

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

Injury No.: 11-107331

Employee: James Anderson
Employer: Alberici Constructors (Settled)
Insurer: Arch Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This 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, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

The Second Injury Fund's Motion to Dismiss Employee's Application for Review

On January 6, 2018, employee filed a timely application for review in this matter. On January 25, 2018, the Second Injury Fund filed its "Answer to Application for Review and Motion to Dismiss" (hereinafter "Motion"). The Second Injury Fund argues the Commission should dismiss employee's application for review for failure to comply with Commission rule 8 CSR 20-3.030(3)(A), which provides as follows:

An applicant for review of any final award, order or decision of the administrative law judge shall state specifically in the application the reason the applicant believes the findings and conclusions of the administrative law judge on the controlling issues are not properly supported. It shall not be sufficient merely to state that the decision of the administrative law judge on any particular issue is not supported by competent and substantial evidence.

The Second Injury Fund argues employee's application for review fails to comply with the foregoing rule, because employee failed to state a basis on which his appeal could be taken, and has not alleged error with specificity.

On February 16, 2018, employee filed with the Commission his response to the Second Injury Fund's Motion.

On February 23, 2018, employee filed with the Commission a further response to the Second Injury Fund's Motion.

Employee: James Anderson

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In considering the Second Injury Fund's Motion, we are mindful of the following admonition from the Missouri courts:

Cases should be heard and decided on their merits. To that end, statutes and rules relating to appeals, being remedial, are to be construed liberally in favor of allowing appeals to proceed. Accordingly we review claimant's application for review in light of a liberal construction of 8 CSR 20-3.030(3)(A).

Isgriggs v. Pacer Indus., 869 S.W.2d 295, 296 (Mo. App. 1994).

After careful consideration, and applying a liberal construction of 8 CSR 20-3.030(3)(A), we are more persuaded by employee's arguments. We conclude that employee's application for review is sufficient to satisfy the Commission's rule. We rule this issue against the Second Injury Fund.

The Second Injury Fund's Motion is hereby denied. We will review employee's application for review and consider the merits of his appeal.

Second Injury Fund liability

Employee suffered an injury at work on or about December 1, 2011. He reached a settlement with the employer/insurer, and proceeded to a hearing on his claim against the Second Injury Fund. Section 287.220 RSMo creates the Second Injury Fund, and allows for an award of benefits where a work injury combines with a preexisting disability to result in enhanced or total disability.

Generally speaking, a successful claim against the Second Injury Fund requires evidence to permit the administrative law judge or Commission to determine the following: (1) the nature and extent of the disability resulting from the work injury; (2) the existence of a preexisting disability or disabilities that constituted a hindrance or obstacle to employment or reemployment; and (3) evidence showing that the effects of the work injury and preexisting disability combine in such a way as to result in either enhanced permanent partial disability, or permanent total disability.

Here, the administrative law judge denied employee's claim for benefits from the Second Injury Fund, because employee did not present any evidence regarding the nature of either his last work injury, or any preexisting conditions that might have combined with the last work injury to result in more disability. We acknowledge employee's arguments suggesting he was not given a fair hearing. We have carefully reviewed the transcript of the hearing before the administrative law judge on December 12, 2017. We conclude that the hearing was fair, because the administrative law judge gave employee a full opportunity to present his case.

We further conclude that the administrative law judge correctly ruled that the evidence presented by employee is not sufficient to support an award of benefits from the Second Injury Fund. For this reason, we must, and do hereby deny employee's claim against the Second Injury Fund.

Employee: James Anderson

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Decision

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Lee B. Schaefer, issued December 22, 2017, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 3rd day of April 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

VACANT
Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	James Anderson	Injury No.: 11-107331
Dependents:	N/A	Before the
Employer:	Alberici Constructors, Inc. (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Arch Insurance Company (settled)	Department of Labor and Industrial
Hearing Date:	December 12, 2017	Relations of Missouri
		Jefferson City, Missouri
		Checked by: LBS

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: December 1, 2011
5. State location where accident occurred or occupational disease was contracted: Unknown
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: Unknown
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: BAW referable to the low back
14. Nature and extent of any permanent disability: 14.5 % PPD of the BAW referable to the low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$577.42/425.19
- 20. Method wages computation: From the Stipulation for Compromise Settlement (Exhibit 1)

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
Employer previously settled.
- 22. Second Injury Fund liability: None
- 23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Anderson	Injury No.: 11-107331
Dependents:	N/A	Before the
Employer:	Alberici Constructors, Inc. (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Arch Insurance Company (settled)	Department of Labor and Industrial
Hearing Date:	December 12, 2017	Relations of Missouri
		Jefferson City, Missouri

The parties appeared before the undersigned administrative law judge on December 12, 2017, for a final hearing to determine the liability of the Second Injury Fund in the matter of James Anderson (“Claimant”). Claimant appeared pro se. Assistant Attorney General Caroline Bean represented the Second Injury Fund. The Employer and Insurer, Alberici Constructors, Inc. (“Employer”), and its insurer, Arch Insurance Company (“Insurer”), previously settled with Claimant and did not participate in the hearing.

STIPULATIONS

The parties stipulated to the following:

1. On or about December 1, 2011, Claimant sustained an accidental injury arising out of and in the course of employment;
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.;
3. Venue is proper in Saint Louis;
4. Employer received proper notice of the claim and Claimant filed his Claim for Compensation within the time allowed by law;
5. The appropriate rates of compensation are \$577.42 for temporary and permanent total disability benefits and \$425.19 for permanent partial disability benefits.

ISSUE

The only issue to be determined is:

1. Is the Second Injury Fund liable for permanent partial or permanent total disability benefits?

EXHIBITS

Claimant offered and had accepted into evidence, the following Exhibits:

- Exhibit 1: Stipulation for Compromise Settlement, Injury No. #11-107331
Exhibit 2: Correspondence from Claimant to his former attorney and a Notice of Mediation from the Division of Workers' Compensation dated December 2, 2016

Note: Some of the records submitted at hearing contain handwritten remarks or other marks on the Exhibits. All of these marks were on these records at the time they were admitted into evidence and no other marks have been added since their admission on December 12, 2017.

FINDINGS OF FACT

Claimant testified at length regarding what he considered a “flaw” in the system. He testified that he did not receive disability from Workers’ Compensation (and also Social Security) because his medical records did not reach the necessary level for disability. Claimant further testified that he “separated” from his attorney because his medical records did not reach the required level to get disability. Claimant testified that it was a “flaw” that his case was on the docket and that he and his former attorney were “joined back together.”

Claimant did not offer any testimony regarding his primary work injury. All information contained in this Award regarding that accident was gleaned from the Stipulation for Compromise Settlement. (Exhibit 1). Claimant did not provide any testimony regarding what, if any, prior injuries or disabilities he had prior to his December 1, 2011, work injury.

The Assistant Attorney General noted that when Claimant had a mediation with another judge at the Division of Workers’ Compensation, his case was discussed at length. The minute entry from the Division of Workers’ Compensation for October 3, 2017, indicates that at the mediation, Claimant requested that this case be set for hearing in November of 2017.

RULINGS OF LAW

A claimant in a workers’ compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D. 2008). In order for a claimant to recover against the Second Injury Fund, he must prove that he sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant did not meet the burden

imposed by law.

Claimant failed to introduce evidence regarding the specific nature of his primary injury. Further, he did not discuss any lingering disabilities or limitations from his primary injury. In addition, Claimant did not introduce any evidence regarding his pre-existing injuries or disabilities. Therefore, this Court must deny Claimant's claim against the Second Injury Fund.

CONCLUSION

The Second Injury Fund is not liable to Claimant for permanent partial or permanent total disability benefits.

Made by: _____
LEE B. SCHAEFER
Administrative Law Judge
Division of Workers' Compensation