

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

Injury No.: 06-088622

Employee: Barton White

Employers: 1) O'Sullivan Industries (Dismissed)
2) Manpower (Settled)

Insurers: 1) Wausau Underwriters Co. (Dismissed)
2) Transportation Insurance (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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 20, 2010. The award and decision of Administrative Law Judge Robert H. House, issued April 20, 2010, 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 5th day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Barton White

Injury No. 06-088622

Dependents: N/A

Employer: O'Sullivan Industries / Manpower

Additional Party: Second Injury Fund

Insurer: Transportation Insurance / Gallagher Bassett

Hearing Date: March 15, 2010

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

Checked by:

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: 9-15-2006
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? N/A
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: LEFT KNEE (last injury)
14. Nature and extent of any permanent disability: See FINDINGS OF FACT AND CONCLUSIONS OF LAW
15. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages:
19. Weekly compensation rate: \$193.33

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20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: -0-

-0- weeks of temporary total disability (or temporary partial disability)

-0- weeks of permanent partial disability from Employer

-0- weeks of disfigurement from Employer

22. Second Injury Fund liability: 14.4 weeks of compensation - \$2,783.95

TOTAL: \$2,783.95

23. Future requirements awarded: N/A

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

RANDY ALBERHASKY

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Barton White

Injury No. 06-088622

Dependents: N/A

Employer: O'Sullivan Industries / Manpower

Additional Party: Second Injury Fund

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

AWARD ON HEARING

The parties presented evidence at a hearing on March 15, 2010. Only one issue was presented for determination: The liability of the Second Injury Fund.

The parties agreed that claimant's workers' compensation rate was \$193.33 per week.

At the time of the hearing claimant was 59 years old. He has a sixth grade education. For most of his life, claimant was a truck driver. For 25 to 30 years he drove as an over-the-road trucker. Claimant was employed by Transport Distribution Company on May 18, 2005. On that date, claimant sustained an injury when he fell while strapping down a load on a flatbed trailer. He had one foot on a ladder and one foot on the flatbed as he was reaching for a strap. The ladder came out from underneath him; and he fell about four feet, hitting his right buttocks, his back, and his head. Claimant received physical therapy for his injury. He was treated by Dr. Estep of Occumed in Joplin. Dr. Estep fully released claimant on August 26, 2005, noting a left bicep shoulder strain which was resolving and a right knee strain that had resolved. Dr. Estep provided no restrictions for claimant. Prior to Dr. Estep's release, the physical therapist recommended releasing claimant from physical therapy on July 30, 2005, while noting claimant still had some mild tenderness along the bicep tendon and mild tenderness along the medial right knee. Dr. Estep noted that claimant was back at his normal job without difficulty and was doing quite well. However, claimant returned to Dr. Estep on September 23, 2005. Dr. Estep noted that claimant had twisted his knee after a coworker bumped into him. Dr. Estep diagnosed a left knee MCL sprain, but he returned claimant to full duty. Dr. Estep also noted that claimant had been initially seen for an earlier left shoulder and a right knee injury as well as right knee pain, cervical strain, and groin strain in May.

Claimant testified that he continued to work for Transport Distribution Company following his May 2005 injury, albeit driving a tractor while pulling a "box trailer" as opposed to pulling a flatbed trailer. He continued to work until he received a ticket for driving under the influence. Claimant lost his commercial drivers' license and could not be employed as a truck driver. Thereafter, as a result, of the loss of his license, claimant was fired from his job with Transport Distribution Company. Claimant testified that he was able with some difficulty to perform his job as a truck driver up and to the time that he received his DUI and was fired.

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After claimant was fired from his job Transport Distribution Company, he applied for and received unemployment benefits for 26 weeks. He then applied for a job at O'Sullivan Industries through Manpower and began working for Manpower at O'Sullivan. While working at O'Sullivan on September 15, 2006, on a production line, claimant had to lift four to five foot doors. He pivoted, and his left foot got caught between two pallets, thereby twisting his knee. Claimant was treated by Dr. Eric Miller on the date of his injury, claimant continued to treat with Dr. Miller through October 9, 2006. On October 9, 2006, Dr. Miller noted that claimant was feeling better. Dr. Miller noted his impression that claimant had a left MCL stress. There is nothing in the record indicating any continuing treatment for claimant's left knee injury following his last visit with Dr. Miller.

However, claimant continued to complain of his left shoulder injury when he was examined by Dr. David Rogers, an orthopedic surgeon, on March 1, 2007. Dr. Rogers opined that claimant had a partial thickness rotator cuff tear after reviewing an MRI. He noted that claimant had a probable superior labral tear and a subacromial impingement along the degenerative joint disease of the acromial clavicular joint.

Claimant also underwent an evaluation by Dr. Timothy L. Sprenkle for the Missouri Department of Elementary and Secondary Education Section of Disability Determinations. Dr. Sprenkle noted that claimant's chief complaints were "diffuse back pain, left shoulder pain, knee and hip pain, diffuse arthralgias, mild sleep apnea, hyperlipidemia." Dr. Sprenkle found that claimant had the following conditions:

- 1) Diffuse polyarthralgia with weakness, unexplained.
- 2) Possible early upper extremity bilateral carpal tunnel syndrome secondary to obesity.
- 3) Fibromyalgia. He exhibits several points of subcutaneous tissue tenderness.
- 4) Premorbid obesity.
- 5) Mild endogenous depression.
- 6) Degenerative joint disease.
- 7) Tension headaches.
- 8) Extremely poor vision.
- 9) Hyperlipidemia.

Apparently Dr. Sprenkle's assessment for claimant on June 20, 2007, involved an assessment of claimant so that he could obtain bariatric surgery to lose weight. Claimant subsequently obtained that surgery and has lost weight from 360 pounds to 190 pounds.

Claimant has had no surgery for any of his conditions. At the time of the hearing he was taking no prescriptive medication. However, claimant testified that every other day he takes approximately 16 to 18 Ibuprofen (without listing the size of the Ibuprofen.) Claimant testified that he would use some pain pills he received for dental pain for his other problems and that in the past he had borrowed pain medications from friends.

Claimant obtained the services of Dr. P. Brent Koprivica, an occupational medical specialist. Dr. Koprivica examined claimant, wrote two reports, and testified by deposition. Dr. Koprivica rated claimant's disability as 5 percent to the body as a whole for chronic thoracic pain, 15 percent to the left upper extremity at the 232 week-level for claimant's chronic impingement syndrome, and 10-15 percent to the body as a whole for chronic mechanical back pain. He combined those disabilities globally for a 30 percent permanent partial disability to the body as a whole for all injuries sustained on May 19, 2005. Dr. Koprivica also rated claimant's disability from the September 15, 2006, injury. He found that

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claimant sustained a 15 percent permanent partial disability to the left lower extremity at the level of the knee (160 week-level) for that injury. Dr. Koprivica further opined that claimant had a 10 percent enhanced permanent partial disability based upon a combination of the two injuries. Dr. Koprivica also recommended that claimant be assessed vocationally.

Claimant obtained the services of Philip Eldred, a vocational rehabilitation counselor, who opined that claimant was permanently and totally disabled vocationally and that claimant could not be expected to be employed or placed in the open market nor would any reasonable employer be expected to hire claimant. Nevertheless, Mr. Eldred found that claimant could perform a very limited number of sedentary jobs even though he believed that Dr. Koprivica's restrictions would place claimant in the less-than-sedentary work capacity.

The Second Injury Fund obtained the services of James England, a vocational rehabilitation counselor, who opined that claimant was not permanently and totally disabled vocationally and that there were a limited number of jobs that claimant could perform under the restrictions provided by Dr. Koprivica.

Dr. Koprivica placed significant restrictions upon claimant's activities. In his September 9, 2008, report Dr. Koprivica set out the restrictions he imposed on claimant as follows:

In terms of ongoing activities, a number of the complaints at this point are subjective in nature.

Nevertheless, with the mechanical complaints that he continues to have, particularly the complaints involving the left shoulder girdle, I would restrict Mr. White from above shoulder lifting using his left arm. He should avoid repetitive tasks above shoulder girdle level on the left. He should do no sustained activities above shoulder girdle level on the left. He should not do any climbing types of tasks.

Mr. White should avoid sustained or awkward postures of the cervical spine.

He should avoid frequent or constant bending at the waist, pushing, pulling or twisting. He should avoid sustained or awkward postures of the lumbar spine.

Posturally, Mr. White should have the ability to change posture from sitting to standing or walking and vice versa. In general, intervals of one to two hours for those activities would be within his capacity.

I would restrict Mr. white entirely from squatting, crawling or kneeling.

As noted by Dr. Koprivica in his report and in his deposition, claimant's restrictions were based upon subjective complaints of claimant rather than objective findings. Additionally, from claimant's testimony in his deposition and at trial, claimant can sit up to four hours without pain increasing significantly and can stand or walk two to three hours. Claimant also admitted that he could lift up to 50 pounds with his right arm and had no problems with his right arm or right leg.

It is clear that claimant is restricted in the jobs he could obtain based upon not only his physical condition but also on his lack of education. Nevertheless, claimant was able to perform his job as a truck driver and also his job at O'Sullivan Industries in spite of his lack of education. Moreover, it was Mr. Eldred's belief from his interview with claimant that claimant received unemployment benefits following

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his injury at O'Sullivan. In order to obtain unemployment benefits both claimant and Mr. Eldred recognized that claimant must be ready, willing and able to work. At trial claimant did not recall whether he received unemployment benefits following the injury at O'Sullivan for Manpower.

Claimant asserts that he is permanently and totally disabled. Total disability, as defined in Section 287.020, ". . . shall mean inability to return to any employment and not merely mean inability to return to employment in which the employee was engaged at the time of the accident." As stated in *Gordon v. Tri-State Motor Transit Co.*, 908 S.W. 2d 849, 853 (Mo.App. S.D. 1995):

The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.S.D.1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.E.D.1992). Total disability means the "inability to return to any reasonable or normal employment." *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo.App.E.D.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d at 367. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.E.D.1993); *Kowalski v. M-G Metals and Sales*, 631 S.W.2d at 922.

A claimant's ability to return to any reasonable or normal employment or occupation does not mean claimant's returning to a demeaning and undignified occupation such as selling peanuts, pencils or shoestrings on the street. *Vogle v. Hall Implement Company*, 551 S.W.2d 922 (Mo.App. 1977).

Section 287.220, RSMo, determines the liability of the Second Injury Fund for disability. Applying that statute, I must first determine claimant's disability from the last injury alone and of itself. The court in *Vaught v. Vaughts, Incorporated*, 938 S.W.2d 931, 939 (Mo.App. S.D. 1997) stated:

As explained in *Stewart [v. Johnson]*, 398 S.W.2d 850, 854 (Mo.1966),] . . . §287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury "may be at least equal to that provided for permanent total disability." Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. §287.220.1.

Based upon all of the evidence in this case I find that claimant is not permanently and totally disabled as a result of his last injury alone. There is no expert opinion to that effect. Moreover, claimant through his settlement with employer/insurer for 15 percent permanent partial disability to the left knee for his last injury admits that he is not permanently and totally disabled from his last injury at work.

Based upon all of the evidence at hearing, I find that claimant is not permanently and totally disabled. It is clear from Dr. Koprivica's testimony that claimant's complaints were mainly subjective in nature. The only clear objective finding is a rotator cuff tear and an impingement syndrome of claimant's left shoulder verified by MRI. Dr. Koprivica rated claimant's disability to the left shoulder as 15 percent to the left upper extremity. In stating that percentage of disability Dr. Koprivica based it upon claimant's impingement syndrome and not the rotator cuff tear. All of Dr. Koprivica's remaining disability ratings were based upon claimant's expression of pain and limitations of movement which are based in large part upon claimant's subjective complaints. Dr. Koprivica noted that his validity assessment of claimant was appropriate. Nevertheless, Dr. Koprivica admitted that he had nothing to support any of his ratings of disability other than claimant's subjective complaints with the sole exception of the MRI of claimant's shoulder. Indeed, Dr. Koprivica testified that he largely based his ratings and restrictions upon claimant's subjective complaints and tests. Dr. Koprivica's restrictions were based upon what claimant told him and did at the time of his testing. They differ from claimant's testimony in his deposition as admitted at trial that he could sit before pain increased up to four hours and walk and stand for two to three hours. Consequently, I find and conclude that claimant is capable of sitting and standing for longer periods of time than the restrictions imposed by Dr. Koprivica. Additionally, I find that the diagnoses of Dr. Koprivica other than the left shoulder are based upon subjective complaints of pain. Claimant has not undergone any surgeries for his conditions nor apparently is he on any prescriptive medication for any of his conditions even though he is currently covered by Medicare. As a result, I find that Mr. Eldred's assessment and Mr. England's assessment of claimant's vocational abilities which in large part rely upon Dr. Koprivica's restrictions are fatally flawed to the extent that Dr. Koprivica's restrictions are based upon claimant's subjective complaints which differ from claimant's testimony in his deposition and at trial. Nevertheless, even with Dr. Koprivica's restrictions Mr. England found that claimant could perform a limited number of sedentary jobs.

I find and conclude that claimant, although limited by his education and his physical condition, is capable of working generally and that a reasonable employer could be expected to hire claimant. I find and conclude that he is not permanently and totally disabled.

There are no ratings in this case other than those by Dr. Koprivica. Although I find that Dr. Koprivica may have overstated claimant's restrictions, it is clear that claimant has settled his 2005 injury for \$24,783.50 without indicating any percentage of disability or rate of compensation. He has also settled his 2006 injury for 15 percent to the left lower extremity at the 160-week level. It is unclear whether the 2005 settlement includes compensation for anything other than permanent disability. Nevertheless, I find that the ratings of Dr. Koprivica are undisputed and that claimant sustained a disability of 30 percent to the body as a whole for the 2005 injury. I also find that Dr. Koprivica's rating, and the settlement for 15 percent of the left knee for the 2006 injury, are appropriate and that claimant has sustained a permanent partial disability to that extent. Based upon the significance of the 2005 injuries, I find that those injuries constitute a hindrance and obstacle to employment. I additionally find that claimant's overall disability has been enhanced by the combination of the disabilities from the 2005 injury with the disability from the 2006 injury to result in an additional enhancement of 10 percent. As a result, I find that claimant is entitled to 14.4 weeks of compensation from the Second Injury Fund based upon the combination of the 30 percent disability to the body as a whole (120 weeks) and the 15 percent disability to the knee (24 weeks) for a total of 144 weeks with the enhanced disability of 10 percent

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applied for a total of 14.4 weeks of compensation ($120 + 24 = 144 \times 10\% = 14.4$.) I order the Second Injury Fund to pay claimant 14.4 weeks of compensation at the agreed upon rate of \$193.33 for a total of \$2,783.95.

I find that claimant's attorney, Randy Alberhasky, is entitled to an attorney's fee of 25 percent of all amounts awarded herein which shall constitute a lien upon this award.

Date: April 20, 2010

Made by: /s/ Robert H. House

Robert H. House
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson

Naomi Pearson
Division of Workers' Compensation