

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 08-011470

Employee: Rusty Archer
Employer: City of Cameron
Insurer: Midwest Public Risk of Missouri
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the May 6, 2013, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and award set forth below.

Preliminaries

Injury No. 08-011470 (this case):

On January 16, 2008, employee sustained an injury by accident arising out of and in the course of employment. Employee filed a claim for compensation. The administrative law judge heard the claim on April 1, 2013, in a consolidated hearing with Injury No. 10-075527. The issues in dispute at trial were: 1) whether employee sustained any disability and, if so, the nature and extent of that disability; 2) whether employer/insurer is liable to employee for unpaid medical expenses in the amount of \$37,874.54; 3) whether the employer/insurer is liable to the employee for future medical care in order to cure and relieve the effects of the January 16, 2008, injury; and, 4) whether the Second Injury Fund is liable to employee. The administrative law judge issued an award against employer/insurer of permanent partial disability benefits, past medical expenses, and future medical care. Employee filed an Application for Review of the award to preserve his opportunity to challenge the award in the event the Second Injury Fund prevails on its Application for Review of the award issued in Injury No. 10-075527.

Injury No. 10-075527 (companion case):

On September 16, 2010, employee sustained an injury by accident arising out of and in the course of employment. Employee filed a claim for compensation. The administrative law judge heard the claim on April 1, 2013, in a consolidated hearing with Injury No. 08-011470. The issues in dispute at trial were: 1) whether employee sustained any disability and, if so, the nature and extent of that disability; and, 2) whether the Second Injury Fund is liable to employee. The administrative law judge issued an award of permanent partial disability against employer/insurer and an award of permanent total disability against the Second Injury Fund. The Second Injury Fund filed an Application for Review challenging the administrative law judge's award in Injury No. 10-075527.

¹ Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

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The first question we must answer in our review of both awards is this: What is the nature and extent of the disability employee sustained as a result of the 2008 injury, considered in isolation? As will be explained below, we conclude employee was rendered permanently and totally disabled by his January 16, 2008, injury.

Contemporaneously with our issuance of this award, we are issuing our award reversing the administrative law judge's award of permanent total disability benefits against the Second Injury Fund in Injury No. 10-075527.

Discussion

The administrative law judge has accurately summarized the evidence presented in this matter. We adopt her findings thereon except as modified and supplemented herein.

“Pursuant to section 287.020.6, the term ‘total disability’ means the ‘inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.’ The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. ‘Total disability’ does not require the employee be completely inactive or inert, rather, it means the inability to return to any reasonable or normal employment.”² Courts have ruled “inability to return to any employment” means that the employee is unable 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.*³

Both Dr. Stuckmeyer and Mr. Dreiling opined that employee was rendered permanently and totally disabled by the 2008 injury. The administrative law judge disregarded both opinions. The administrative law judge faulted each opinion because the administrative law judge believed employee “worked in the open labor market laying concrete from 2008 up to September 16, 2010.” We disagree with the characterization of employee’s job as “in the open labor market.” Employee’s position was not in the open labor market – employee occupied the job.

More importantly, employee’s return to his job after his injury is not proof that employee could then *compete* in the open labor market. “Compete,” means, “to seek or strive for something (as a position, possession, reward) for which others are also contending.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 463 (2002). Employee last *competed* for his position in February 2007 when he was hired.

An employer deciding whether to bring its injured worker back to work may be motivated by different factors than an employer filling a vacant position in the open labor market. An injured worker’s employer has many potential incentives to return its injured worker to work even if the worker is no longer able to perform all of the duties the job ordinarily entails. An employer may want to return an injured worker to her job to reciprocate for the worker’s loyalty to the employer. Or an employer may feel compelled to return an injured

² *Underwood v. High Rd. Indus., LLC*, 369 S.W.3d 59, 66-67 (Mo. App. 2012)(internal citation omitted).

³ See, e.g., *Kowalski v. M-G Metals & Sales, Inc.*, 631 S.W.2d 919, 922 (Mo. App. 1982).

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worker to his job to foreclose bad feelings that could give rise to legal action arising out of other events in the employment relationship. It may be more cost-effective for an employer to put a trained, injured worker back to work in a diminished capacity than it is to hire and train a new worker, even though the new worker has more physical abilities. But in an arms-length recruitment process those same employers would not reasonably be expected to hire candidates who cannot perform all of the duties of the jobs in the manner that such duties are customarily performed by average persons engaged in such employments over candidates who can perform all of the duties of the jobs in the customary manner.

It is for reasons such as those above that the critical question in permanent total disability cases is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker given his physical condition as it existed as of the time his disability became permanent, and expect the injured worker to perform the duties in the manner in which they are customarily performed.

When employee returned to work for employer after the 2008 injury, employer accommodated employee's restrictions. Employee's co-workers helped him "a lot" with duties he performed on his own before the 2008 injury. Employee had to take frequent breaks during the work day in an effort to alleviate his pain. Employee missed work frequently. Employee would have been unable to return to work without accommodation and assistance. We find that during employee's return to work, employee was not performing the usual duties of his employment in the manner that such duties are customarily performed by the average person engaged in such work. Consequently, employee's return to work did not constitute proof that employee could compete for work in the open labor market. The administrative law judge's finding to the contrary was in error as was her determination to disregard the opinions of Dr. Stuckmeyer and Mr. Dreiling on that basis.

The overwhelming weight of the evidence favors a finding that employee was rendered permanently and totally disabled by the effects of the 2008 injury, considered in isolation.

Medical Experts

In Dr. Stuckmeyer's opinion, employee sustained the following permanent disabilities as a result of the 2008 accident: 15% permanent partial disability of the body as a whole referable to the cervical spine, 10% permanent partial disability of the body as a whole referable to the thoracic spine, and 15% permanent partial disability of the body as a whole referable to the lumbar spine. In light of those permanent disabilities, Dr. Stuckmeyer believes that going forward employee should observe and/or will be constrained by the following permanent physical restrictions and limitations: no lifting greater than 30-35 pounds, occasionally, and no overhead lifting greater than 20-25 pounds, occasionally. Dr. Stuckmeyer reviewed voluminous medical records regarding employee's work injury. On February 9, 2011, Dr. Stuckmeyer conducted a physical examination of employee. Upon discussing employee's medical history and then-current complaints, Dr. Stuckmeyer concluded that employee's pain increased after the 2010 accident, but that by the time of the February 2011 examination, employee had "essentially returned to baseline in regard to his spinal complaints." It is Dr. Stuckmeyer's opinion that employee's 2010 injury did not

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cause the need for any additional physical restrictions and did not result in any additional physical limitations. Dr. Stuckmeyer testified that employee has no impairment associated with his 2010 work injury. Dr. Stuckmeyer believes employee was at maximum medical improvement by the time Dr. Stuckmeyer examined employee on February 9, 2011. After considering Mr. Dreiling's opinion about the vocational impact of employee's disabilities, Dr. Stuckmeyer formed the opinion that employee is permanently and totally disabled as a result of the January 16, 2008, accident.

Dr. Wheeler first examined employee on June 4, 2008. Dr. Wheeler believes employee reached maximum medical improvement as of September 4, 2008. In Dr. Wheeler's opinion, employee sustained an 8% permanent partial disability of the body as a whole as a result of the January 2008 accident. Dr. Wheeler believes that going forward employee should observe and/or will be constrained by the following permanent physical restrictions and limitations: no lifting over 70 pounds, no overhead lifting over 40 pounds, and only occasional bending and reaching. Dr. Wheeler examined employee again on October 10, 2012. Dr. Wheeler reviewed medical records covering the period since she last examined employee. She was unable to identify any additional disability caused by the 2010 injury.

Treating physician Dr. Middleton examined employee multiple times between February 2010 and December 2012. Dr. Middleton testified that across that period – which the careful reader will note straddles the date of the 2010 injury – employee's physical examination stayed essentially the same.

We accept the unanimous opinion of the medical experts that employee sustained no new disability as a result of the 2010 injury. We find that employee reached maximum medical improvement as of September 4, 2008, as opined by Dr. Wheeler.⁴

Vocational Experts

Both vocational experts who testified in this matter – Michael Dreiling and James England – believe that employee is permanently and totally disabled.

Mr. Dreiling considered employee's physical restrictions and limitations, as well as employee's education, training, vocational experience, and appearance, and concluded that no employer in the usual course of business would reasonably be expected to hire employee in the physical condition in which he was left after the 2008 injury. Stated another way, considering just the restrictions and limitations with which employee was left as a result of the 2008 injury, Mr. Dreiling believes employee is permanently and totally disabled. The administrative law judge discredited Mr. Dreiling's opinion in part because he "only considered the restrictions from the January 2008 accident, but relies upon employee's physical state in 2011 to conclude that he is unemployable in the open

⁴ On April 23, 2008, Dr. Zarr offered a contingent maximum medical improvement opinion. Dr. Zarr felt employee was at maximum medical improvement *if* the pain management clinic did not feel additional injections would be beneficial for employee. The pain management physician felt additional epidural injections could be helpful so the contingency upon which Dr. Zarr's maximum medical improvement opinion relied was not met.

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labor market.” The administrative law judge’s criticism is unfounded. The only physician-imposed restrictions appearing in the record flow solely from the January 2008 accident. We find Mr. Dreiling’s opinions to be well-founded and credible.

Although Mr. England had not even reviewed the report of employer’s medical expert, Dr. Wheeler – or perhaps *because* he had not reviewed her report – Mr. England formed an opinion that it was the combination of employee’s increased pain from the 2010 slip and fall and the restrictions/limitations from the 2008 injury that rendered employee permanently and totally disabled. When asked why he reached this conclusion even though Drs. Wheeler and Stuckmeyer did not believe employee sustained any permanent disability as a result of the 2010 accident, Mr. England explained: “Because I think [employee] made it pretty clear that he thought just the opposite; that he was, in fact, able to go back and function up to 30 hours a week, and it was only after that second accident that he got to the point where the pain level went back up to become so severe and that he wasn’t really able to function very well at all after that. I mean, that’s what he told me and that’s what I based that on.” Clearly, Mr. England founded his expert vocational opinion upon employee’s lay opinion regarding the cause, nature, and extent of employee’s disability, which lay opinion (however reasonable on its face), was contrary to a unanimity of the medical opinion and evidence produced in this matter. Mr. England’s opinions regarding the cause(s) of employee’s disability are unsupported by the medical evidence and such opinions cannot be substituted for expert medical testimony regarding causation.

We find the vocational opinion of Mr. Dreiling more persuasive than the opinion of Mr. England. In forming his opinion, Mr. Dreiling considered employee’s perception of his condition as well as the opinions of the medical experts. On the other hand, Mr. England’s testimony makes plain he did not consider all medical opinions and that Mr. England lacked a clear understanding of employee’s functional restrictions resultant from each accident.

Conclusion

Based upon the record before us and for the reasons set forth above, we find that no employer would reasonably be expected to hire employee given his physical condition as it existed as of September 4, 2013, and reasonably expect employee to perform duties in the manner in which they are customarily performed.

As previously noted, the employer herein accommodated employee’s restrictions following his 2008 work injury and, as a result, employee was able to continue working for an extended period of time. Employer is to be commended for its conduct. It might appear that this a classic case of Second Injury Fund liability, particularly based on a reasonable (lay) perception that the 2010 work injury produced additional disability, symptoms, and limitations. It may also seem that to impose liability on the employer under these circumstances is both unjust and inconsistent with the purpose of our Second Injury Fund law. Although we are sympathetic to this view and we understand the administrative law judge’s reluctance to award permanent total disability benefits against this employer, we simply cannot ignore the unanimity of expert medical testimony that all of employee’s restrictions are a result of his 2008 work injury.

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Consequently, we conclude that employee was rendered permanently and totally disabled as a result of the effects of the January 16, 2008, injury, considered in isolation.

Award

We modify the award of the administrative law judge on the issue of the nature and extent of permanent disability. Employee was rendered permanently and totally disabled as a result of the effects of the January 16, 2008, injury, considered in isolation. Beginning September 5, 2008, employer shall pay to employee weekly permanent total disability benefits of \$404.32 for employee's lifetime, or until this award is further modified in accordance with the Workers' Compensation Law.

As to the other issues in dispute, we affirm and adopt the administrative law judge's award and decision. We further approve and affirm 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.

The award and decision of Administrative Law Judge Lisa Meiners issued May 6, 2013, is attached hereto and incorporated herein by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 30th day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Rusty Archer Injury No. 08-011470
Employer: City of Cameron
Insurers: Midwest Public Risk of Missouri
Corporate Claims Management, Incorporated
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: April 1, 2013 Checked by: LM/cy

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: January 16, 2008
5. State location where accident occurred or occupational disease was contracted: Clinton County, Cameron, 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: Claimant, while in the course and scope of employment, was operating a skid loader when the skid loader hit a manhole, causing injury to Claimant's neck, thoracic spine and low back.
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: Neck, thoracic spine, low back
14. Nature and extent of any permanent disability: 35% percent permanent partial disability or \$54,465.60 due to the January 16, 2008 accident.
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$45,370.66
17. Value necessary medical aid not furnished by employer/insurer? \$37,874.58
18. Employee's average weekly wages: \$606.45
19. Weekly compensation rate: \$404.32/\$389.04
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Compensation payable: The Employer is liable to Employee for 35% permanent partial disability body as a whole or \$54,465.60 and \$37,874.58 of unpaid medical expenses.
22. Future requirements awarded: Employer is liable to the Employee for future medical care in order to cure and relieve the effects of the January 16, 2008 injury.
23. Second Injury Fund liability: The Employee did not have a pre-existing condition that was a hindrance or obstacle to his employment.

Said payments to begin as of date of the award 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 in favor of the following attorney for necessary legal services rendered to the Claimant: Steffanie Stracke.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rusty Archer Injury No. 08-011470
Employer: City of Cameron
Insurers: Midwest Public Risk of Missouri
Corporate Claims Management, Incorporated
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: April 1, 2013 Checked by: LM/cy

On April 1, 2013, the parties appeared for hearing. Rusty Archer appeared in person and with counsel, Steffanie Stracke. The Employer, City of Cameron, through its' insurer, Midwest Public Risk of Missouri, was represented by Kip Kubin. The Second Injury Fund was represented by Assistant Attorney General Richard Wiles.

STIPULATIONS

The parties stipulated to the following:

- 1) That the Employer was operating subject to Missouri workers' compensation law on January 16, 2008;
- 2) That Employer was insured through Midwest Public Risk;
- 3) That Mr. Archer was their Employee;
- 4) That Employee was working subject to the law in Clinton County, Cameron, Missouri;
- 5) That Employee sustained an accident that arose out of and in the course and scope of his employment on January 16, 2008;
- 6) That the average weekly wage was \$606.45;
- 7) That the temporary total disability rate is \$404.32, and the permanent partial disability rate is \$389.04;
- 8) That notice was properly given;
- 9) That the claim was filed within the time allowed by law;
- 10) That Employer provided \$45,370.66 in medical expenses and no benefits in this case.

ISSUES

The issues to be tried by this hearing are as follows:

- 1) Whether the Employee sustained any disability and, if so, the nature and extent of that disability;

- 2) Whether Employer is liable to Employee for unpaid medical expenses in the amount of \$37,874.58;
- 3) Whether the Employer is liable to the Employee for future medical care in order to cure and relieve the effects from the January 16, 2008 injury;
- 4) Whether the Second Injury Fund is liable to Employee.

Claimant, during the course of his employment with the City of Cameron, struck a manhole while driving a skid loader. The impact of the raised manhole cover caused the skid loader to abruptly stop. At that point, Claimant hit the windshield and lost consciousness. Immediately after recovering, Claimant felt neck, thoracic and low back pain.

Claimant underwent conservative care for cervical thoracic and cervical strains. Claimant received a myriad of prescription medication, physical therapy and epidural injections without relief. In March of 2008, Dr. Daniel Bruning of PainCARE assessed Claimant with low back pain, lumbar disk displacement, thoracic spine pain with spondylosis and trigger points at T6-T7 cervicalgia with bursitis, and rotary cuff syndrome AC joint of the left shoulder.

Several doctors also issued permanent restrictions and ratings as a result of the January 16, 2008 accident. Dr. Zarr in April of 2008 restricted Claimant to no lifting over 70 pounds, no overhead lifting of 40 pounds, and occasional bending and reaching. Dr. Zarr then opined a 3% percent permanent partial disability body as a whole as a result of the January 2008 accident. Another doctor, Dr. Eden Wheeler, released Claimant from treatment on September 4, 2008. Dr. Wheeler agreed and placed the same restrictions as Dr. Zarr. Dr. Wheeler assessed an 8% percent permanent partial disability body as a whole as a result of the January 2008 accident. Dr. Wheeler testified Claimant would require ongoing medication regimen in order to cure and relieve the effects of the January 2008 accident. Dr. Wheeler found the January 2008 accident the prevailing factor of Claimant's cervical thoracic and lumbar pain syndromes, along with a myofascial component to his pain syndrome.

Dr. Hendler also evaluated Claimant several times. Dr. Hendler assessed a myofascial pain, lumbar and cervical spondylolisthesis. Dr. Hendler, like Dr. Wheeler, recommended ongoing pharmacological management in order to cure and relieve the effects of the January 2008 accident.

On July 7, 2009, Dr. Terrance Pratt performed an independent medical examination. Dr. Pratt opined the January 2008 accident as the prevailing factor of cervicothoracic syndrome, cervical spondylolisthesis, low back pain, L5-S1 disk herniation, lumbar spondylolisthesis, chronic thoracic discomfort with radicular-type symptoms and left shoulder syndrome responding to conservative care. At that time, Dr. Pratt recommended ongoing medical needs, pain management and a pain psychologist. He also placed restrictions of no frequent bending, twisting, lifting over 50 pounds, occasional lifting of 25 pounds, and to avoid overhead lifting greater than 25 pounds.

Although doctors placed permanent restrictions on Claimant, he continued to work performing his regular job duties from fall of 2008 until September 16, 2010. Indeed, Claimant credibly testified he received assistance from coworkers if he was unable to perform certain activities, as well as was accommodated by his employer due to the work restrictions. Despite his inability to perform all of his job functions as he did prior to 2008, he was given a raise by the City of Cameron and worked within restrictions laying concrete. Claimant also was permitted to take frequent breaks sitting in his truck throughout the workday. Claimant did not perform repetitive heavy lifting as he did prior to 2008, but a June 9, 2010 medical record of Dr. Middleton revealed Claimant continued to lay concrete every day.

Claimant continued to receive conservative care by Dr. Middleton of his neck, mid and low back in order to cure and relieve the effects of the January 16, 2008 accident despite being released from care by authorized doctors on September 4, 2008. Dr. Middleton prescribed various medications, physical therapy and injections to relieve the pain and muscle spasticity. On September 1, 2010, medical records of Dr. Middleton reveal Claimant received some relief from muscle spasms as a result of prescription medication and Botox injections. I find Claimant had very little right hip pain and no weakness, numbness or tingling. I also find Claimant's headaches that he once experienced were greatly reduced at that time on September 1, 2010. On September 16, 2010, Claimant sustained another injury that occurred while bending over to shape a newly formed curb of concrete. At that time, Claimant's foot slipped, causing a twisting and jarring sensation of his mid to low back and pain escalation to 10 on a scale of 0 to 10. Claimant was sent to Corporate Care who diagnosed chronic and acute thoracic strain, myofascial syndrome, chronic lumbar strain and muscle spasms. The doctor released Claimant to modified duty of no lifting or pulling greater than five pounds and no working below the waist and sit and stand as tolerated.

I infer the September 16, 2010 accident was the prevailing factor of Claimant's acute thoracic strain and additional complaints of burning pain of his back, along with increased headaches. I infer this based on the records from Corporate Care that state the diagnosis, as well as "the cause of this problem is related to work activities." As such, I find Claimant sustained another subsequent injury that was the prevailing factor of an additional thoracic sprain, along with the burning pain of his low back and increased headaches.

Claimant was released from care on October 8, 2010 with the same restrictions placed upon him from the 2008 injury. At that time, doctors indicated his pain returned to "baseline." Regardless, I find based on Dr. Middleton's records and James England's report that Claimant sustained additional injury of his thoracic spine and low back. Indeed, medical records reveal Claimant's condition worsened after September 16, 2010. As such, I disregard Drs. Stuckmeyer and Wheeler's opinions that Claimant sustained 0% percent permanent partial disability, because their opinions are contradicted by medical records generated from the September 2010 accident up to the present.

Rather, Claimant, as a result of the September 2010 accident, has increased frequency of bad headaches and now a burning sensation of his low back. Indeed, medical records reveal

complaints of a burning sensation of Claimant's low back and right leg that he did not experience before the September 16, 2010 accident. In 2012, Dr. Middleton prescribed a walker due to the leg and back pain and as such, I find Claimant sustained a 7.5% percent permanent partial disability body as a whole due to the September 16, 2010 accident.

However, I find as a result of the January 2008 injury that Claimant had significant pain of the left shoulder, neck, and mid-back. Claimant also experienced severe muscle spasms and pain that radiated from the left side of his back to his rib cage, causing issues with his ability to stand erect. Claimant had limitations standing, walking, bending and stooping that he did not have prior to January 2008.

The parties request this award address whether Claimant sustained any disability and, if so, the nature and extent of that disability. Claimant alleges he is permanently and totally disabled as a result of the January 16, 2008 accident. Claimant presented two experts that find Claimant is unemployable in the open labor market due to the January 16, 2008 accident. Dr. Stuckmeyer assessed 40% percent permanent partial disability body as a whole due to the January 16, 2008 accident, along with restrictions of lifting no greater than 35 pounds occasionally, no lifting overhead greater than 25 pounds. Dr. Stuckmeyer restricted Claimant from operating heavy machinery and vehicles due to the prescription narcotics. Dr. Stuckmeyer opined Claimant permanently and totally disabled as a result of the January 16, 2008 accident.

Mr. Michael Dreiling, Claimant's vocational expert, found Claimant unemployable based on his tenth grade education, medical restrictions, limited work history and Claimant's existing physical presentation as of December 26, 2011. Dreiling, however, never discussed the subsequent September 16, 2010 injury with Claimant. I infer from Dreiling's report that Dreiling only considered the restrictions from the January 2008 accident, but relies on Claimant's existing physical state in 2011 to conclude that he is unemployable in the open labor market. I disregard Dreiling's opinion since Dreiling never discussed the September 16, 2010 injury, and his opinion is taken four years after the 2008 accident. I also disregard Dreiling's opinion since Claimant had subsequent intervening accident of September 16, 2010 and had worked in the open labor market from 2008 to 2010. I also find Dreiling's opinion lacks credibility when one doesn't consider the subsequent 2010 work injury, yet relies on Claimant's existing physical condition after the 2010 accident.

I also disregard Dr. Stuckmeyer's opinion that Claimant is permanently and totally disabled due to the 2008 injury because Claimant worked in the open labor market laying concrete from 2008 up to September 16, 2010. I do not find Claimant's work with the City of Cameron between that time period so accommodating to render him unemployable, especially when Claimant received a raise and medical records reveal he was laying concrete every day in June of 2010.

However, I find Claimant sustained significant hindrances and obstacles stemming from the 2008 accident. Indeed, he is no longer able to stand, lift or sit as he did prior to 2008. Medical records reveal Claimant experienced severe muscle spasms that hindered his ability to perform his duties laying concrete. Indeed, there is a plethora of medical restrictions placed on

Claimant by every doctor he saw between 2008 up to 2010. Therefore, based on the numerous medical restrictions and medical records, along with testimony presented at hearing, I find Claimant sustained 35% percent permanent partial disability body as a whole from the January 2008 accident.

I do not find the Second Injury Fund is liable to Claimant as a result of a preexisting low back condition. Indeed, no medical records or testimony presented at hearing support the finding that he suffered from a hindrance or obstacle prior to January 16, 2008.

I also find the Employer is liable to the Employee for future medical care in order to cure and relieve the effects from the January 2008 accident. Dr. Wheeler, Dr. Middleton, Dr. Hendler and Dr. Pratt all state Claimant will need ongoing medical care. The Employer is liable based on those opinions, but treatment is not limited to the suggestions made at the time of hearing should other treatment options recommended by the authorized medical doctors become available or advised.

I also find the Employer is liable to the Employee for unpaid medical expenses in the amount of \$37,874.58. The Employee requested and was denied further treatment that I find was reasonable and necessary to cure and relieve the effects stemming from the injury of January 16, 2008. Indeed, this finding is based on the testimony of Drs. Middleton and Stuckmeyer, the corresponding bills contained in Exhibit C and medical records presented at trial.

As such, the Employer is liable to the Employee for 35% percent permanent partial disability or \$54,465.60 due to the January 16, 2008 accident. Additionally, the Employer is liable to the Employee for past medical expenses in the amount of \$37,874.58, as well as future medical care in order to cure and relieve the effects of the 2008 accident, including but not limited to Botox injections, physical therapy, prescription medications, pain management, pain psychologist, and epidural injections.

This award is subject to an attorney's lien for services rendered by Attorney Steffanie Stracke in the amount of 25% percent.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 10-075527

Employee: Rusty Archer
Employer: City of Cameron
Insurer: Midwest Public Risk of Missouri
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge dated May 9, 2013.

Preliminaries

Injury No. 10-075527 (this case):

On September 16, 2010, employee sustained an injury by accident arising out of and in the course of employment. Employee filed a claim for compensation. The administrative law judge heard the claim on April 1, 2013, in a consolidated hearing with Injury No. 08-011470. The issues in dispute at trial were: 1) whether employee sustained any disability and, if so, the nature and extent of that disability; and, 2) whether the Second Injury Fund is liable to employee. The administrative law judge issued an award of permanent partial disability against employer/insurer and an award of permanent total disability against the Second Injury Fund. The Second Injury Fund filed an Application for Review challenging the administrative law judge's award in Injury No. 10-075527.

Injury No. 08-011470 (companion case):

On January 16, 2008, employee sustained an injury by accident arising out of and in the course of employment. Employee filed a claim for compensation. The administrative law judge heard the claim on April 1, 2013, in a consolidated hearing with Injury No. 10-075527. The issues in dispute at trial were: 1) whether employee sustained any disability and, if so, the nature and extent of that disability; 2) whether employer/insurer is liable to employee for unpaid medical expenses in the amount of \$37,874.54; 3) whether the employer/insurer is liable to the employee for future medical care in order to cure and relieve the effects of the January 16, 2008, injury; and, 4) whether the Second Injury Fund is liable to employee. The administrative law judge issued an award against employer/insurer of permanent partial disability benefits, past medical expenses, and future medical care. Employee filed a protective Application for Review of the award in Injury No. 08-011470 to preserve his opportunity to challenge the award in the event the Second Injury Fund prevails on its Application for Review of the award issued in this case (Injury No. 10-075527).

¹ Statutory references are to the Revised Statutes of Missouri 2010, unless otherwise indicated.

Employee: Rusty Archer

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This date we are contemporaneously issuing our award in Injury No. 08-011470, wherein we conclude that employee was rendered permanently and totally disabled as a result of the 2008 injury, considered in isolation.

Discussion

The administrative law judge has accurately summarized the evidence presented in this matter and her award and decision are attached hereto for reference.

The administrative law judge found that as a result of the 2010 accident, employee sustained a permanent partial disability of 7.5% of the body as a whole. None of the medical experts who testified in this matter believes employee sustained any permanent disability as a result of the 2010 fall.

It is Dr. Stuckmeyer's opinion that employee's 2010 injury did not cause the need for any additional physical restrictions and did not result in any additional physical limitations. Dr. Stuckmeyer testified that employee has no impairment associated with his 2010 work injury.

Dr. Wheeler examined employee multiple times both before and after the 2010 injury, the last time on October 10, 2012. In conjunction with the October 10, 2012, examination, Dr. Wheeler reviewed medical records covering the period since she had last examined employee in 2008. She was unable to identify any additional disability caused by the 2010 injury.

Treating physician Dr. Middleton examined employee multiple times between February 2010 and December 2012. Dr. Middleton testified that across that period – which the careful reader will note straddles the date of the 2010 injury – employee's physical examination stayed essentially the same.

The administrative law judge's conclusion that employee sustained permanent disability as a result of the 2010 accident is contrary to the entire weight of expert medical opinion. We disagree with the administrative law judge's ruling that employee sustained permanent partial disability as a result of the 2010 accident. We accept the unanimous medical opinion that employee sustained no permanent disability as a result of the 2010 accident.

Conclusion

"An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability."² This injury by accident is not compensable because the accident caused no disability.

Award

We reverse the administrative law judge's finding of permanent partial disability in this matter. We reverse the administrative law judge's award of compensation against employer. We reverse the administrative law judge's award of compensation against the Second Injury Fund. We deny compensation in this matter. All other issues are moot.

² Section 287.020.3(1) RSMo.

Employee: Rusty Archer

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The award and decision of Administrative Law Judge Lisa Meiners issued May 9, 2013, is attached hereto solely for reference.

Given at Jefferson City, State of Missouri, this 30th day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Rusty Archer Injury No. 10-075527
Employer: City of Cameron
Insurers: Midwest Public Risk of Missouri
Corporate Claims Management, Incorporated
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: April 1, 2013 Checked by: LM/cy

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: September 16, 2010
5. State location where accident occurred or occupational disease was contracted: Clinton County, Cameron, 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: Claimant, while in the course and scope of employment, sustained injury laying concrete.
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: Thoracic spine, low back
14. Nature and extent of any permanent disability: 7.5% percent permanent partial disability.
15. Compensation paid to-date for temporary disability: \$131.60
16. Value necessary medical aid paid to date by employer/insurer? \$5,639.02
17. Value necessary medical aid not furnished by employer/insurer? \$0
18. Employee's average weekly wages: \$690.85
19. Weekly compensation rate: \$460.59/\$418.58
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Compensation payable: The Employer is liable to Employee for 7.5% permanent partial disability body as a whole or \$12,557.40.
22. Second Injury Fund Liability: The Second Injury Fund is liable to Claimant for permanent total disability benefits beginning October 1, 2011, his last day of employment and to the present for Claimant's lifetime. The Second Injury Fund, beginning October 1, 2011, is liable for differential payments of \$42.01 for 30 weeks and thereafter for \$460.59 per week for Claimant's lifetime.

Said payments to begin as of date of the award 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 in favor of the following attorney for necessary legal services rendered to the Claimant: Steffanie Stracke.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rusty Archer Injury No. 10-075527
Employer: City of Cameron
Insurers: Midwest Public Risk of Missouri
Corporate Claims Management, Incorporated
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: April 1, 2013 Checked by: LM/cy

On April 1, 2013, the parties appeared for hearing. Rusty Archer appeared in person and with counsel, Steffanie Stracke. The Employer, City of Cameron, through its' insurer, Midwest Public Risk of Missouri, was represented by Kip Kubin. The Second Injury Fund was represented by Assistant Attorney General Richard Wiles.

ISSUES

The issues to be tried by this hearing are as follows:

- 1) Whether the Employee sustained any disability and, if so, the nature and extent of that disability;
- 2) Whether the Second Injury Fund is liable to Employee.

Prior to September 16, 2010, Claimant, during the course of his employment with the City of Cameron, struck a manhole while driving a skid loader. The impact of the raised manhole cover caused the skid loader to abruptly stop. At that point, Claimant hit the windshield and lost consciousness. Immediately after recovering, Claimant felt neck, thoracic and low back pain.

Claimant underwent conservative care for cervical thoracic and cervical strains. Claimant received a myriad of prescription medication, physical therapy and epidural injections without relief. In March of 2008, Dr. Daniel Bruning of PainCARE assessed Claimant with low back pain, lumbar disk displacement, thoracic spine pain with spondylosis and trigger points at T6-T7 cervicalgia with bursitis, and rotary cuff syndrome AC joint of the left shoulder.

Several doctors also issued permanent restrictions and ratings as a result of the January 16, 2008 accident. Dr. Zarr in April of 2008 restricted Claimant to no lifting over 70 pounds, no overhead lifting of 40 pounds, and occasional bending and reaching. Dr. Zarr then opined a 3% percent permanent partial disability body as a whole as a result of the January 2008 accident. Another doctor, Dr. Eden Wheeler, released Claimant from treatment on September 4, 2008. Dr. Wheeler agreed and placed the same restrictions as Dr. Zarr. Dr. Wheeler assessed an 8% percent permanent partial disability body as a whole as a result of the January 2008 accident. Dr. Wheeler testified Claimant would require ongoing medication regimen in order to cure and relieve the effects of the January 2008 accident. Dr. Wheeler found the January 2008 accident the prevailing factor of Claimant's cervical thoracic and lumbar pain syndromes, along with a myofascial component to his pain syndrome.

Dr. Hendler also evaluated Claimant several times. Dr. Hendler assessed a myofascial pain, lumbar and cervical spondylolisthesis. Dr. Hendler, like Dr. Wheeler, recommended ongoing pharmacological management in order to cure and relieve the effects of the January 2008 accident.

On July 7, 2009, Dr. Terrance Pratt performed an independent medical examination. Dr. Pratt opined the January 2008 accident as the prevailing factor of cervicothoracic syndrome, cervical spondylolisthesis, low back pain, L5-S1 disk herniation, lumbar spondylolisthesis, chronic thoracic discomfort with radicular-type symptoms and left shoulder syndrome responding to conservative care. At that time, Dr. Pratt recommended ongoing medical needs, pain management and a pain psychologist. He also placed restrictions of no frequent bending, twisting, lifting over 50 pounds, occasional lifting of 25 pounds, and to avoid overhead lifting greater than 25 pounds.

Although doctors placed permanent restrictions on Claimant, he continued to work performing his regular job duties from fall of 2008 until September 16, 2010. Indeed, Claimant credibly testified he received assistance from coworkers if he was unable to perform certain activities, as well as was accommodated by his employer due to the work restrictions. Despite his inability to perform all of his job functions as he did prior to 2008, he was given a raise by the City of Cameron and worked within restrictions laying concrete. Claimant also was permitted to take frequent breaks sitting in his truck throughout the workday. Claimant did not perform repetitive heavy lifting as he did prior to 2008, but a June 9, 2010 medical record of Dr. Middleton revealed Claimant continued to lay concrete every day.

Claimant continued to receive conservative care by Dr. Middleton of his neck, mid and low back in order to cure and relieve the effects of the January 16, 2008 accident despite being released from care by authorized doctors on September 4, 2008. Dr. Middleton prescribed various medications, physical therapy and injections to relieve the pain and muscle spasticity. On September 1, 2010, medical records of Dr. Middleton reveal Claimant received some relief from muscle spasms as a result of prescription medication and Botox injections. I find Claimant had very little right hip pain and no weakness, numbness or tingling. I also find Claimant's headaches that he once experienced were greatly reduced at that time on September 1, 2010.

On September 16, 2010, Claimant sustained an injury that occurred while bending over to shape a newly formed curb of concrete. At that time, Claimant's foot slipped, causing a twisting and jarring sensation of his mid to low back and pain escalation to 10 on a scale of 0 to 10. Claimant was sent to Corporate Care who diagnosed chronic and acute thoracic strain, myofascial syndrome, chronic lumbar strain and muscle spasms. The doctor released Claimant to modified duty of no lifting or pulling greater than five pounds and no working below the waist and sit and stand as tolerated.

I infer the September 16, 2010 accident was the prevailing factor of Claimant's acute thoracic strain and additional complaints of burning pain of his back, along with increased headaches. I infer this based on the records from Corporate Care that state the diagnosis, as well as "the cause of this problem is related to work activities." As such, I find Claimant sustained another subsequent injury that was the prevailing factor of an additional thoracic sprain, along with the burning pain of his low back and increased headaches.

Claimant was released from care on October 8, 2010 with the same restrictions placed upon him from the 2008 injury. At that time, doctors indicated his pain returned to "baseline." Regardless, I find based on Dr. Middleton's records and James England's report that Claimant sustained additional injury of his thoracic spine and low back. Indeed, medical records reveal Claimant's condition worsened after September 16, 2010. As such, I disregard Drs. Stuckmeyer and Wheeler's opinions that Claimant sustained 0% percent permanent partial disability, because their opinions are contradicted by medical records generated from the September 2010 accident up to the present.

Rather, Claimant, as a result of the September 2010 accident, has increased frequency of bad headaches and now a burning sensation of his low back. Indeed, medical records reveal complaints of a burning sensation of Claimant's low back and right leg that he did not experience before the September 16, 2010 accident. In 2012, Dr. Middleton prescribed a walker due to the leg and back pain and, as such, I find Claimant sustained a 7.5% percent permanent partial disability body as a whole due to the September 16, 2010 accident.

However, I find as a result of the January 2008 injury that Claimant had significant pain of the left shoulder, neck, and mid-back that were hindrances and obstacles to his employment in the amount of 35 percent permanent partial disability. Claimant also experienced severe muscle spasms and pain that radiated from the left side of his back to his rib cage, causing issues with his ability to stand erect. Claimant had limitations standing, walking, bending and stooping that he did not have prior to January 2008.

The parties request this award address whether Claimant sustained any disability and, if so, the nature and extent of that disability. In order to establish Second Injury Fund liability for permanent total disability benefits, the Claimant must prove the following:

- 1) That he has sustained permanent disability resulting from a compensable work-related injury;

- 2) That he has permanent disability predating the compensable work-related injury which is “of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the Employee becomes unemployable.” §287 RSMo 1994, Messex v. Sachs Electric Company, 989 S.W. 2d (Mo.App. 1997); Garibay v. Treasurer, 964 S.W. 2d 474 (Mo.App. 1998); Rose v. Treasurer, 899 S.W. 2d 563 (Mo.App. 1995);
- 3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury results in permanent total disability. Boring v. Treasurer, 947 S.W. 2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo.App. 1992).

The parties stipulated Claimant sustained an accident that arose out of and in the course of his employment. I find as noted above that Claimant suffered a 7.5 percent permanent partial disability body as a whole due to the further restrictions of walking, bending, twisting caused by the September 16, 2010 accident. Secondly, I find Claimant sustained significant hindrances and obstacles stemming from the 2008 accident. Indeed, he was limited to standing, lifting or sitting prior to 2010. Medical records reveal Claimant experienced severe muscle spasms that hindered his ability to perform his duties laying concrete. Indeed, there is a plethora of medical restrictions placed on Claimant by every doctor he saw between 2008 up to 2010. Therefore, based on the numerous medical restrictions and medical records, along with testimony presented at hearing, I find Claimant sustained 35% percent permanent partial disability body as a whole from the January 2008 accident.

Claimant alleges he is permanently and totally disabled as a result of the January 16, 2008 accident. Claimant presented two experts that find Claimant is unemployable in the open labor market due to the January 16, 2008 accident. Dr. Stuckmeyer assessed 40% percent permanent partial disability body as a whole due to the January 16, 2008 accident, along with restrictions of lifting no greater than 35 pounds occasionally, no lifting overhead greater than 25 pounds. Dr. Stuckmeyer restricted Claimant from operating heavy machinery and vehicles due to the prescription narcotics. Dr. Stuckmeyer opined Claimant permanently and totally disabled as a result of the January 16, 2008 accident.

Mr. Michael Dreiling, Claimant’s vocational expert, found Claimant unemployable based on his tenth grade education, medical restrictions, limited work history and Claimant’s existing physical presentation as of December 26, 2011. Dreiling, however, never discussed the subsequent September 16, 2010 injury with Claimant. I infer from Dreiling’s report that Dreiling only considered the restrictions from the January 2008 accident, but relies on Claimant’s existing physical state in 2011 to conclude that he is unemployable in the open labor market. I disregard Dreiling’s opinion since Dreiling never discussed the September 16, 2010 injury, and his opinion is taken four years after the 2008 accident. I also disregard Dreiling’s opinion since Claimant had subsequent intervening accident of September 16, 2010 and had worked in the open labor market from 2008 to 2010. I also find Dreiling’s opinion lacks credibility when one doesn’t consider the subsequent 2010 work injury, yet relies on Claimant’s existing physical condition after the 2010 accident.

I also disregard Dr. Stuckmeyer's opinion that Claimant is permanently and totally disabled due to the 2008 injury because Claimant worked in the open labor market laying concrete from 2008 up to September 16, 2010. I do not find Claimant's work with the City of Cameron between that time period so accommodating to render him unemployable, especially when Claimant received a raise and medical records reveal he was laying concrete every day in June of 2010. Instead, I find Claimant is permanently and totally disabled based on a synergistic effect from the September 16, 2010 accident and the January 16, 2008 injury.

Presently Claimant's primary complaint is pain from the middle of his back on the left side, along with pain from his left shoulder all the way down to his last rib. Claimant has numbness in his hands and feet at times. He has extreme limited range of motion of his left arm. He is able to stand for 30 minutes and can walk approximately a block. Indeed, observing Claimant, who I find testified credibly, he stood bent over at the time of hearing. Medical records reveal he has difficulties standing erect due to back pain. Claimant is unable to squat. Claimant is able to lift a gallon of milk and drops many things due to lack of grip strength. Claimant is able to sit for approximately 30 minutes at a time and avoids climbing stairs. Claimant uses a cane and sometimes a walker to ambulate, since sometimes his balance is easily thrown off. Additionally, doctors placed various medical restrictions on Claimant ranging from lifting no greater than 70 pounds to lifting limitations of 35 pounds occasionally.

James England, a vocational expert, also opined Claimant is unemployable based on the two injuries. England found Claimant's limited education of tenth grade, medical restrictions and lack of transferrable job skills renders Claimant unemployable in the open labor market. England, after careful examination of medical records, found Claimant was able to work with restrictions after the 2008 injury, but that the second injury in September 2010 caused the pain level to increase to the point he is incapable of working on a sustained basis in the open labor market. I agree with James England.

As such, the Second Injury Fund is liable to Claimant for permanent total disability benefits beginning October 1, 2011, his last day of employment and to the present for Claimant's lifetime. The Employer is liable to Claimant for 30 weeks of compensation or \$12,557.40. The Second Injury Fund, beginning October 1, 2011, is liable for differential payments of \$42.01 for 30 weeks and thereafter for \$460.59 per week for Claimant's lifetime.

This award is subject to an attorney's lien for services rendered by Attorney Steffanie Stracke in the amount of 25% percent.

Made by: _____
Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation