

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

Injury No.: 07-132545

Employee: Steven Bay
Employer: Bays Window & Siding
Insurer: Selective Insurance Company of South Carolina
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. We have read the briefs, reviewed the evidence, and considered the whole record. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Introduction

The administrative law judge denied employee's claims for future medical treatment from the employer and permanent total disability and permanent partial disability benefits from the Second Injury Fund. Employee filed a timely Application for Review arguing the administrative law judge erred in failing to award either permanent partial or permanent total disability benefits from the Second Injury Fund. We agree with the administrative law judge that employee failed to meet his burden of proving that he is entitled to compensation from the Second Injury Fund, but because we wish to make additional findings and comments, we write this supplemental opinion.

Accordingly, we adopt and affirm the decision of the administrative law judge to the extent it is not inconsistent with our findings, analysis, and conclusions herein.

Discussion

Second Injury Fund liability

Employee argues he is permanently and totally disabled owing to a combination of the effects of his primary injury and his preexisting conditions of ill. We agree with the administrative law judge that Mr. Lalk is more credible than Mr. Israel on the subject whether employee is permanently and totally disabled. Mr. Lalk identified a number of jobs within employee's physical restrictions and skill range that would allow him to sit, stand, and move throughout the day, such as a cashier in a self-service or convenience store, a desk clerk in a motel or rental store, an unarmed security guard or information clerk, and a variety of customer service representative positions. Mr. Lalk explained that employee's age does not limit his access to the labor market because people of employee's age and background routinely enter such jobs as secondary careers.

Mr. Lalk appeared to us to be more confident in his position. He did not back away from his opinions on cross-examination but rather thoroughly explained them. We find Mr. Lalk

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credible. We find that employee is not permanently and totally disabled. It follows that the Second Injury Fund is not liable to employee for permanent total disability benefits.

We turn now to the question whether the Second Injury Fund is liable for permanent partial disability benefits owing to any synergistic combination of employee's preexisting conditions of ill and the effects of the primary injury. Employee argues that both Dr. Poetz and Dr. Chabot opined that employee suffered preexisting permanent partial disability referable to the spine. Dr. Poetz did testify that employee suffered a preexisting 5% permanent partial disability of the cervical spine at the time of the primary injury. Dr. Chabot assigned permanent partial disability ratings to employee's cervical and thoracic spine conditions, but his testimony is temporally nonspecific; it is unclear whether the doctor was talking about employee's condition after the June 2008 surgery and subsequent maximum medical improvement, or before the work injury, or some other time. For purposes of § 287.220.1 RSMo, we are concerned only with the extent of preexisting permanent partial disability "at the time the last injury was sustained." When we turn to employee's own testimony, we find little indication that employee's preexisting cervical or thoracic spine conditions interfered with his work.

Ultimately, we find Dr. Poetz's rating to be reasonable and find that employee suffered a 5% preexisting permanent partial disability of the body as a whole referable to the cervical spine at the time the last injury was sustained.

As to employee's hearing loss, we note that employee failed to provide any expert medical evidence that would help us to determine the extent of this preexisting disabling condition. Normally, the determination of the extent of permanent disability referable to a given injury or condition is within our special province, and expert medical testimony is unnecessary. See *Murphy v. W.J. Lynch Co.*, 57 S.W.2d 685 (Mo. App. 1933); *Bock v. City of Columbia*, 274 S.W.3d 555 (Mo. App. 2008). But determining the extent of disability referable to hearing loss is a complex task that requires consideration of several factors and the application of mathematical formulas set forth in § 287.197 RSMo. See *Thatcher v. TWA*, 69 S.W.3d 533, 536 (Mo. App. 2002). Section 287.197.4 RSMo provides the criteria for measuring disability referable to hearing loss and provides, as follows:

In measuring hearing disability, the lowest measured losses in each of the three frequencies shall be added together and divided by three to determine the average decibel loss. For every decibel of loss exceeding twenty-six decibels an allowance of one and one-half percent shall be made up to the maximum of one hundred percent which is reached at ninety-two decibels.

In his brief, employee argues persuasively that his preexisting hearing loss was disabling, but fails to identify (or direct us to evidence that would allow us to identify) his lowest measured losses at each of the three relevant frequencies. On our own search of the medical records, we were able to locate a pure tone audiometry test result from Midwest Otologic Group dated February 2, 2005, but this document does not clearly provide the required information; the numbers set forth in the charts are paired with unexplained acronyms that prevent us from determining their import. Employee fails, in his brief, to discuss this document or suggest an interpretation of the information contained within it.

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For the same reasons, our review of the March 31, 2004, pure tone audiogram results from the Center for Hearing and Balance Disorders is unenlightening.

Faced with this essentially indecipherable medical evidence, with no suggestion from employee how to proceed, and in the absence of any testimony from an expert on the question, we find that we are unable to perform the calculations required for measuring hearing disability under § 287.197.4. Compounding these problems, the record suggests employee's hearing loss worsened over time (employee told Mr. Lalk that his hearing was worse when he met with him than it was in 2007), so the audiogram results from 2004 and 2005 may not even provide an accurate picture of the degree of hearing loss employee suffered at the time the last injury was sustained. Once again we are faced with the temporal specificity problems we identified above with respect to Dr. Chabot's testimony.

Given these circumstances, we are not confident that we can determine the percentage of disability referable to employee's hearing loss at the time the last injury was sustained. We conclude, therefore, that employee has failed to satisfy his burden of proof as to the extent of preexisting permanent partial disability referable to hearing loss.

The disability referable to employee's preexisting cervical spine complaints at the time of the work injury amounts to 20 weeks. This is insufficient to meet the applicable 50-week threshold for triggering Second Injury Fund liability under § 287.220.1 RSMo. We conclude, therefore, that the Second Injury Fund is not liable for permanent partial disability enhancement benefits.

Conclusion

The Commission supplements the award and decision of the administrative law judge with our own analysis herein.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued April 18, 2011, is affirmed and attached hereto and incorporated herein to the extent it is not inconsistent with this supplemental opinion.

Given at Jefferson City, State of Missouri, this 21st day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary