

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

Injury No.: 04-049334

Employee: Timothy Andrews
Employer: Murphy Tractor and Equipment Co. (Settled)
Insurer: Sentry Insurance Company (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 August 31, 2010. The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued August 31, 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 9th day of February 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD AS TO SECOND INJURY FUND ONLY

Employee: Timothy Andrews Injury No: 04-049334
Employer: Murphy Tractor and Equipment Co.
Insurer: Sentry Insurance Company
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 21, 2010

Checked By: PAM/lh

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: April 1, 2004
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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? 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 hurt her right arm while stopping a child from falling down a set of stairs.
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: Bilateral upper extremities
14. Nature and extent of any permanent disability: Body as a whole, from employer (settled prior to hearing.)
15. Compensation paid to-date for temporary disability: \$38,959.07
16. Value necessary medical aid paid to date by employer/insurer? \$70,826.11
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$581.57/\$347.05
20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability: (See Findings and Rulings.)
22. By the employer: By prior stipulation.
23. Future requirements awarded: N/A

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 Claimant:
Mr. Steven Effertz

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Timothy Andrews

Injury No: 04-049334

Employer: Murphy Tractor and Equipment Co.

Insurer: Sentry Insurance Company

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: July 21, 2010

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On July 21, 2010, the parties appeared for hearing. The Employee, Timothy Andrews, appeared in person and with counsel, Steven Effertz. The Employer and Employee had settled prior to the hearing. The remaining party, the Second Injury Fund, was represented by Laura Van Fleet.

STIPULATIONS

The parties stipulated to the following:

1. that on or about April 1, 2004, Murphy Tractor and Equipment Company was an employer operating under the provisions of the Missouri Workers' Compensation Law and that their liability under said law was fully insured by Sentry Insurance Company;
2. that on or about April 1, 2004, Andrews was an employee of Murphy Tractor and Equipment Company and was working under the provisions of the Missouri Workers' Compensation Law;
3. that on or about April 1, 2004, Andrews sustained an injury by occupational disease arising out of and in the course of his employment;

4. that the employer had notice of the injury;
5. that a claim for compensation was filed within the time prescribed by law;
6. that the compensation rate is \$581.57/\$347.05 per week;
7. that temporary total disability benefits were paid by the employer in the amount of \$38,959.07;
8. that medical aid has been furnished by the employer in the amount of \$70,826.11.

ISSUES

The only issue to be determined by this hearing is the liability of the Second Injury Fund under §287.220.1 RSMo (2000).

FINDINGS AND RULINGS

Timothy Andrews is a 50-year-old former general mechanic for Murphy Tractor and Equipment Company. Andrews sustained significant upper extremity repetitive use injuries in the course of his employment with Murphy Tractor. Andrews' injuries required multiple surgeries to his right upper extremity. He declined surgical intervention on his left upper extremity due to limited relief of symptoms on the right.

Andrews did return to work for Murphy following his release from medical treatment. Due to his significant permanent restrictions, Andrews was unable to meet the job requirements at Murphy and was terminated with severance on January 18, 2008. Subsequent to his termination, Andrews relocated his residence from Kansas City to Warsaw, Missouri.

Andrews had injuries which predated the April 1, 2004 upper extremity injuries including a back fusion and fractured left foot. Andrew testified that his left foot ached after prolonged working or standing. Andrews' back problems caused him to avoid pushing, pulling, heavy lifting and awkward positions. Currently Andrews has difficulty with upper extremities, sleep, and back pain.

Dr. Koprivica testified that Andrews has significant permanent restrictions due to bilateral upper extremity and back injuries. Dr. Koprivica attributed 20% permanent partial disability to Andrews' back fusion. Dr. Koprivica assessed 50% permanent partial disability to Andrews' significant bilateral upper extremity injuries. Dr. Koprivica further assessed 10% enhancement due to the synergistic effect of combining the disabilities. Dr. Koprivica does consider Andrews employable despite the assigned disability ratings and permanent restrictions.

Michael Dreiling, vocational expert, testified Andrews' lack of high school diploma, GED, or formal training is significant in terms of Andrews' employability. However, Dreiling does believe Andrews may be capable of obtaining his GED which would expand his employment opportunities. Dreiling acknowledged that it will be difficult for Andrews to obtain employment due to his educational status as well as limited job opportunities in the labor market where Andrews currently resides. Despite these significant vocational issues, Dreiling does not deem Andrews unemployable on the open labor market.

Andrews claims he is permanently and totally disabled due to the primary claim and pre-existing disability.

To determine whether an employee is deemed totally disabled under the Missouri Workers' Compensation Law, it must be found that the Claimant is unable to return to any employment. §287.020(7) RSMo (1986) defines total disability as "an inability to return to any employment and not merely ... inability to return to the employment which the employee was engaged at the time of the accident." The terms "any employment" mean any reasonable or normal employment or occupation. Reese v. Gary & Roger Link, Inc., 5 S.W. 3d 522 (Mo. App. 1999); Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo. App 1996); Kowalski v. M-G Metal and Sales, Inc., 631 S.W. 2d 919, 921 (Mo. App. 1982); Groce v. Pyle, 315 S.W. 2d 482, 490 (Mo. App. 1958).

In applying the above to the current case, I find Andrews was not permanently and totally disabled as a result of the April 1, 2004 work injury. Neither Dr. Koprivica nor Mr. Dreiling determines Andrews to be permanently totally disabled. Admittedly, Andrews' job prospects are limited in the Warsaw vicinity, but that alone does not support a permanent total disability claim.

However, I do find Andrews entitled to compensation for permanent partial disability from the Second Injury Fund.

In order for Claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, one must prove that the last injury, combined with 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, 183 S.W. 3d 714, 717-18 (Mo. Banc 2004). Andrews has met the burden imposed by law.

Considering expert testimony, Andrews' testimony, as well as the medical records, I find that Andrews had permanent partial disability prior to April 2004 in the following amounts: 19% of the left lower extremity at the 150 week level and 20% of the body as a whole referable to Andrews' back.

The Second Injury Fund is liable for permanent partial disability for the following conditions: 19% permanent partial disability of the left foot for 28.5 weeks; 20% body as a whole referable to the back for 80 weeks; and 50% body as a whole for the April 1, 2004 work injury for 200 weeks. The combined total weeks are 308.5 weeks multiplied by the synergistic factor of 10% equals 30.85 weeks at \$347.05 per week. The Second Injury Fund is liable for \$10,706.49 (30.85 x \$347.05).

This Award is subject to an attorney's lien of 25% for services rendered by Steven Effertz.

Made by: _____

Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of _____, 2010 by:

Naomi Pearson
Division of Workers' Compensation