



## **Port St. Lucie, Florida Workers' Compensation Judge Awards Permanent Disability Benefits to Injured Construction Worker - Barone v. Kennedy Construction Service & Claims Center**

On July 26, 2007, David Barone, a 59 year-old New Smyrna Beach, Florida construction worker, fell approximately 20 feet from a platform resulting in a shattered right heel and multiple left foot fractures. The accident was accepted as compensable and the workers' compensation carrier provided several unsuccessful open reduction surgeries. Over the course of several years the fractures resulted in non-unions (a failure of healing following a broken bone) causing a permanent injury.

The insurance company asserted multiple defenses, including an apportionment argument which would result in another employer and carrier (or possibly the injured worker himself) being financially responsible for payment of a portion or possibly all medical and lost wage benefits. The Honorable Robert McAliley denied the carrier's attempt to continue the hearing finding that they had sufficient time, knowledge and opportunity to, "flush out the issue well before the motion to continue was filed."

In reviewing the facts of the case, Judge McAliley stated that Barone had climbed a 24 foot ladder and was standing on a platform to pour structural concrete when the platform gave way and he fell to the ground below. He was immediately taken to a local hospital and operated on by a board-certified Orthopedic surgeon to repair a divergent left foot Lisfranc fracture and a displaced right foot cuboid with calcaneus fracture. Barone was discharged and given non-weight bearing restrictions and returned to work at Kennedy. In November 2007, he had a pin removed and was returned to work at a sit down job. In February 2008, x-rays revealed bending of the pins in the right foot indicating a non-union resulting in further surgery and insertion of a plate. In 2009, Barone began working for a new company as a seasonal supervisor which he described as a light job. By September 2010, signs of post traumatic degenerative changes on x-rays were seen and in December 2010, the prior surgery was repeated. By July 15, 2011, the surgeon states Barone "is a disabled person."

Under the current workers' compensation laws in Florida, to be entitled to Permanent Total Disability (PTD) benefits an injured worker must establish eligibility pursuant to Fla. Stat. §440.15(1)(b)5, which requires demonstrating one of the following: (1) permanent medical incapacity to engage in at least sedentary employment, within a fifty mile radius of the employee's residence, due to physical limitation or (2) permanent work-related physical restrictions coupled with an 12 exhaustive but unsuccessful job search or (3) permanent work

related physical restrictions that, while not alone totally disabling, preclude claimant from engaging in at least sedentary employment when combined with vocational factors. *Blake v. Merck & Co.*, 43 So. 3d 882 (Fla. 1st DCA 2010).

Judge McAliley found Barone was eligible for PTD benefits based on the second and third criteria. Specifically, the Judge opined Barone had an 18% whole body orthopedic impairment, significant anatomical restrictions and considerable foot discomfort which was confirmed by the insurance company's expert. Barone has a pronounced limp, cannot stand on his feet for an appreciable length of time, cannot walk a long distance and his vocational skills are limited to carpentry with no office or computer skills.

The Judge found Barone was sincere in his history of a job search, including his testimony that, "every time I went back to work, the foot would give out." Thus, Barone's efforts in seeking new employment reflected a bonafide attempt at finding work. Further, the judge pointed to the district court's position that, "obtaining employment should be measured in terms of the real world, not some abstraction," and that, "this court has stated that the legal question presented under section 440.15(1)(b)5, is not merely whether the employee is physically capable of performing at least sedentary employment, but whether the employee (the individual seeking the benefits, not a hypothetical individual) can reasonably secure or obtain -- engage in -- at least sedentary employment within a fifty mile radius of his residence, considering his physical and vocational limitations." *HDV Construction Systems, Inc. v. Aragon*, 66 So. 3d 331, 34 (Fla. 1st DCA 2011).

Based on the above testimony and evidence, Barone was found permanently and totally disabled and the insurance company was required to pay him PTD benefits required under the law.

As Workers' Compensation attorney's we handle claims like this on a regular basis. Remember, the insurance company's goal is to spend as little money on you as possible when handling your claim. That in turn means that you, the injured employee, are facing a fight at every turn.

Let us do the fighting for you. We represent injured employees throughout Florida and Georgia and can help you obtain medical and lost wage benefits. Contact us at 1-877-WE-CAN-HELP or visit us online at the [Law Offices of Franks & Koenig](#).

Contact us at [anewelt@franksandkoenig.com](mailto:anewelt@franksandkoenig.com); call us at 1-877-WE-CANHELP (932-2643) or visit us on the web at <http://www.franksandkoenig.com>