage. Based upon payments actually made by Employer-Insurer (which Claimant has not disputed), the average weekly wage is somewhere between \$270.10 and \$325.00. Claimant's testimony of an average weekly wage of \$335.75 (not surprisingly) corresponds with the highest rate reported (but not paid) of \$223.83; Claimant's CLAIM FOR COMPENSATION, however, alleges an average weekly wage of \$300.00. I find the average weekly wage to be \$300.00, yielding a compensation rate of \$200.00.

Liability, if any, of the Second Injury Fund. Claimant alleges that he is permanently and totally disabled, and is seeking 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 a 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). When the 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 renders a 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 court will look at the employee's age and the work in which he has experience and will ask: Given this employee's age, could he be considered for another type of job? Given his physical (or mental) condition, could anyone be expected to employ this person?" *Reves v. Kindell's Mercantile Co., Inc.*, 793 S.W.2d 917, 921 (Mo.App.S.D. 1990).

The evidence is overwhelming that Claimant is permanently and totally disabled. The question, then, is whether Claimant is permanently and totally disabled from the last injury alone, or from the last injury combined with preexisting disabilities. I believe this is a clear case of Second Injury Fund liability. While the Fund has argued that Claimant had no preexisting disability, as he worked "just fine" with a prosthetic leg, there is really no question that Claimant's below knee amputation constituted a significant preexisting disability, notwithstanding his success at using a leg prosthesis. The May 19, 2005 accident and injury has destroyed Claimant's ability to use the leg prosthesis successfully. He is in constant pain, must use strong pain medications every day, can no longer drive, and has significant difficulty with walking and standing. In my opinion, the analysis is simple: if not for the prior amputation, the May 19, 2005 accident would not and could not have resulted in permanent total disability. It is clearly the combined effect of the prior amputation and the May 19, 2005 accident that has rendered Claimant permanently and totally disabled, and the liability for permanent total disability benefits lies with the Second Injury Fund.

The Notice of Commencement/Termination of Compensation dated May 27, 2009, and filed by Employer-Insurer, stated the reason for the termination of compensation on May 19, 2009, was maximum medical improvement. I find that Claimant's condition reached maximum medical improvement on May 19, 2009. The Second Injury Fund's liability for permanent total disability benefits began on May 20, 2009, subject to a credit for Employer's liability for permanent partial disability benefits. I find that the May 19, 2005 accident and injury resulted in a permanent partial disability of 75% of the body as a whole, resulting in 300 weeks of benefits. As the permanent partial disability weekly compensation rate and the permanent total disability weekly compensation rate are identical (\$200.00), the Second Injury Fund is entitled to 300 weeks of credit, i.e., through February 17, 2015. After application of the credit, the liability of the Second Injury Fund begins on February 18, 2015.

FINDINGS OF FACT AND RULINGS OF LAW

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

1. Claimant sustained an accident and injury arising out of and in the course of his employment with Employer on May 19, 2005;
2. The accident and injury of May 19, 2005 did not come from a hazard or risk unrelated to Claimant's employment;
3. Prior to May 19, 2005, Claimant was working with a significant disability due to a below-the-knee amputation of the left lower extremity which required the use of a leg prosthesis; prior to May 19, 2005, Claimant was successful in using the leg prosthesis, and was able to maintain employment; this condition constituted a hindrance or obstacle to Claimant's employment or reemployment;
4. The May 19, 2005 accident caused trauma and injury to Claimant's left lower extremity, including a posttraumatic popliteal cyst of the left knee, and required five surgeries including excision and drainage of abscess followed by debridement and split thickness skin grafting of the popliteal fossa;
5. As a further result of the May 19, 2005 accident and injury, Claimant's leg prosthesis does not fit correctly; Claimant is in constant pain and must utilize strong pain medications on a constant basis; also as a result of the May 19, 2005 accident and injury Claimant can no longer drive and cannot stand for any significant period of time and must use crutches or a walker to ambulate;
6. The compensable work-related accident of May 19, 2005 was the prevailing factor in the cause of the posttraumatic popliteal cyst of Claimant's left knee, and was also the prevailing factor in the surgeries to address same;
7. Claimant's medical conditions from the May 19, 2005 accident achieved maximum medical improvement on May 19, 2009;
8. The May 19, 2005 accident resulted in a permanent partial disability of 75% of the body as a whole (300 weeks);
9. Claimant's average weekly wage is \$300.00, yielding a compensation rate of \$200.00;
10. In his current physical condition, Claimant is unable to compete in the open market for employment;
11. Claimant is permanently and totally disabled;

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12. The May 19, 2005 injury, considered alone, did not result in permanent total disability;
13. Claimant's permanent and total disability is due to the combination of the May 19, 2005 injury and Claimant's preexisting disability as a result of left below-the-knee amputation;
14. The Second Injury Fund is liable for weekly permanent total disability benefits of \$200.00 beginning May 20, 2009;
15. For the first 300 weeks, the Second Injury Fund is entitled to a credit of \$200.00 per week, due to permanent partial disability benefits attributable to the May 19, 2005 injury;
16. Claimant's attorney, Thomas E. Loraine, is entitled to attorney's fees for necessary legal services rendered to Claimant in this matter.

ORDER

The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay permanent total disability benefits of \$200.00 per week, beginning February 18, 2015, for Claimant's lifetime.

Claimant's attorney, Thomas E. Loraine, is allowed 25% of all disability benefits awarded herein, including future benefits, as and for necessary attorney's fees, and the amount of such fees shall constitute a lien on those benefits.

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

Made by /s/Robert J. Dierkes 6/26/2013

Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation