

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

Injury No. 04-073701

Employee: Stephen Barkley
Employer: Daimler-Chrysler (Settled)
Insurer: Old Carco, LLC (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 read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing 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

Evidentiary rulings

The Second Injury Fund raises a number of challenges to the evidentiary rulings by the administrative law judge. We have previously dealt with one of these challenges in our order dated November 3, 2015, wherein we accepted into the record the copy of the Second Injury Fund's post-hearing motion to the administrative law judge, with selected portions of employee's 2009 and 2013 depositions (re-designated as the Second Injury Fund's Exhibit IA) and the copy of a page from the Division's Complete Case History, bearing some handwritten notations (re-designated as the Second Injury Fund's Exhibit IIA).

The Second Injury Fund also argues that the administrative law judge erred in accepting employee's Exhibit 5 into evidence. As acknowledged by the Second Injury Fund, however, it is not clear from the administrative law judge's award whether he ultimately admitted Exhibit 5, as he deferred a ruling on the issue at the hearing, and thereafter did not make any ruling or any reference at all to Exhibit 5 in his award. Employee's Exhibit 5 consists of what appears to be an independent medical evaluation of July 10, 2001, authored by Dr. Michael P. Nogalski, as well as what appears to be another independent medical evaluation of December 5, 2003, authored by Dr. Bruce Schlafly.

At the hearing before the administrative law judge, employee's counsel argued that the contents of Exhibit 5 are admissible because Dr. Berkin discussed them and was cross-examined with regard to them at his deposition. We have carefully reviewed Dr. Berkin's deposition, and we find no reference to any independent medical evaluations by Drs. Nogalski or Schlafly. His report also contains no indication that he reviewed any independent medical evaluations by these doctors.

Employee: Stephen Barkley

- 2 -

On the other hand, employee's vocational expert, James Israel, does appear to have reviewed a July 10, 2001, report from Dr. Nogalski and a December 5, 2003, report from Dr. Schlafly. It may be argued that the contents of Exhibit 5 are thus marginally relevant to show what information Mr. Israel had available to him, but after careful consideration, we are not persuaded. Employee presented expert medical testimony from Dr. Shawn Berkin, who took a history as to employee's preexisting disabling conditions, physically examined employee, and also reviewed the settlements employee reached in connection with his prior work injuries. As a result, we deem the contents of Exhibit 5 to be largely cumulative of Dr. Berkin's opinions and ultimately irrelevant and unnecessary to a disposition of this claim. Accordingly, we hereby sustain the Second Injury Fund's objection to Exhibit 5 on this basis. Exhibit 5 is not admitted into the record in this matter.

Second Injury Fund liability

The Second Injury Fund argues that with its exhibits admitted and employee's Exhibit 5 excluded, the record compels a different result. Although it is true that there is evidence in the record that could support a different result, after careful consideration, we are not persuaded to disturb the administrative law judge's (implied) finding that employee's testimony at the hearing was credible. We also agree with the administrative law judge's finding that the unanimous (and uncontested) opinions from employee's experts Dr. Berkin and Mr. Israel persuasively establish that employee is permanently and totally disabled as a result of the effects of his work injury in combination with his preexisting conditions of ill-being. We so find.

Corrections

In the third sentence of the seventh paragraph on page four of his award, the administrative law judge indicates: "Mr. England interviewed Claimant, conducted vocational testing and reviewed the medical record." We hereby correct the foregoing to read instead as follows: "Mr. Israel interviewed employee, conducted vocational testing and reviewed the medical record."

Additionally, we note that in the section of the award on pages 5 and 6 analyzing liability of the Second Injury Fund, the administrative law judge discusses the concept of synergy, which implies he deemed a showing of synergy necessary for purposes of employee's claim for permanent total disability benefits from the Second Injury Fund. While we do not disagree with the administrative law judge's finding that employee's disabilities affecting all four of his major extremities interact in a synergistic fashion, we note that a finding of synergy is not necessary to demonstrate Second Injury Fund liability for permanent total disability benefits. See *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 157 (Mo. App. 2014). Instead, the relevant question is simply whether the primary and preexisting disabilities combine to render the employee permanently and totally disabled.

Because the administrative law judge, in his conclusion, appears to have ultimately applied this proper test, and because we are not persuaded to disturb the administrative law judge's award of permanent total disability benefits from the Second Injury Fund, we discern no need to further supplement his analysis.

Employee: Stephen Barkley

- 3 -

Conclusion

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

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 28, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We 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.

Given at Jefferson City, State of Missouri, this 14th day of January 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Stephen Barkley

Injury No.: 04-073701

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Daimler-Chrysler Corporation (settled)

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

Additional Party: Second Injury Fund

Insurer: Old Carco, LLC

Hearing Date: February 24, 2015

Checked by: JED

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: July 26, 2004
5. State location where accident occurred or occupational disease contracted: St. Louis County
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? N/A
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Employee was ejected from moving motor vehicle.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Parts of body injured by accident or occupational disease: right lower extremity, right shoulder, left knee
14. Nature and extent of any permanent disability: 50% PPD of right ankle, 25% PPD right shoulder, 10% PPD of left knee; PTD against SIF.
15. Compensation paid to-date for temporary disability: \$15,062.91
16. Value necessary medical aid paid to date by employer/insurer? \$73,491.26

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$675.90 TTD/ \$354.05 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

100 weeks of permanent partial disability from Employer	(settled)
---	-----------

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential (\$321.85) payable by SIF for 151.5 weeks beginning June 2, 2008 and, thereafter, \$675.90 for Claimant's lifetime	Indeterminate
---	---------------

TOTAL:	INDETERMINATE
--------	---------------

23. Future requirements awarded: Unknown

Said payments to begin immediately 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Thomas M. Burke

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Stephen Barkley	Injury No.: 04-073701
Dependents:	N/A	Before the
Employer:	Daimler-Chrysler Corporation (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Old Carco, LLC	Department of Labor and Industrial
Hearing Date:	February 24, 2015	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED

This case involves right ankle, right shoulder and left knee injuries resulting to Claimant with the reported accident date of July 26, 2004. Employer/Insurer previously settled its risk of liability. Both parties are represented by counsel. The single issue for trial is the liability of the Second Injury Fund ("SIF"). Claimant seeks permanent total disability benefits. Claimant's objections to the SIF's Exhibits I and II are sustained.

FINDINGS OF FACT

Claimant was employed in the metal shop for Employer beginning in 1973. He became an inspector but switched to operating a forklift due to problems with his hands and knees. This change in jobs allowed him to continue working full-time and over-time. Claimant last worked for Employer in 2005.

Claimant sustained right ankle, right shoulder and left knee injuries as a result of being ejected from a moving motor vehicle during a turn at the assembly plant. He fell on his left side. Claimant underwent surgery with Dr. Richard Hulsey for repair of trimalleolar fractures which required internal fixation. Prognosis included slow healing of fractures due to diabetes. Revision surgery to the right ankle occurred on November 1, 2004 requiring internal fixation and bone graft. Degenerative changes of the talonavicular joint were noted. In April, persistent swelling was noted on the right lower extremity to the level of the knee due to the trauma and diabetes. Further studies revealed bilateral inguinal lymphadenopathy and bilateral moderate osteoarthritis of the hips with joint effusions. He was, among other things, placed on Coumadin.

Claimant's right shoulder was diagnosed with a torn rotator cuff which was not operated but for which Claimant received multiple injections. Dr. Hulsey noted right shoulder symptoms could be due in part to use of a walker in recovery. Radiology revealed moderate osteoarthritis of the AC joint and mild arthritis of the GH joint.

Dr. Hulsey found Claimant attained maximum medical improvement on June 2, 2008. Claimant was unable to return to work on a permanent basis because of his inability to walk about without pain and swelling in his right ankle and his inability to lift above shoulder height. Claimant took early retirement. Claimant continues to have disabling right ankle pain and swelling, bilateral knee pain that increases with activity and right shoulder symptoms that disturb his sleep and severely limited lifting.

Pre-Existing Conditions

In 1998, Claimant injured his knees during a fall at work. Claimant settled his case for 5% PPD of each knee (Exhibit 3). Claimant testified that his knee pain slowed his productivity and reduced his tolerance in the metal shop warranting him to take the forklift job. In 2001, Dr. Nogalski also diagnosed osteoarthritis of the left hip with referred pain to the clinically normal left knee (Exhibit 5).

In 2001, Claimant underwent both bilateral elbow surgeries for cubital tunnel syndrome and bilateral carpal tunnel releases. Claimant apparently settled his case for 22.5% PPD of each wrist and 20% PPD of the left elbow and 22.5 % PPD of the right elbow (Exhibit 8, *Deposition Ex. B, p. 7*). Claimant testified that the intense work of the metal shop also warranted a move to the forklift job.

Claimant is unable to return to working due to the cumulative orthopedic problems of his four extremities combined with the primary injuries. His typical day involves minimal chores with no lifting and watching television.

Opinion Evidence

Claimant offered the deposition and narrative reports of Dr. Shawn Berkin as Exhibit 8. Dr. Berkin reviewed the medical record and examined Claimant. He provided follow-up reports. Records review revealed serious prior injuries described above. Physical examination was consistent with the medical records and the multiple surgeries to the various body parts. Dr. Berkin assigned a 25% PPD to the right shoulder, 45% PPD of the right ankle and 25% PPD of the right hip due to the primary injury. He further assigned preexisting PPD including 25% PPD of each elbow, 30% PPD of each wrist and 12.5 % PPD of each knee.

Dr. Berkin further opined that Claimant is unable to obtain or maintain gainful employment. Dr. Berkin opined that Claimant is permanently totally disabled as a result of the combination of the primary injuries in combination with his preexisting medical conditions. His testimony was persuasive and un rebutted.

Claimant offered the deposition of James Israel, a licensed rehabilitation counselor, as Exhibit 7. On July 2, 2013, Claimant was evaluated by Mr. Israel,. He evaluated Claimant's employability in the open labor market. Mr. England interviewed Claimant, conducted vocational testing and reviewed the medical record. He found limited transferable skills useful

only in work closely related to Claimant automotive experience. He noted severe physical limitations as well. Mr. Israel concluded that because of Claimant's problems in combination with one another, Claimant is unlikely to sustain any substantial gainful or full-time employment. Mr. Israel's testimony was persuasive and unrebutted.

RULINGS OF LAW

Nature and Extent of Permanent Disability

Claimant credibly testified that he had continuous pain with accompanying limitations primary and pre-existing injuries. Claimant offered unrebutted expert testimony that he is unemployable. His attempt to return to work was unsuccessful. The prior surgeries and diagnoses are undisputed in the record. The record supports a finding that Claimant demonstrated an overall 50% PPD of the right ankle, 25% PPD of the right shoulder and 10% PPD of the left knee as a result of the primary injury. Claimant had significant preexisting disability of the upper and lower extremities which, in addition to the undiminished value contained in prior WC settlements, include very significant PPD of the hips as evidenced by radiological studies revealing moderate osteoarthritis bilaterally.

Claimant's assertion of permanent total disability is supported by the injuries and preexisting injuries that were noted. Section 287.020.6 RSMo (2005) defines total disability as the "... inability to return to any employment and not merely... [the] inability to return to the employment in which the employee was engaged at the time of the accident." The words "inability to return to any employment" have been construed to mean "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." See Kowalski v. M-G Metals and Sales, Inc. 631 S.W.2d 919,922 (Mo. App. 1982)(*analyzing the same language*). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet the statutory definition." Id. at 922.

In addition, the record supports a finding that, while working as a forklift operator prior to the reported injury, Claimant exhibited serious pre-existing injuries to his elbows, wrists and knees. His productivity diminished over the years forcing him to change jobs from the metal shop to the forklift job sometime after 2001. Supported by a record of disability, Dr. Berkin found Claimant permanently and totally disabled. Mr. Israel found Claimant unemployable. On this basis, Claimant cannot be reasonably expected to perform regular hours in any line of work on a full-time basis. The medical record was undisputed and the medical opinions were unrebutted and unimpeached.

Liability of the Second Injury Fund

The liability of the Second Injury Fund is set out in Section 287.220 RSMo (2000). SIF liability is premised on synergistic combination of the primary and pre-existing disabilities. Synergy is the concept in which the current PPD and the pre-existing PPD are found, in

combination, to create a “substantially greater” disability, or an increased overall disability, for which the employer should not be held liable. The medical evidence and other evidence suggest Claimant’s disabilities found herein are a hindrances and obstacles to reemployment. Here, Claimant’s primary injuries and prior extremity disabilities constitute multiple deficits, including opposing extremity deficits, that belie any strength or stability for physically demanding work. Further, common *upper body-lower body* synergy is appreciated by serious injury to each upper extremity in combination with the primary injuries preventing virtually any compensatory body mechanics.

Conclusion

Accordingly, on the basis of substantial and competent evidence contained within the whole record, Claimant is found to have sustained a 50% PPD of the right ankle, 25% PPD of the right shoulder and 10% PPD of the left knee as a result of the primary injury. In addition, Claimant is found to have sustained permanent total disability as a result of the combination of the primary injury with the preexisting disabilities described. The SIF is liable for the differential between the PTD rate and the PPD rate for the period of PPD installment and, thereafter, for Claimant’s lifetime, or until Claimant is no longer permanently and totally disabled. Section 287.200.1 RSMo (2000).

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge