

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

Injury No.: 08-120375

Employee: Robert Bollinger
Employer: The Education Institute (Settled)
Insurer: Travelers Commercial Casualty (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. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the 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 modifications set forth below.

Discussion

On September 16, 2008, employee sustained a compensable right knee injury when he slipped and fell while working for employer. He settled his claim against the employer and proceeded to a hearing before an administrative law judge on his claim against the Second Injury Fund. The administrative law judge found that employee is entitled to 20.24 weeks of enhanced permanent partial disability benefits from the Second Injury Fund. The Second Injury Fund filed a timely Application for Review with the Commission. The Second Injury Fund alleges, among other things, that the administrative law judge erred in including employee's preexisting diabetes in her calculation of Second Injury Fund liability. The Second Injury Fund points out the administrative law judge specifically found that employee's preexisting diabetes was not a hindrance or obstacle to employment at the time of the primary injury on September 16, 2008. The administrative law judge provided the following rationale for so finding:

Although Claimant indicated that his diabetes is now out of control, such was not the case at the time of the last or primary injury. ... The testimony of Claimant and his spouse indicate that any problems with diabetes or diabetic neuropathy were minimal, consisting of an infrequent need to sip some juice to correct Claimant's blood sugar level.

Award, page 7.

We believe the administrative law judge inappropriately analyzed the question whether employee's diabetes constituted a hindrance or obstacle to employment. The courts have consistently instructed that the question whether a preexisting condition constitutes a hindrance or obstacle to employment does not turn on the degree of difficulty which the condition caused the employee in the past:

Many occupations can be ably performed by workers with one eye or one arm. In such cases, the condition may not cause the employee to miss any work or otherwise diminish his earning power. The condition becomes disabling only when combined with a further injury. It is the potential for those more serious combinations of injury and previous condition that gives rise to the employer's

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incentive to discriminate in the absence of a Second Injury Fund. Thus, a requirement that the condition be shown to have caused the employee to have missed work or suffer diminished earnings prior to the injury which combines with the condition to render the employee disabled is inconsistent with the purpose of the Fund. In many instances, the effect would be to deny the protection of the Fund to those most in need of it.

If the Second Injury Fund is to fulfill its acknowledged purpose, the proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the *potential* that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed.

Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo. App. 1995) (emphasis in original).

The foregoing "potential to combine" standard has been consistently cited by the courts to determine whether a preexisting condition constitutes a hindrance or obstacle to employment. See *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007); *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 371 (Mo. App. 2005); *E.W. v. Kan. City Sch. Dist.*, 89 S.W.3d 527, 538 (Mo. App. 2002); and *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997). Nevertheless, the misperception continues that an employee's failure to provide evidence that a preexisting condition caused difficulty in the past means that the employee has failed to prove the condition was a hindrance or obstacle to employment.

Evidence that a preexisting condition affected an employee's earning potential before the work injury is certainly relevant to the question whether employee suffered from a preexisting permanent partial disability; this, of course, is a related but separate requirement for establishing Second Injury Fund liability under § 287.220 RSMo. It appears that much of the confusion in this area stems from the regular conflation of these two distinct concepts. Here, the administrative law judge found that employee's diabetes *did* amount to a preexisting permanent partial disability to the extent of 10% of the body as a whole—but then cited the fact employee's diabetes was controlled by sipping some juice as evidence for finding employee's diabetes *did not* constitute a hindrance or obstacle to employment at the time of the primary injury.

We disagree with the administrative law judge's conclusion that employee's diabetes did not constitute a hindrance or obstacle to employment. When we apply the appropriate standard, as identified in *Wuebbeling* and consistently reaffirmed by the courts, we conclude that employee's preexisting diabetes amounted to a hindrance or obstacle to employment at the time he sustained the primary injury. This is because we are convinced a cautious employer could reasonably perceive employee's diabetes as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition.

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As Dr. Shuter pointed out, employee's diabetes negatively impacted his treatment for the primary injury, leading to delays in December 2008 while treating doctors tried to get his diabetes under control. This case thus fittingly illustrates the concept expressed by the *Wuebbeling* court: a prospective employer considering whether to hire employee could reasonably anticipate that employee's diabetes, while under control at the date of hire, may—as actually happened here—hamper employee's ability to recover from a subsequent work injury, and thus (in the absence of the Second Injury Fund) expose the prospective employer to more liability than otherwise would have resulted from the work injury. It follows that employee's diabetes is precisely the sort of preexisting condition the legislature had in mind when the Second Injury Fund was created.

Accordingly, we modify the analysis of the administrative law judge on the question of Second Injury Fund liability as follows. We conclude employee's preexisting diabetes was a hindrance or obstacle to employment for purposes of § 287.220 RSMo.

Award

We modify the analysis of the administrative law judge on the question of Second Injury Fund liability. We conclude employee's preexisting diabetes was a hindrance or obstacle to employment at the time of the primary injury on September 16, 2008.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued February 2, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 27th day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Robert Bollinger

Injury No. 08-120375

Dependents: N/A

Employer: The Education Institute (settled)

Additional Party: Treasurer of the State of Missouri
as custodian of The Second Injury Fund

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Travelers Commercial Casualty (settled)

Hearing Date: December 14, 2011

Reviewed by: VRM/ps

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, 2008.
5. State location where accident occurred or occupational disease was contracted: Battlefield, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee slipped on water and sustained an injury to his right knee.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right knee.
14. Nature and extent of any permanent disability: 39 percent of the right knee and enhanced permanent partial disability as against the Second Injury Fund.
15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? Not Applicable.
18. Employee's average weekly wages: Sufficient to yield the following rate of compensation.
19. Weekly compensation rate: \$240.44 for all purposes.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled as to Employer/Insurer.
22. Second Injury Fund liability: Yes – permanent partial disability.

Disability from the primary injury to the knee = 62.40 weeks
(39 percent x 160 weeks)

Preexisting disability for chronic depression = 100 weeks
(25 percent x 400 weeks)

Preexisting disability for diabetes, including neuropathy = 40 weeks
(10 percent x 400 weeks)

Simple Sum = 202.40

Multiplied by 10 percent loading factor (202.40 x 10) = 20.24 weeks

20.24 weeks x weekly benefit rate of \$240.44 =

TOTAL: \$4,866.51.

23. Future requirements awarded: None

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: Jerry A. Klein.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Bollinger

Injury No. 08-120375

Dependents: N/A

Employer: The Education Institute (settled)

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of the State of Missouri
as custodian of The Second Injury Fund

Insurer: Travelers Commercial Casualty (settled)

Hearing Date: December 14, 2011

Reviewed by: VRM/ps

INTRODUCTION

The parties appeared before the undersigned Administrative Law Judge on December 14, 2011, in Springfield, Missouri, for a final hearing to determine the liability of the Second Injury Fund. Attorney Jerry A. Klein represented Robert Bollinger (Claimant). Assistant Attorney General Barbara Bean represented the Second Injury Fund. The Education Institute (Employer), and Travelers Commercial Casualty (Insurer) previously settled with Claimant. Mr. Klein requested a 25 percent fee. The parties stipulated to the following:

STIPULATIONS

Claimant sustained an accidental injury arising out of and in the course of his employment on September 16, 2008. The injury occurred in Battlefield, Missouri. Venue and jurisdiction are appropriate. On the injury date, Claimant was an employee of The Education Institute, a fully insured entity. Both Employer and Claimant were subject to and covered by the Missouri Workers' Compensation Law. Employer received proper notice of the claim. The claim was filed timely. The applicable rate of compensation is \$240.44 for both permanent partial disability and temporary total disability. Employer/Insurer paid no temporary total disability benefits and no medical benefits. The sole issue for this hearing is whether the Second Injury Fund has any liability for enhanced permanent partial disability.

EXHIBITS

Only Claimant offered exhibits. The following exhibits were admitted:

- A. Amended Claim for Compensation
- B. Report of Injury
- C. Notice Receipt – March 3, 2009
- D. Stipulation for Compromise Settlement
- E – F. Medical Records – Various Providers
- G. Deposition – Dr. Eli Shuter, with Reports and Curriculum Vitae

FINDINGS OF FACT¹

Claimant and his wife testified live. Their testimonies are found credible. Claimant worked for Employer as a cook and dishwasher for a learning institution. He described his work as a very physically demanding job, requiring that he always be on his feet and moving. His duties included preparing meals for 120 children and staff and regularly cleaning dishes and the kitchen.

On September 16, 2008, Claimant slipped on water on the floor at work. He lost his balance and injured his right knee, tearing the medial meniscus. He obtained medical care, as delineated in Exhibit E. Claimant explained that he never was able to obtain surgery for his knee, partially because of his weight and diabetes. Claimant had never hurt his knee in the past. Now he experiences pain in the right knee, impaired balance, right knee effusion, diminished strength, and diminished range of flexion from the last work injury. He takes over-the-counter medications such as ibuprofen and Tylenol most days to cope with the discomfort.

As a result of the knee injury, Claimant no longer can fish or participate in recreational activities such as hiking, swimming, bowling, or playing ball. He is unable to stand on his feet for long periods of time. He is unable to kneel. Claimant's spouse, Lisa Bollinger, substantiated that Claimant was able to perform his job duties prior to the last accident, and did not miss work. Now Claimant has had to change jobs. While the vast amount of Claimant's work has been in food service or sales, which he no longer can perform due to its physical demands, he now works with his wife as a house parent at a residential care facility for troubled youth.

Stipulation for Compromise Settlement

Claimant settled the primary claim with Employer/Insurer for 39 percent permanent partial disability to the right knee. Given the medical records reviewed and testimony of Claimant and his spouse, I find that the stipulation accurately portrays the degree of permanent disability resulting from the last work injury.

Preexisting Disabilities

Depression – Claimant had suffered depression for several years prior to the last work injury, first being diagnosed in 2001. He was hospitalized in 2001 for suicidal ideation for a period of four to six weeks. This was between jobs. He again was hospitalized in 2002 after a suicide attempt by drug overdose. The diagnosis at that time included suicidal ideation with bipolar disorder and aspirin overdose. Claimant has taken antidepressants for several years as a result of his depression. He indicated that the medication helps control his depression.

Diabetes – Claimant was diagnosed with diabetes prior to the last work injury. Initially, he was treated with diet and medication. He later was switched to insulin, which he now takes twice each day. Claimant explained that since the work injury his diabetes has been out of control. The

¹ Only evidence necessary to support this Award is summarized. Objections not expressly addressed at the hearing or in this Award are not overruled. To the extent there are marks or highlights contained in the exhibits, they were placed there prior to the exhibit's admission, and were not made by Administrative Law Judge. Further, any such markings had no impact on any rulings made in this case.

inactivity because of the knee injury has contributed to a rise in his hemoglobin. Claimant is approximately 5' 10" and weighs more than 300 pounds. He believed he has gained weight due to his inactivity following the right knee injury.

On cross-examination by the Second Injury Fund, Claimant was asked how the diabetes affected his work prior to the last accident. Claimant responded that other than having to go the bathroom more often, it had no impact on his ability to perform all of his job duties. He mentioned that he had some neuropathy, but he still was able to stand to perform his physically demanding job duties. That was not just in the last job, but in each of his prior jobs. These jobs had been as a cashier, as a sales person, and in food service.

Claimant's wife, Elisa Bollinger, described a couple of incidents prior to the last work injury in which Claimant's blood sugar dropped significantly low. Because Claimant's wife worked at the same facility, she was called from the classroom to assist her husband in recovering from his low blood sugar. After sitting and drinking some juice for 15 to 20 minutes, Claimant would resume his work duties. Mrs. Bollinger agreed that Claimant never missed any work from his job or had any difficulty performing his job duties, despite his diabetic condition.

Medical Opinion

Dr. Eli R. Shuter examined Claimant, took a history, and issued reports. He found that Claimant suffered a work-related accident resulting in injury to his right knee. He assigned a permanent partial disability of 55 percent to the right lower extremity at the knee (160 week level). This equals 88 weeks of disability.

With respect to Claimant's preexisting conditions, Dr. Shuter did not specifically rate Claimant as having a disability due to diabetes. Rather, he said Claimant suffered a 20 percent permanent partial disability to the body as a whole due to the "diabetic neuropathy." He also rated Claimant as having a 25 percent permanent partial disability due to preexisting chronic depression. He opined that both of these conditions were hindrances or obstacles to employment and combined synergistically with the disability from the primary or last injury.

Dr. Shuter believed Claimant's diabetic neuropathy caused burning and a lack of sensation in the feet, which would have been a hindrance or obstacle to employment. When asked about his work as a cook and spending time on his feet each day, Dr. Shuter responded that Claimant failed to discuss with him what proportion of his day was spent on his feet leading up to the knee injury. Dr. Shuter admitted that Claimant gave him no information about needing unscheduled breaks or special accommodations due to the neuropathy of the feet. Claimant did not tell Dr. Shuter that he missed work because of his diabetes. Dr. Shuter did not know when Claimant started taking insulin as opposed to oral medication.

Dr. Shuter also did not have a history of Claimant having missed work because of problems relating to depression leading up to the knee injury. Dr. Shuter speculated, however, that the depression could have accounted for Claimant's frequent moves or job changes.

Credibility Finding

As stated at the outset, I find the testimonies of Claimant and his wife credible. Their testimonies contrast with the opinion of Dr. Shuter as to the degree of disability referable to the diabetic neuropathy. Given that Claimant spent significant amounts of time on his feet performing a job which he described as physically demanding, I find that Dr. Shuter's rating of 20 percent is inflated. Dr. Shuter made this rating without any history as to how much time Claimant spent on his feet on his job. For this same reason, I do not find credible Dr. Shuter's opinion that the diabetic neuropathy was a hindrance or obstacle to employment or reemployment. While Claimant certainly has a preexisting disability attributable to diabetes, I find that Claimant's disability from the diabetes, including his neuropathy, is 10 percent of the body as a whole.

I accept as credible, however, Dr. Shuter's opinions regarding Claimant's chronic depression. While Dr. Shuter did not have specific evidence of Claimant having missed work due to depression, it is apparent that repeated hospitalizations of substantial periods of time could be a hindrance or obstacle to employment or reemployment. Given the severity of Claimant's mental problems, I find the 25 percent permanent partial disability to the body as a whole to be reasonable.

As to the primary injury, I already have found that the stipulation for compromise settlement more accurately reflects the degree of disability from the primary injury. I agree with Dr. Shuter that the primary injury to Claimant's knee, as well as the preexisting chronic depression, causing repeated hospitalizations, to be hindrances or obstacles to employment or reemployment. I also agree with Dr. Shuter's opinion that these disabilities combined synergistically to create greater disability than their simple sum.

CONCLUSIONS OF LAW

A claimant in a Workers' Compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008). To recover against the Second Injury Fund, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. § 287.220.1, RSMo. A claimant also must prove that he had a preexisting permanent partial disability, whether from a compensable injury or otherwise, that (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15 percent for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. E.D. 2008). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with one or more preexisting permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). Claimant has met the burden imposed by law.

The primary injury to Claimant's knee is significant. The percentage of disability set forth in the stipulation (39 percent at the 160 week level or 62.40 weeks) meets the percentage threshold set

out in § 287.220.1, RSMo. Claimant's testimony clearly demonstrates how the injury has adversely affected his life and job choices. The knee disability is a hindrance or obstacle to employment.

Claimant's depression was sufficiently severe to constitute a hindrance or obstacle to work. Certainly, the need for repeated inpatient hospitalizations demonstrates the *potential* to affect one's employment. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. E.D. 1995) (noting that the focus is to be on the *potential* that a preexisting condition may have on future employment and not just on the impact it has had in the past). The 25 percent permanent partial disability rating of Dr. Shuter also would meet the threshold set out in § 287.220.1, RSMo.

The simple sum of the disability from the preexisting chronic depression (100 weeks of disability) and the primary injury to the knee (62.40 weeks of disability) is 162.40 weeks of disability. I accept Dr. Shuter's opinion that these disabilities combine synergistically.

The Second Injury Fund argues that the Claimant's preexisting disability from his diabetes was not a hindrance or obstacle to employment or reemployment. I agree. For these reasons set forth in the above Findings of Fact, I have found, and now conclude, that Claimant's diabetes, as of the date of the last injury, was not sufficiently severe as to constitute a hindrance or obstacle to employment or reemployment. I have assigned a 10 percent permanent partial disability for the diabetes, including the neuropathy.

Although Claimant indicated that his diabetes is now out of control, such was not the case at the time of the last or primary injury. The Second Injury Fund has no liability for the deterioration of a preexisting condition. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793-94 (Mo. App. S.D. 1992). The testimony of Claimant and his spouse indicate that any problems with diabetes or diabetic neuropathy were minimal, consisting of an infrequent need to sip some juice to correct Claimant's blood sugar level.

Despite my finding and conclusion that the diabetes, including diabetic neuropathy, does not meet the statutory percentage threshold set forth in § 287.120.1, RSMo, and is not a hindrance or obstacle to employment or reemployment, I am cognizant that the Labor and Industrial Relations Commission has held that such condition still must be included in the calculation of the Fund's liability if the thresholds otherwise have been met. In other words, even if one of a worker's preexisting disabilities considered in isolation fails to meet one of the thresholds described in §287.220.1, RSMo, that condition should not be ignored for all purposes when considering the liability of the Second Injury Fund. See *e.g.*, *Larry D. Calvert v. Noranda Aluminum, Inc. & Treasurer*, Injury No. 03-077312 (Dec. 12, 2011); *Burlinger v. Treasurer*, Injury No. 08-072563 (Dec. 8, 2011); *Richards v. Treasurer*, Injury No. 08-121450 (Dec. 8, 2011); *Turner v. The Boeing Co. & Treasurer*, Injury No. 07-051333 (Dec. 8, 2011).² While this interpretation appears to be a substantial departure of the interpretation previously given the statute, the Commission's rationale is based on a strict interpretation, as required by § 287.800 RSMo Cum. Supp. 2005. Absent a contrary opinion of the Missouri Court of Appeals, I defer to the interpretation provided by the Commission.

² A review of the official records of the Division of Workers' Compensation reveals that each of the cases has been appealed to the Missouri Court of Appeals.

Claimant, Robert G. Bollinger, Jr., had more than a single preexisting, disabling condition. The thresholds were met with respect to the primary injury to the knee and the preexisting disability for the chronic depression. The simple sum of these two disabilities, as noted above, is 162.40 weeks. The 10 percent permanent partial disability I have found attributable to the diabetes (encompassing or including the diabetic neuropathy) is an additional 40 weeks. Thus, the simple sum of all disabilities is 202.40 weeks. I find and conclude that Claimant's disability is greater than the simple sum of these disabilities by 10 percent. Therefore, the Second Injury Fund is liable for 20.24 weeks of enhanced permanent partial disability. At the weekly benefit rate of \$240.44, The Second Injury Fund is liable for \$4,866.51.

The Second Injury Fund shall pay Claimant \$4,866.51 in enhanced permanent partial disability benefits. Attorney Jerry A. Klein shall have a lien in the amount of 25 percent of the amount awarded as a reasonable fee for necessary legal services provided to Claimant.

Made by: _____
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation