

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 04-120304

Employee: Leonard Adams
Employer: Ameren UE (Settled)
Insurer: Union Electric Co. c/o CCMSI (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 20, 2004
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, 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 February 20, 2008, as supplemented herein.

Preliminaries

The administrative law judge found that employee was not permanently and totally disabled. The administrative law judge specifically noted that she was not persuaded by Mr. England's opinion that employee was unable to compete in the open labor market, citing the fact that Mr. England based his opinion upon employee's subjective complaints, and the work restrictions imposed by Dr. Volarich. The administrative law judge found that employee sustained 5% permanent partial disability to the body as a whole as a result of the primary injury of October 20, 2004; and that employee's 5% permanent partial disability of the body as a whole did not reach the threshold necessary to trigger Second Injury Fund liability.

Employee filed a timely Application for Review with the Commission alleging that the administrative law judge erred in finding that employee was not permanently and totally disabled because: 1) she completely ignored the competent, credible, and substantial evidence on the record as a whole in coming to her conclusion; and 2) the medical testimony as well as vocation expert testimony was credible, compelling, uncontradicted, and unimpeached. We disagree and affirm the award of the administrative law judge.

Discussion

To establish Second Injury Fund liability, employee must show either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two

disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself. *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo.App. W.D. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo.App. W.D. 2001).

The Commission is the judge of the credibility of witnesses and has discretion to determine the weight to be given opinions. *Bloss v. Plastic Enter.*, 32 S.W.3d 666, 671 (Mo.App. W.D. 2000), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003). Medical causation not within common knowledge or experience must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 222 (Mo.App. W.D. 1992). The Commission may accept or reject medical evidence and is free to disbelieve uncontradicted or unimpeached testimony. *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo.App S.D. 2006), citing *Alexander v. D.L Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo.banc 1993).

Employee has failed to establish Second Injury Fund liability. There is not sufficient competent and substantial evidence in the record to support a finding of permanent total disability against the Second Injury Fund, nor does employee's 5% permanent partial disability reach the threshold necessary to trigger Second Injury Fund liability. Employee provided expert testimony by Dr. Volarich and Mr. England to support his claim of permanent total disability. However, the expert testimony provided on behalf of employee by Dr. Volarich and Mr. England is not credible.

Dr. Volarich testified on behalf of employee at trial. Dr. Volarich was not employee's treating physician but performed an independent medical examination (IME) at the request of employee for the purpose of determining disability for his workers' compensation claim. Dr. Volarich evaluated employee only once, on May 9, 2005 and prepared a report that same day. Dr. Volarich stated in his report that his opinions and conclusions were based on a combination of his physical examination of employee, a review of employee's medical records, as well as employee's subjective complaints and limitations.

Dr. Volarich was informed by employee that he suffered various injuries to his back and neck since he began work for employer in 1978. Dr. Volarich was aware of the fact that employee sought treatment for his spine during the 1980s; however, Dr. Volarich did not review any records for treatment dated prior to the year 2000. Dr. Volarich did not review the actual films for the diagnostic tests for employee's neck and low back, but relied only upon the reports provided in rendering his opinion. Dr. Volarich agreed that the diagnosis, degenerative disc disease of the cervical and lumbar spine, was essentially unchanged from the diagnostic testing in 2000 and 2004.

In addition, Dr. Volarich admitted that degenerative disc disease was common in individuals over the age of 40 and that it is a progressive disease that gets worse over time and may become symptomatic regardless of the presence of an acute trauma. Moreover, Dr. Volarich noted that employee experienced exacerbation of his condition while on vacation in May of 2000; when he fell off a stage in February of 2001; and when he was playing golf in June of 2001.

Furthermore, Dr. Volarich acknowledged that surgery had never been recommended for employee's neck or low back by any of his treating physicians; and subsequent to October 20, 2004, no treating physicians imposed any permanent restrictions for employee's low back or neck.

With regard to employee's upper extremities, employee underwent bilateral carpal tunnel surgeries by Dr. Brown in June 2003. Dr. Volarich testified that employee was released by his treating doctor, Dr. Brown, without restrictions for his wrists or elbows in August of 2003 and that employee returned to work full-time after his release.

Dr. Volarich stated that employee was not taking any medications at the time of his evaluation and at no time had any of employee's treating physicians imposed permanent restrictions on employee with regard to his upper extremities or spine. In spite of this, Dr. Volarich placed a number of restrictions on employee for both his upper extremities and spine.

In addition to the restrictions, Dr. Volarich's ratings were not consistent with the record. As noted, employee was not given any restrictions for his spine and was released to full duty without restrictions for his upper extremities. Dr. Volarich's ratings of 35% permanent partial disability of each hand; 17½ % of the left elbow; 30% permanent partial disability of the body as a whole referable to the cervical spine; and 30% permanent partial disability to the lumbosacral spine is not an accurate assessment of his disability. Employee settled his claim with employer for 5% permanent partial disability to the body as a whole with regard to his neck, back and thoracic spine.

Although Dr. Volarich was the only medical expert to testify, we find that his conclusions are not substantiated by the record and therefore are not worthy of belief. Dr. Volarich stated that his assessment was based upon both a review of employee's medical records as well as employee's subjective complaints. As such, we find his opinion to be not credible.

Dr. Volarich deferred to a vocational expert on the issue of whether employee was permanently and totally disabled. Mr. James England, vocational expert, evaluated employee for the purpose of determining his employability. Mr. England did not believe that employee would be able to sustain work in the long run considering the combination of employee's impairments and the limitations he experiences as well as the negative effect his impairments cause on his ability to rest properly.

However, in coming to his conclusion, Mr. England relied upon Dr. Volarich's IME, including the restrictions Dr. Volarich imposed on employee's upper extremities and spine. Mr. England also relied upon employee's subjective complaints and limitations, including employee's difficulty with concentration as a result of his pain level along with employee's need to recline periodically. Mr. England testified that employee informed him at the time of his evaluation that he was not taking any medications, and that there were not any permanent restrictions placed on him by his treating physicians.

We find Mr. England's opinion that employee is permanently and totally disabled from a vocational standpoint is not credible. Mr. England based his opinion on employee's subjective complaints as well as the restrictions imposed by Dr. Volarich.

Conclusion

The Commission does not find the opinions of Dr. Volarich or Mr. England to be credible; therefore disbelieves the testimony of employee's experts. The record does not support a finding that employee is permanently and totally disabled, but that the substantial weight of the evidence supports a finding that employee suffered a 5% permanent partial disability to the body as a whole.

The Commission agrees with the ultimate conclusion reached by the administrative law judge that employee failed to establish Second Injury Fund liability.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued February 20, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of September 2008.

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Leonard Adams

Injury No.: 04-120304

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Ameren UE (Settled)

Additional Party: Second Injury Fund (Open)

Insurer: Union Electric Co. C/O CCMSI

Hearing Date: December 5, 2007

Checked by: MDL

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
 - 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: October 20, 2004

- State location where accident occurred or occupational disease was contracted: St. Louis, 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? N/A

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:
Employee performed repetitive physical labor which caused degenerative disc disease

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Cervical and lumbar spine

- Nature and extent of any permanent disability: 5% PPD of the body as a whole previously settled with Employer

15. Compensation paid to-date for temporary disability: N/A

16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Leonard Adams

Injury No.: 04-120304

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: Unknown

19. Weekly compensation rate: \$675.90/\$354.05

20. Method wages computation: stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: 0

22. Second Injury Fund liability: No

Total: 0

23. Future requirements awarded: None

Said payments to begin 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Leonard Adams

Injury No.: 04-120304

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Ameren UE (Settled)

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

Additional Party: Second Injury Fund (Open)

Insurer: Union Electric Co. C/O CCMSI

Checked by: MDL

PRELIMINARIES

A hearing was held on December 5, 2007 at the Division of Workers' Compensation in the City of St. Louis. Leonard Adams ("Claimant") was represented by Ms. Cynthia Hennessey. Ameren UE ("Employer") previously settled its liability with Claimant, and this case proceeded to a hearing against the Second Injury Fund ("SIF") which was represented by Assistant Attorney General Kay Osborne. Ms. Hennessey requested a fee of 25% of Claimant's award.

The parties stipulated that on or about October 20, 2004 Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the city of St. Louis; and the claim was timely filed. The parties further stipulated Claimant's rates of compensation are \$675.90 for temporary total disability ("TTD") benefits and \$354.05 for permanent partial disability ("PPD") benefits. The parties agreed if Claimant is found to be permanently and totally disabled, benefits should commence on December 7, 2004.

The issues for resolution by hearing are whether the SIF is liable for permanent partial disability benefits or permanent total disability benefits.

SUMMARY OF EVIDENCE

CLAIMANT'S TESTIMONY

Claimant is a fifty-two year old man who is currently unemployed. Claimant graduated from high school in 1973 and attended junior college. Claimant is six to ten hours short of an Associate's degree. Claimant has no difficulties with reading, writing, or general mathematics. Following high school, Claimant completed a three year apprenticeship as a baker, and worked as a baker from 1975 to 1978.

In 1978, Claimant began working for Employer. Claimant worked for eight and one-half years as a meter reader. For 19 years, Claimant was in underground construction. His position in underground construction was very physical, and required heavy lifting, and operating heavy equipment such as jackhammers, ditchwitches and backhoes.

Over the years Claimant had some minor injuries. In 1981, Claimant injured his low back and legs when he fell from a pole. He sought treatment from a chiropractor. In 1985, Claimant injured his neck and low back when he fell into a trench while jackhammering. Claimant testified that is when he really started paying attention to the pain in his back, and in the mid 1980s to the 1990s, his problems in his back became a constant ache. Installing conduit in a small trench was problematic. Claimant continued to seek chiropractic care through the 1980s and 1990s.

Claimant began treating at Associated Physicians in 2000. It was getting harder for Claimant to stand up straight and maneuver his neck. Both Claimant's elbows, knees and ankles ached. He started treating for his hands in 2000. His pain extended from his hands to his elbows. Claimant began having problems with numbness, tingling and pain when jackhammering or using pneumatic hammers or drills.

Claimant underwent conservative treatment and ultimately had bilateral carpal tunnel surgeries by Dr. Brown in June 2003. Claimant was off work for six to eight weeks. After his surgeries Claimant's hands improved, but he lost strength. When Claimant returned to work around August, 2003, he tried to hold everything in his arms, or he asked co-workers to pick things up for him. His back started hurting because he was trying to lift things differently.

Claimant testified from August 2003 to 2004, his back was getting worse. Claimant struggled through the days, and used up his sick leave going to the chiropractor. He decreased his overtime because he was struggling to get through an eight hour day.

On October 26, 2004 Claimant went to work but his back, neck, hands, arms and knees hurt so badly he was unable to do the work. Claimant did not return to work that day, and has been on disability ever since. From October 2004 to now, Claimant has been unable to sleep or get comfortable. Claimant can fall asleep, but he wakes up after about one and one-half hours. The only pain relief he gets is when he lies down. In a typical day Claimant gets up and sees his wife off to work. He lies down for about one and one-half hours, every three hours. He is supposed to walk as much as possible, but he loses concentration because he is so tired all the time. Medications make him worse because they make him drowsy. He no longer plays golf, and no longer participates in community theater, hiking or camping. He only cuts the grass at home with the use of a riding lawn mower. The most he can sit comfortably is 15 to 20 minutes. After 10 minute on his feet he is really uncomfortable. He is able to walk for about 30 minutes if he pushes himself. Claimant does not believe his is able to work.

Claimant acknowledged he had no permanent restrictions from Dr. Brown, and had no permanent work restrictions from a treating physician for his neck or low back.

MEDICAL EVIDENCE

Medical records of Associated Physicians Group indicate Claimant sought treatment there beginning in January 2000. In January 2000, X-rays revealed degenerative spondylosis of the cervical spine, and scoliosis and probably degenerataive spondylosis at L3-4. In December 2000 Claimant was diagnosed with cervical radiculopathy at C5-C6.

Claimant was diagnosed with cervical hyperlordosis, lumbar strain, and degenerative disc disease in 2000. He experienced an exacerbation of symptoms while on vacation in May 2000, was diagnosed with low back pain, and sciatica, and was provided with an orthotic support.

Claimant complained of ongoing lumbar pain and stiffness in September 2000 and was diagnosed with resolving muscle spasms. In October 2000 during a followup with Dr. Collins, he was diagnosed with lumbar, cervical, thoracic pain with pain radiating into the upper and lower extremities. In December 2000, he was diagnosed with degenerative osteoarthritis of the lumbar and cervical spine with muscle spasms. He was provided with a back

support in January 2001.

On February 7, 2001, Claimant fell three feet off a stage and experienced an exacerbation of neck and low back symptoms. He again experienced an exacerbation of low back pain while playing golf on June 6, 2001. He was diagnosed with cervical radiculopathy in February 2002.

A nerve conduction study performed in January 2003 revealed right peroneal nerve neuropathy. Claimant complained of tingling in his left foot. A nerve conduction study repeated in February 2003 revealed right peroneal entrapment at the tibial head, with peroneal radiculopathy and medial plantar left neuropathy.

In June 2003 Claimant underwent bilateral carpal tunnel releases. On August 4, 2003 Claimant was released at MMI with respect to his hands. At that time Claimant reported no longer having the numbness he was having prior to his surgery. Claimant had good active range of motion of both wrists and all digits of both hands. He reported good sensation and perfusion to all digits of both hands. Claimant was released without medical restrictions.

In September 2003 Claimant developed a burning pain over his left lateral elbow. He could recall no specific traumatic injury. Claimant was diagnosed with left lateral epicondylitis, and was treated conservatively.

In December 2003, Claimant reported increased neck pain after jackhammering. He was administered trigger point injections. He reported an increase in symptoms in October 2004. An MRI of the lumbar spine performed in November 2004 revealed a right L3-4 disc protrusion, L4-5 and L5-S1 disc dessication. An MRI of the cervical spine performed in November 2004 revealed C3-7 degenerative disc disease and spondylosis, greatest at C3 and C4.

In December 2004, Claimant complained of pack pain and numbness in his legs. He was diagnosed with degenerative disc disease, cervical and lumbar spine. He was administered three epidural steroid injections and reported alleviation of symptoms for one week.

Claimant settled his claim for his carpal tunnel syndrome with Employer for 17-1/2% PPD of each hand and 5% PPD of the left elbow. (Injury No. 03-136422). Claimant settled his claim for his back and neck problems for 5% PPD of the body as a whole.

Dr. Volarich testified on behalf of Claimant. Dr. Volarich found Claimant had 35% PPD of each wrist due to Claimant's carpal tunnel syndrome. He also found Claimant had 17-1/2% PPD of the left elbow due to mild cubital tunnel syndrome and epicondylitis.

Dr. Volarich testified Claimant had a PPD of 30% of the body as a whole at the cervical spine due to the disc protrusion at C5-6 to the left and the bulge at C6-7 centrally as well as the degenerative disc disease and degenerative joint disease C-3 through C-7. Dr. Volarich testified 15% was due to the underlying pathology leading up to October 20, 2004 and the remaining 15% was due to his preexisting degenerative disc disease and degenerative joint disease.

Dr. Volarich also found a 30% PPD of the body as a whole rated at the lumbosacral spine due to degenerative disc disease and degenerative joint disease and disc protrusion at L3-4. He opined 15% PPD was due to the "preexisting" degenerative changes and disc pathology, and the remaining 15% was due to the aggravation of the degenerative disc disease and degenerative joint disease leading up to October 20, 2004.

Dr. Volarich imposed the following work restrictions with regard to Claimant's upper extremities: avoid using the hands in an awkward or blind fashion; minimize repetitive gripping, pinching, squeezing, pushing, pulling, twisting, rotatory motions; avoid impact and vibratory trauma to the hands and should use appropriate braces, anti-vibration gloves, support straps, and other protective devices as needed; should not handle weights greater than 3-5 pounds with either upper extremity alone, particularly with his arms extended away from the body; he can handle weights to tolerance with the arms dependent, close to the body, but in general no more than 10-15 pounds; to continue a strengthening, stretching, and range of motion exercise program for the hands to tolerance on a daily basis.

With regard to Claimant's spine, Dr. Volarich imposed the following work restrictions: limit repetitive

bending, twisting, lifting, pushing, pulling, carrying, climbing, and other similar tasks to an as-needed basis; he should not handle any weight greater than 25 pounds and should limit this task to an occasional basis, assuming proper lifting techniques; he should not handle weight over his head or away from his body nor should he carry weight over long distances or uneven terrain; he should avoid remaining in a fixed position for any more than about 30 minutes at a time, including both sitting and standing; he should change positions frequently to maximize comfort and rest when needed; he should pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to nonimpact aerobic conditioning such as walking, biking, or swimming to tolerance on a daily basis.

Dr. Volarich deferred to a vocational expert on the issue of whether Claimant was permanently and totally disabled. Dr. Volarich testified surgery had never been recommended for Claimant, and Claimant had no permanent restrictions before October 20, 2004.

VOCATIONAL EVIDENCE

James England, a rehabilitation counsellor, testified on behalf of Claimant. Mr. England performed an evaluation of Claimant and met with him in September 2005. Mr. England found the restrictions imposed by Dr. Volarich would prevent Claimant from performing even the most sedentary work. Mr. England found considering Claimant's combination of impairments, and the limitations he experiences, as well as the negative effect his impairments cause on his ability to rest properly, he does not see how Claimant would be able to sustain any work in the long run. Considering the problems Claimant has with his back and neck, the trouble with his upper extremities, the fact that he is not able to get through the day without reclining periodically, and his trouble concentrating at times because of pain, Mr. England felt Claimant would likely remain totally disabled from a vocational standpoint. He did not believe Claimant would be able to make it through a regular, eight hour day, five days a week, and he did not feel Claimant was a candidate for vocational rehabilitation because of his apparent functional difficulties.

Mr. England testified Claimant told him he was not on any medications, and there were no permanent restrictions imposed by any of the treating physicians.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon the competent and substantial evidence, my observations of Claimant at hearing, a comprehensive review of the evidence and the application of Missouri law I find:

Claimant is not permanently and totally disabled. Dr. Volarich deferred to the opinion of a vocational expert on the issue of whether Claimant is unemployable in the open labor market. Although Mr. England found Claimant to be unable to compete in the open labor market, it was based upon Claimant's subjective complaints, and the work restrictions imposed by Dr. Volarich. I am not persuaded by Mr. England's opinion on the issue of permanent total disability.

First, Claimant settled his claim for occupational disease for his October 2004 injury for a mere 5% PPD of the body as a whole for his neck, back, and thoracic spine combined. Claimant has never had surgery for his spine, nor has surgery ever been recommended by a physician. Dr. Volarich opined Claimant is not a surgical candidate. Claimant is currently on no anti-inflammatory or pain medications. No treating physician has ever imposed any permanent work restrictions. Although Dr. Volarich enumerated various restrictions, Dr. Volarich did not treat Claimant, and was hired for purposes of litigation.

Having found Claimant is not permanently and totally disabled, the remaining issue is whether Claimant is entitled to PPD benefits from the SIF. For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total

disability. See § 287.220.1; *Lorentz v. Missouri State Treasurer*, 72 S.W.3d 315, 318 -319 (Mo.App. S.D. 2002)

In addition, pursuant to § 287.220.1, RSMo 1994; the extent of both the preexisting and subsequent compensable injury must equal a minimum of fifty weeks of disability of the body as a whole or 15% of a major extremity unless they combine to result in permanent total disability.

I find Claimant sustained 5% PPD of the body as a whole as a result of the primary injury of October 20, 2004. Claimant agreed to settle his claim for 5% of the body as a whole, and the evidence supports that level of disability. Since Claimant's 5% PPD of the body as a whole does not reach the threshold necessary to trigger SIF liability, no PPD is awarded.

Because Claimant is not permanently and totally disabled, and his 5% PPD for the primary injury does not reach the threshold to trigger SIF liability, the claim for benefits is denied.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation