

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

Injury No.: 99-092868

Employee: Barry Webb
Employer: Ferguson Machine Co., c/o Industrial Motion Control
Insurer: Pacific Employers Mutual Insurance Co., c/o ACE USA ESIS
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 27, 1999
Place and County of Accident: St. Louis, 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 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 11, 2006. The award and decision of Administrative Law Judge Margaret D. Landolt, issued December 11, 2006, 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 15th day of August 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Barry Webb Injury No.: 99-092868
Dependents: N/A Before the
Employer: Ferguson Machine Co., c/o Industrial Motion **Division of Workers'**
Control Department of Labor and Industrial **Compensation**
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: Pacific Employers Mutual Insurance Co., c/o
ACE USA ESIS
Hearing Date: September 14, 2006 Checked by: MDL:tr

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: July 27, 1999
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 injured his back while operating a machine.
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: Low back
14. Nature and extent of any permanent disability: 35% PPD of the body as a whole referable to the low back; permanent total disability due to combination of primary and preexisting injuries.
15. Compensation paid to-date for temporary disability: \$31,282.58
16. Value necessary medical aid paid to date by employer/insurer? \$77,985.32

Employee: Barry Webb Injury No.: 99-092868

17. Value necessary medical aid not furnished by employer/insurer? \$10,228.28
18. Employee's average weekly wages: \$864.40
19. Weekly compensation rate: \$576.26/\$303.01
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$10,288.28
140 weeks of permanent partial disability from Employer	\$42,421.40

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential (\$273.25) payable by SIF for 140 weeks beginning July 19, 2002, and \$576.26 thereafter for Claimant's lifetime	*
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(* represents an indeterminate lifetime benefit)

TOTAL:	\$52,709.68 *
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23. Future requirements awarded: Future medical treatment pursuant to award

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:

Ms. Jill Bollwerk

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Barry Webb	Injury No.:	99-092868
Dependents:	N/A	Before the	
Employer:	Ferguson Machine Co., c/o Industrial Motion Control	Division of Workers' Compensation	
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	Pacific Employers Mutual Insurance Co., c/o ACE USA ESIS	Checked by:	MDL:tr

PRELIMINARIES

A hearing was held on September 14, 2006, at the Division of Workers' Compensation in the City of St. Louis. Barry Webb (Claimant) was represented by Ms. Jill Bollwerk. Ferguson Machine Company in care of Industrial Motion Control and its insurer, Pacific Employers Mutual Insurance Company in care of ACE USA ESIS were represented by Mr. Robert Haeckel. The Second Injury Fund was represented by Assistant Attorney General Eileen Krispin. Ms. Bollwerk requested a fee of 25% of all benefits awarded to Claimant.

The parties stipulated that on or about July 27, 1999, Claimant sustained an accidental injury arising out of and in the course and scope of employment; Claimant was an employee of Employer; venue is proper in the City

of St. Louis; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated Claimant was earning an average weekly wage of \$864.40 resulting in rates of compensation of \$576.26 for total disability benefits and \$303.01 for permanent partial disability benefits. Employer paid TTD benefits of \$31,282.58 representing a period of 54 2/7th weeks. Employer also paid medical benefits of \$77,985.32. The parties further stipulated that as of July 19, 2002, Claimant had no TTD or unemployment benefits.

The issues for resolution by hearing are medical causation; liability of Employer for past medical benefits of \$10,288.28; liability of Employer for future medical care; nature and extent of permanent partial disability; whether Claimant is permanently and totally disabled; and liability of the Second Injury Fund.

SUMMARY OF EVIDENCE

Claimant is a 55 year old man who graduated from high school in 1969, and attended one semester of college. Claimant obtained some post high school training in the military. After studying machine shop technology at Four Rivers Vocational School, Claimant began working as a machinist in 1981.

Prior to the primary injury, Claimant had Osgood Schlatters disease in his knees. In the early 1970's while Claimant was in military boot camp, his Osgood Schlatters became symptomatic and he obtained some treatment. As a result of his disease, his knees currently bother him. He is unable to kneel, and his knees ache all the time. Claimant also reported difficulty with climbing stairs or ladders, running, and jumping. This preexisting condition slowed him down leading up to the primary injury.

Claimant injured his left shoulder in 1985 in a motorcycle accident. He suffered a complete acromioclavicular separation, for which he underwent acromioclavicular surgery with instrumentation and was off work for ten weeks. Once recovered, Claimant did not miss work due to his shoulder, but he did experience achiness especially with weather changes. His shoulder was weaker, his range of motion was limited, and he had difficulty with overhead activities. This injury slowed him down leading up to the primary injury.

On July 27, 1999, Claimant was operating a cam grinding machine, and when he tried to remove the cam, he experienced low back pain. He did not initially report the injury because he thought it would get better. He finished his shift, and two days later he was brushing his teeth when his symptoms intensified to the point where he knew he needed treatment. Claimant was sent to Healthline by Employer where he received muscle relaxants and was released to work. Physical therapy was scheduled and he was referred to Dr. Samson.

Claimant asked for a second opinion and was referred to Dr. Robson, a board certified orthopedic surgeon, who performed surgery on November 5, 1999. Claimant underwent a laminectomy and discectomy at L5-S1, which was followed by physical therapy. Claimant remained off work until mid January. After Claimant was released to work, he had a 50 pound maximum lifting restriction, and a 35 pound repetitive lifting restriction. Claimant testified his back was never quite right after that surgery, and he felt he was declining steadily. He experienced back and leg pain, and numbness in his leg. He was sent back to Dr. Robson who prescribed more medications, injections, and physical therapy.

In mid May, Claimant bent over and experienced excruciating pain. Employer referred Claimant back to Dr. Robson who performed a second surgery on August 21, 2000. Claimant had a lumbar laminectomy, hemilaminectomy at L5-S1, with removal of recurrent disc herniation, and posterior fusion at L5-S1, with pedicle screw fixation and fusion, and left iliac crest bone graft. After being off work for eight months after his surgery, Claimant returned to work with restrictions in March 2001. After he went back to work, Claimant continued to have back and leg problems with numbness and tingling. Claimant's lifting restrictions were made permanent. On November 15, 2001, Dr. Robson re-examined Claimant at his request. Claimant was still complaining of low back pain and right calf tenderness. Dr. Robson recommended an EMG and nerve conduction study both of which were normal. Dr. Robson recommended a repeat MRI which was performed on January 8, 2002, and revealed some mild stenosis at the L4-S level above his fusion. Dr. Robson did not believe any further treatment was warranted, and his assessment of 25% PPD of the body as a whole remained unchanged. Claimant was placed at MMI in June 2001, and Dr. Robson assigned a 25% PPD body as a whole rating to Claimant's injury. Claimant continued to work until March 2002.

In March 2002, Employer's business was in the process of closing, and was winding down. Claimant went back to see Dr. Robson on several occasions and continued to obtain medications. Because the company was winding down, Claimant's job duties got lighter and easier. While working he was able to sit and lie down in the back during that year. During that year when Claimant continued to work, he collapsed after he got off work. Claimant testified he would limp out to the car after work, drive home, then collapse. Claimant testified he was taking Vioxx and Hydrocodone and couldn't concentrate.

Claimant stopped working in March 2002. He was contacted by another employer, and he cleaned shop for one day. After the second day, Claimant was unable to continue to work.

In June or early July 2002, Claimant worked a little bit maintaining vacuum cleaners for Merry Maids. He performed that job for five weeks for a couple of hours a night. He had flexibility concerning when he worked, and he worked as much as three nights per week.

After Employer's plant closed, Claimant applied for and received unemployment compensation. Claimant also talked to vocational rehabilitation, and was sent for testing. It was determined Claimant might be able to work making prosthetic devices. After Claimant discovered the job with prosthetics was as physical as what he had done as a machinist, he did not pursue that any further. Since the summer of 2002, Claimant has not attempted to work.

On July 23, 2002 Claimant demanded additional treatment from Employer. He specifically requested pain management due to his ongoing pain. Claimant received additional medical treatment beginning in November 2002. He saw a physiatrist, Heidi Prather, who took x-rays, did additional diagnostic testing and injections, none of which helped. Dr. Prather referred Claimant to Dr. Taylor who wanted to do another surgery. Claimant then saw Dr. Bridwell for a second opinion, and he suggested a fusion. Claimant incurred numerous bills as a result of these visits to various doctors.

Dr. Robson re-evaluated Claimant on August 13, 2003. At that time Dr. Robson reviewed additional films. On Claimant's CT myelogram, Dr. Robson found some progression of the stenosis and degenerative changes at the L4-5 level above his fusion, which he characterized as moderate. Dr. Robson discussed the possibility with Claimant of surgically extending the fusion to the additional L4-5 level, although he did not recommend it. Claimant had pain management on his own through Dr. Swarm and Dr. Graham.

Currently, Claimant has pain in his low back, his left and right buttocks, and down his leg to his calf. His toes and right foot are asleep. Claimant is unable to sit more than 15 to 20 minutes, and is unable to ride in the car. If Claimant drives, after about an hour, he must walk and stretch. Claimant is unable to walk over one half hour. Claimant tries to walk about 30 minutes for exercise twice a day. If Claimant walks too long, he suffers miserably. Sometimes Claimant uses a TENS Unit. Claimant continues to do stretching exercises. He is unable to stand in one spot for more than 15 to 20 minutes and has difficulty sleeping. Sometimes he sleeps on a 4-inch foam mattress on his living room floor. Claimant is able to sleep about an hour and a half to two hours before he has difficulty. Claimant currently takes Celebrex, Hydrocodone, Amitriptyline, and Lexipro.

On a typical day, Claimant wakes up, feeds his dogs, and starts stretching. Claimant then does some light housekeeping and light grocery shopping. He tries to have some food ready for his wife when she comes home from work. Claimant vacuums about once a week, and when he does that that's about all he can do. Claimant does not mow the lawn. Before July 27, 1999, Claimant had some back pain and some chiropractic treatment on one or two occasions.

Dr. Volarich testified on behalf of Claimant. After an examination of Claimant, and review of the medical records, Dr. Volarich diagnosed a herniated nucleus pulposus L5-S1 to the right causing right leg radiculopathy, status post laminectomy and discectomy, recurrent disc herniation at L5-S1 to the right causing right leg radiculopathy, status post redo laminectomy and discectomy with fusion and instrumentation at L5-S1, juxtafusal stenosis L4-5 secondary to disc bulging and facet arthropathy accelerated by his L5-S1 fusion not surgically repaired. Dr. Volarich testified Claimant also developed failed back syndrome, which causes lost motion, ongoing back pain, and persistent right leg radiculopathy. These diagnoses were attributed to the injury of July 27, 1999. Dr. Volarich testified that the work injury of July 27, 1999, is a substantial factor for the back complaints and

injury. Dr. Volarich rated Claimant's disability at 65% of the body as a whole regarding the low back as a result of the injury of July 27, 1999. He also found Claimant had a permanent partial disability of the right knee of 20%, a PPD of the left knee of 25%, and a PPD of the left shoulder of 35%. Dr. Volarich testified that Claimant is permanently and totally disabled unless vocational evaluation and assessment could determine how he might best return to the open labor market. Dr. Volarich opined Claimant is permanently and totally disabled as a result of the work related injury of July 27, 1999 in combination with his preexisting left shoulder and lower extremity conditions. He also recommended additional treatment through a pain clinic including injections, and a TENS unit, among other things.

Dr. Robson testified on behalf of Employer. Dr. Robson found Claimant had remained at maximum medical improvement, and had a PPD of 25% of the body as a whole at the level of the low back due to his work accident. As of May 4, 2006, Dr. Robson testified Claimant could work from a medical point of view within the restrictions he imposed. Dr. Robson testified that surgery might be indicated in the future if his symptoms continue to progress, and the need for the surgery would be related to his work accident.

Donna Abrams testified on behalf of Employer. Ms. Abrams testified Claimant had transferable skills and is employable in the open labor market.

James England testified on behalf of Claimant. Mr. England did not believe Claimant could sustain work activity, even at a sedentary level. Mr. England based his opinion upon Dr. Volarich's restrictions and Claimant's own description of his ability to function.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon my observation of Claimant at hearing, my comprehensive review of the evidence, and the application of Missouri law, I find:

Medical Causation

Claimant's work related accident of July 27, 1999, is a substantial factor in causing Claimant's disability and need for future medical treatment. Employer's own treating physician and surgeon, Dr. Robson, assigned a 25% of the body as a whole rating relative to Claimant's low back. Dr. Robson testified his 25% disability rating was due to the work related accident and the treatment therefor, and he did not assign any disability to preexisting factors. Dr. Volarich also testified the work accident was a substantial factor in causing the herniated disc resulting in the surgeries and his current stenosis. There is no dispute among the medical opinions that Claimant's disability with regard to his low back was directly and causally related to the work accident of July 27, 1999.

Permanent Partial Disability

Employer is responsible for PPD of 35% of the body as a whole relative to the low back caused by the work related accident of July 27, 1999. Dr. Volarich testified Claimant sustained disability of 65% of the body as a whole related to the July 27, 1999 accident. Dr. Volarich did not find Claimant was permanently and totally disabled as a result of the last injury alone, but was due to a combination of the primary and preexisting injuries.

Permanent Total Disability/Liability of the Second Injury Fund

Permanent and total disability is defined as the "inability to return to any employment and [does] not mean the inability to return to the employment in which the employee was engaged at the time of the accident." Section 287.020.7 RSMo 1994; *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo.App. E.D. 1995). The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992). The test for permanent and total disability is whether the claimant would be able to compete in the open labor market. *Id.* Section 287.220.1 RSMo (2000) provides where a previous permanent partial disability or disabilities, whether from a compensable injury or otherwise, combines with the last injury to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury

considered by itself and the Second Injury Fund is liable for the remainder of the compensation that would be due for permanent and total disability under Section 287.200. *Grant v. Neal*, 381 S.W.2d 838, 840 (Mo. 1964); *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 177-178 (Mo.App. 1995). The employee bears the burden to prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury results in permanent and total disability.

Claimant is permanently and totally disabled as a result of the work related injury of July 27, 1999, in combination with his preexisting bilateral knee and left shoulder conditions. I find the opinion of Mr. England to be more persuasive than Ms. Abrams. Claimant's preexisting knee and shoulder disabilities constituted a hindrance or obstacle to employment. I find these injuries combine with the primary injury to create a permanent and total disability.

It is not reasonable to expect any employer to hire Claimant in his current condition. Claimant testified credibly with regard to his symptoms and his level of pain. If Claimant were able to secure employment, it is clear that given his level of functioning he would be unable to sustain it.

Past Medical Expenses

Claimant is entitled to an award of \$10,288.28 in past medical expenses. Although Employer was given the opportunity to provide the additional medical treatment sought by Claimant after his release by Dr. Robson in January 2002, it declined to offer such treatment. Employer had notice of Claimant's need for additional medical treatment but refused to provide it, and therefore is liable for those expenses.

Future Medical Benefits

Dr. Volarich testified Claimant will require future medical benefits in the form of pain management. Future medical treatment may be awarded if claimant shows by a reasonable probability that he is in need of additional medical treatment due to the work related injury. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. 1997) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003)). Dr. Volarich testified Claimant will require ongoing treatment. Dr. Robson testified surgery was indicated if Claimant's symptoms progress. The weight of the evidence calls for an award of future medical treatment, and surgery, if deemed necessary.

CONCLUSION

Claimant sustained an injury on July 27, 1999, that arose out of and in the course of his employment with Employer. Claimant is no longer able to compete in the open labor market due to a combination of prior disabilities and the work accident. Employer shall pay PPD due to the work related injury, and the Second Injury Fund shall pay the balance of permanent total disability benefits.

Employer is ordered to pay permanent partial disability benefits in the amount of 35% of the body as a whole. As agreed by the parties, any benefits for permanent total disability shall begin as of July 19, 2002. Employer is also ordered to pay for the out of pocket medical expenses incurred by Claimant in the sum of \$10,288.28. Finally, the file is left open for future medical treatment for pain management and additional surgery if necessary.

This award is subject to a fee of 25% in favor of Claimant's attorney, Jill Bollwerk.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Employee: Barry Webb

Injury No.:

99-092868