

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

Injury No.: 05-024716

Employee: Alan Chase
Employer: St. Louis Children's Hospital (Settled)
Insurer: BJC Healthcare (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: March 10, 2005
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 6, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Grant C. Gorman, issued July 6, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Alan Chase Injury No.: 05-024716
Dependents: Not Applicable Before the
Employer: St. Louis Children's Hospital (Settled) **Division of Workers'**
Additional Party: Second Injury Fund Department of Labor and Industrial **Compensation**
Insurer: BJC Healthcare Relations of Missouri
Hearing Date: February 9, 2006 Jefferson City, Missouri
Checked by: GCG/kr by bb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
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: March 10, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis City, 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:
Lifting a large bag of laundry.
12. Did accident or occupational disease cause death? No Date of death? Not Applicable
13. Part(s) of body injured by accident or occupational disease: Lumbar Spine, Cervical Spine
14. Nature and extent of any permanent disability: 12.5%, 3.5%
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Alan Chase Injury No.: 05-024716

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Undetermined
19. Weekly compensation rate: Undetermined
20. Method wages computation: Not Applicable

COMPENSATION PAYABLE

21. Amount of compensation payable: Settled

22. Second Injury Fund liability: No

0 weeks of permanent partial disability from Second Injury Fund

TOTAL: \$0

23. Future requirements awarded: None

Said payments to begin 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: Steven K. Brown

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Alan Chase	Injury No.: 05-024716
Dependents:	Not Applicable	Before the
Employer:	St. Louis Children's Hospital (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	BJC Healthcare	Department of Labor and Industrial
Hearing Date:	February 9, 2006	Relations of Missouri
		Jefferson City, Missouri
		Checked by: GCG

INTRODUCTION

Hearing in this case first began on February 9, 2006. On that day, the claim against St. Louis Children's Hospital (Employer) was settled. Due to the time needed for settlement negotiations and execution of the settlement stipulation, evidence in the Claim against the Second Injury Fund (SIF) could not be taken. At that time, the hearing was continued to February 15, 2006. The hearing was reconvened on February 15, 2006, and a discussion was held regarding what appeared to be a misunderstanding between counsel for Employee and counsel for SIF pertaining to the deposition of Dr. Robert Poetz, Employee's expert medical witness, which was initially taken on January 3, 2006. After hearing the position of counsel for both parties, the undersigned ALJ believed that both counsel had acted in good faith and that a full and fair adjudication of this claim on the merits required leaving the claim open for Employee to adduce additional evidence from Dr. Poetz. Due to scheduling conflicts with the attorneys and Dr. Poetz, the deposition could not resume until March 28, 2006, and the transcript was not received in the St. Louis office of the Division of Workers' Compensation until April 13, 2006, more than

30 days after the commencement of the hearing. The undersigned ALJ found that this case presented extraordinary circumstances as contemplated by Section 287.460.1 RSMo. Evidence was held open at request of Employee, and over the objection of SIF, until April 13, 2006 in order to receive the transcript of the deposition of Dr. Poetz.

Claimant Alan Chase (Employee) was present at both hearing dates and represented by attorney Steven Brown. Assistant Attorney General Kevin Nelson represented the Second Injury Fund.

At the time of hearing in this case, Employee and Employer settled the primary injury claim for 12.5% of the body referable to the lumbar spine and 3.5% referable to the cervical spine. At hearing, the parties stipulated that: Employee sustained accidental injury arising out of and in the course of employment; Employee was employed by St. Louis Children's Hospital; venue is proper in the City of St. Louis; Employer received proper notice of injury; the claim was filed within the time prescribed by law.

The issues to be resolved are: Liability of the second injury fund; nature and extent of Employee's permanent partial disability; Employee's average weekly wage.

Employee offered the following exhibits:

Exhibit A: Medical Records from the University of Iowa.

Exhibit B: Medical Records from Trinity Medical Center.

Exhibit C: Records of Dr. David Parks (2 pages).

Exhibit D: Records of Dr. David Parks (6 pages).

Exhibit E: Records of Amato & Shinn Associates.

Exhibit F: Report of Dr. Poetz (October 25, 2005).

Exhibit G: Deposition of Dr. Poetz (January 3, 2006).

Exhibit H: Report of Dr. Poetz (January 4, 2006).

Exhibit I: Deposition of Dr. Poetz with exhibits (March 28, 2006).

Exhibits A, B, D, E, F, G, and H were received into evidence without objection. There was an objection to Exhibit C based on the fact that it had not been previously provided to SIF. That objection was sustained and C was not received into evidence. There was an objection to Exhibit H at the hearing, at that time the objection was sustained, however, the March 28, 2006 deposition testimony of Dr. Poetz has cured the foundational deficiencies for that exhibit, Exhibit H will be received. Exhibit I is the transcript of the March 28 deposition of Dr. Poetz, and will be received into evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Employee testified at hearing, he was very pleasant, and his testimony was credible. Employee is a 44-year-old single man. He is a high school graduate, with no formal post high school education. He began working for Employer in October 2004. He was employed as a material handler. His responsibilities included receiving laundry from an outside source, delivering clean linens to various parts of the hospital, and picking up the dirty laundry from those areas. He would have to push carts loaded with the linens that weighed an estimated 300 pounds. He would have to lift bags of dirty and wet laundry that weighed an estimated 75 to 125 pounds.

On March 10, 2005, while lifting bag of wet laundry over his head to put it into a cart, he felt pain in his lower back. He continued to work that day, and as the day progressed, the pain worsened. When he woke up the next day, he stated he "could not even move to get out of bed." He did not go into work that day. He called his supervisor and told her he had injured his back and had to see the doctor. An MRI on March 24, 2005 revealed mild mid lumbar spine disc bulges without spinal stenosis. Employee was treated with anti inflammatory medicines and physical therapy. He attempted to return to work for Employer, but due to pain could not fulfill the duties of his position. He testified he was ultimately let go after three months because the job could not be held open any longer. He reapplied for positions at Children's Hospital, but was never re-employed there. He later began working at Dillard's Department Store in Kansas City, Missouri as a salesman in November 2005. He is currently employed at Dillard's. The claim against Children's Hospital was settled on the day of hearing as previously indicated.

He had a prior injury to his back approximately seven years ago when he slipped and fell. He received chiropractic treatment for that injury, and it has not bothered him since. In October 2001, he was diagnosed with leukemia. He was treated by the University of Iowa Hospital, and had some additional care at Trinity Hospital in Moline, Illinois. He is now in complete remission. The records from Trinity Hospital (Exhibit B) indicate he was in complete remission beginning October 30, 2001. There is no indication that the leukemia has been active since that time.

Dr. Poetz, opined that the leukemia, even though it was in remission, was a 30% permanent partial disability to Employee, and that the effect of the leukemia and back injury together create a 15% permanent partial disability which exceeds the sum of the two disabilities alone. Dr. Poetz bases his rating on the fact that there are job restrictions and exposure restrictions applicable to leukemia patients. Those include: Avoiding work which causes fatigue, any work that causes extreme heat and cold exposure, any exposure to inhaled irritants and toxic substances, and any exposure to carcinogenic materials. (Exhibit I, p.6-7). However, Dr. Poetz concedes under cross-examination that he is not an oncologist. He further concedes that the treating physicians did not include any of the aforementioned work restrictions in the records provided for his review and entered into evidence at hearing. (Exhibit I, p.15). He further concedes that at the time of this injury, Employee was working two jobs with no medical restrictions. (Exhibit I, p.15).

Section 287.220.1 provides, in pertinent part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. **If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed**, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, **the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained** shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. (Emphasis added).

This section requires that the preexisting disability constitute a “hindrance or obstacle to employment,” and that it is “existing at the time last injury was sustained.” Fund liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained. **Messex v. Sachs Electric Company**, 989 S.W.2d 206, 215 (Mo.App.ED 1999). The evidence adduced in this case does not support either requirement.

There is no credible evidence that the leukemia, in complete remission, is a hindrance or obstacle to employment. The only evidence adduced is Dr. Poetz' testimony regarding work restrictions. However, there is no evidence in the record that the treating physicians at the University of Iowa and Trinity Hospitals had placed any restrictions on Employee. In fact, the position Employee was in at the time of this work injury required him to perform fatiguing tasks. No evidence was adduced that he was in any way limited by his dormant leukemia. Dr. Poetz testified that the basis of his opinion was that there was a risk of reoccurrence of the leukemia. (Exhibit I, p.6). A future risk of reoccurrence is speculative in nature. Medical testimony regarding preexisting disability based on speculation is insufficient. **Id.** at 216. Dr. Poetz did not help his credibility on the issue of work restrictions when he responded to SIF counsel's query regarding scientific tests for fatigue by saying “We say to the patient, do you feel fatigued. And they scientifically say yes or no. And it's a very simple test.” (Exhibit I, p.20).

The court is free to accept or reject medical evidence. **Lytle v. T-Mac, Inc.**, 931 S.W.2d 496, 501 (Mo.App. W.D. 1996). The court may disbelieve the testimony of witnesses even though no contradictory or impeaching evidence is introduced. **Searcy v. McDonnell Douglas Aircraft Co.**, 894 S.W.2d 173, 179 (Mo.App. E.D. 1995). Dr. Poetz' permanent partial disability rating is not credible.

For the reasons discussed above, there is no evidence that Employee suffered from a preexisting disability at the time of the injury on March 10, 2005. The evidence adduced through testimony and in the submitted exhibits demonstrates that the leukemia was in complete remission. The treating physicians had placed no restrictions on Employee. Employee did not testify that there were any functional restrictions from the leukemia on March 10, 2005. There was no evidence adduced that the dormant leukemia was a disability on March 10, 2005, or that any other disability existed on that day. The leukemia would have to have been active on March 10, 2005 for the condition to qualify as a preexisting disability. In its dormant state, it was not a disability on March 10, 2005, and the risk of reoccurrence is merely speculative.

CONCLUSION

Based on the competent and substantial evidence, Employee did not suffer from a preexisting permanent partial disability that would trigger Second Injury Fund liability at the time of his primary work injury. Therefore, all other issues presented for hearing are rendered moot. The claim for compensation against the Second Injury Fund is denied.

Date: July 6, 2006

Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
Patricia "Pat" Secrest
Director
Division of Workers' Compensation