

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

Injury No.: 08-035353

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 benefits from the Second Injury Fund on a finding employee failed to prove he sustained a compensable injury. Employee filed a timely Application for Review arguing the administrative law judge erred in failing to find the Second Injury Fund liable for benefits. We agree with the administrative law judge that employee failed to meet his burden of proving he sustained a compensable primary injury, 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

Employee failed to prove he sustained a primary injury

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a threshold matter, employee must show that he sustained a compensable primary injury resulting in permanent disability, or there is no basis for invoking § 287.220.

The alleged date of injury is April 28, 2008. At the hearing, employee was asked to explain the significance of this date. Employee testified that April 28, 2008, was the day he felt that his injuries were worse than he was letting himself understand or believe. Employee did not specify any complaints or clearly identify any part of his body which was bothering him but rather appeared to be talking about his overall physical condition. Employee suggested that he believed his condition was gradually getting worse and worse after a traumatic injury he suffered in July 2007. Employee alluded to a piece of equipment that he felt unable to move on that day, but stopped short at identifying any

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specific traumatic incident. Employee testified he filed a claim for compensation because he thought his body had just given out.

The Missouri Workers' Compensation Law provides for compensation for injuries that result from workplace accidents or occupational disease. Section 287.020.2 RSMo defines an "accident", as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Given the foregoing definition, it is apparent that employee did not sustain an accident on April 28, 2008. Employee alleges that his body "gave out," but we find that this does not amount to objective symptoms of an injury caused by a specific event, because employee fails to identify any unexpected traumatic event or unusual strain. Rather, he alleges that, while trying to move a piece of equipment, he experienced the realization or feeling that he would be unable to do such work. According to employee's testimony, the significance of April 28, 2008, is that he came to understand on that day that his physical condition was worse than he had believed. A subjective realization or feeling that one's physical condition is worse than previously believed does not fairly come within the terms of the statute set forth above. We conclude, therefore, that employee did not sustain a compensable primary injury by accident.

The question remains whether employee sustained a compensable injury by occupational disease. Section 287.067.2 RSMo provides, as follows:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

There is no expert medical testimony on this record that would suggest any occupational exposure was the prevailing factor causing employee to sustain an injury as of April 2008. Dr. Poetz, employee's expert, did not identify any occupational exposure, nor did he suggest employee's work caused him to sustain a gradual onset or repetitive motion injury. Rather, Dr. Poetz agreed that he believed an "incident" occurred on April 28, 2008. We note that, in his report, Dr. Poetz assigned a 15% permanent partial disability to the body as a whole as measured at the lumbar spine "directly resultant from the April 28, 2008 work related injury." We also note that, in his testimony, Dr. Poetz essentially admitted that he either couldn't remember or didn't know what was alleged to have occurred on April 28, 2008. In response to a question by employer's counsel which suggested employee alleged a "popping" injury in his thoracic spine on that date, Dr. Poetz testified he thought that was the July 2007 event.

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Ultimately, it is unclear to us what Dr. Poetz believed occurred on April 28, 2008. As a result, we are not convinced that Dr. Poetz had a sufficient factual basis upon which to render his rating and causation opinions in this matter. To the extent employee asks us to accept Dr. Poetz's testimony that, on April 28, 2008, some unknown event or the culmination of some unknown occupational exposure was the prevailing factor causing employee to sustain a lumbar spine injury, we find Dr. Poetz lacking credibility.

We conclude that any occupational exposure to which employee was subjected was not the prevailing factor causing him to sustain any medical condition or disability. It follows that employee has failed to prove that he sustained a compensable injury by occupational disease.

Because employee has failed to prove he sustained a compensable primary injury in this matter, there is no basis for invoking Second Injury Fund liability. Accordingly, we affirm the award of the administrative law judge denying employee's claim against the Second Injury Fund.

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