

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

Injury No.: 09-017312

Employee: Michael Coleman
Employer: Jarrell Contracting and Service Company (Settled)
Insurer: Travelers Indemnity Company of America (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.

The Second Injury Fund argues that employee's bilateral carpal tunnel syndrome does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, because "injury" as defined in § 287.020.3 RSMo excludes occupational diseases.

We offer this supplemental opinion to note that we have addressed and rejected an identical argument from the Fund in a number of prior decisions. See, e.g., *Kathleen Peters*, Injury No. 07-114673 (LIRC, March 8, 2012); *Kelly Kirkpatrick*, Injury No. 09-071622 (LIRC, March 8, 2012); *Stephen Green*, Injury No. 07-129027 (LIRC, March 8, 2012); *Michelle Kitson*, Injury No. 09-000988 (LIRC March 8, 2012); *Gloria Stiers*, Injury No. 08-095300 (LIRC March 8, 2012); and *Kevin Hundelt*, Injury No. 09-044470 (LIRC April 16, 2012). The parties are referred to those decisions for our analysis and reasoning pertinent to this argument from the Fund.

We also note that the Western and Eastern Districts of the Missouri Court of Appeals have recently affirmed decisions from the Commission rejecting the same argument advanced by the Fund herein. See *Treasurer of Mo. v. Stiers.*, WD75101 (Oct. 9, 2012), and *Peters v. Treasurer of Mo. As Custodian of Second Injury Fund*, ED98300 (Nov. 6, 2012).

Conclusion

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

The award and decision of Administrative Law Judge Carl Strange, issued June 21, 2012, is attached and incorporated by this reference.

Employee: Michael Coleman

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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 10th day of January 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Michael Coleman

Injury No. 09-017312

Dependents: N/A

Employer: Jarrell Contracting and Service Company

Additional Party: Second Injury Fund

Insurer: Travelers Indemnity Company of America

Hearing Date: April 2, 2012

Checked by: CS/kh

SUMMARY OF FINDINGS

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? January 14, 2009.
5. State location where accident occurred or occupational disease contracted: Ste. Genevieve, 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 happened or occupational disease contracted: Employee engaged in heavy and repetitive activities which caused injury to right and left wrist.

12. Did accident or occupational disease cause death? N/A
13. Parts of body injured by accident or occupational disease: Right wrist and left wrist.
14. Nature and extent of any permanent disability: 17.5% of the right wrist and 17.5% of the left wrist.
15. Compensation paid to date for temporary total disability: N/A
16. Value necessary medical aid paid to date by employer-insurer: N/A
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate: \$404.66 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable:
 - a. Employee's claim against the employer-insurer previously settled by compromise settlement agreement.
 - b. Employee awarded permanent partial disability benefits from Second Injury Fund in the amount of \$15,150.47 (See Findings).
22. Second Injury Fund liability: Yes.
23. Future requirements awarded: N/A

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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 costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Colleen Vetter

FINDINGS OF FACT AND RULINGS OF LAW

On April 2, 2012, the employee, Michael Coleman, appeared in person and by his attorney, Colleen Vetter, for a hearing for a final award. The Second Injury Fund was represented at the hearing by their attorney, Assistant Attorney General Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about January 14, 2009, Jarrell Contracting and Service Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Travelers Indemnity Company of America.
2. On or about January 14, 2009, the employee was an employee of Jarrell Contracting and Service Company and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about January 14, 2009, the employee sustained an occupational disease arising out of and in the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for permanent partial disability is \$404.66.
7. The employee's injury is medically causally related to the work injury occurring on or about January 14, 2009.
8. The employee suffered a 17.5% permanent partial disability of his right upper extremity at the 175 week level with regard to the primary injury.
9. The employee suffered a 17.5% permanent partial disability of his left upper extremity at the 175 week level with regard to the primary injury.
10. The employee had a pre-existing 32.5% permanent partial disability of his left lower extremity at the 160 week level.
11. The employee had a pre-existing 17.5% permanent partial disability of his left upper extremity at the 210 week level.
12. The employee had a pre-existing 15% permanent partial disability of his right lower extremity at the 160 week level.
13. The employee had a pre-existing 7% permanent partial disability of his body as a whole referable to the neck.
14. The employee had a pre-existing 3% permanent partial disability of his body as a whole referable to the mid back.
15. The employee had a pre-existing 5% permanent partial disability of his body as a whole referable to the lower back.

ISSUES:

1. Nature and extent of disability.
2. Liability of the Second Injury Fund.

EXHIBITS:

The following Employee exhibits were offered and admitted into evidence:

- A. Stipulation for Compromise Settlement Injury No. 09-017312;
- B. Medical records of Midwest Plastic and Hand Surgery Inc.;
- C. Medical records of St. Louis Orthopedic, Inc.;
- D. Medical records of Sunset Hills Imaging;
- E. Medical records of Des Peres Hospital;
- F. Medical records of St. Louis Orthopedic, Inc.; and
- G. Deposition of Dr. David Volarich.

Issue 1. Nature and extent of disability. & Issue 2. Liability of the Second Injury Fund.

Michael Coleman (“Employee”) in this case has alleged that the Second Injury Fund is liable for permanent partial disability benefits. Employee has alleged that he has a primary injury to his right wrist and left wrist and pre-existing disabilities involving his left knee, left elbow, right knee, neck, mid back, and lower back. Under Section 287.220.1 RSMo., Employee has the burden of proving that his primary and pre-existing disabilities were of such a serious nature as to constitute a hindrance or obstacle to employment or re-employment. Employee also has the burden of proving that his primary and pre-existing disabilities exceed the applicable statutory threshold of 12½% for body as a whole rating or 15% of an extremity. Finally, the Second Injury Fund is only liable if the combination of Employee’s pre-existing and primary injuries had a synergistic affect which causes Employee’s total disability to exceed the sum of the disabilities from the pre-existing and the primary injuries.

The Second Injury Fund specifically argues that “injury” as defined in 287.020.3 RSMo excludes occupational diseases. In this matter, Employee has alleged bilateral occupational diseases to his wrists as his primary injuries. Thus, the Second Injury Fund argues that Employee’s primary injuries are not a “subsequent compensable injury” that can trigger Second Injury Fund liability under 287.220.1 RSMo. The Second Injury Fund’s argument fails to interpret the entire definition of injury in 287.020.3 which states “*These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form,*” (Emphasis added). Section 287.067 specifically provides for injuries by occupational disease and specifically says those injuries are compensable. Consequently, I find that the term “injury” as it appears in the phrase “subsequent compensable injury” in § 287.220.1 includes occupational diseases.

Employee has offered medical records along with the medical opinion of Dr. David Volarich in support of his pre-existing injuries to his left knee, left elbow, right knee, neck, mid back, and lower back. At the time of the hearing, Employee testified that he continued to have problems with his left knee, left elbow, right knee, neck, mid back, and lower back that included pain, headaches, difficulty with activity, stiffness, difficulty climbing ladders, and problems during weather changes. After examining Employee and reviewing the medical records, Dr. David Volarich opined that Employee suffered a 45% permanent partial disability of his left

lower extremity at the 160 week level, a 30% permanent partial disability of his left upper extremity at the 210 week level, a 30% permanent partial disability of his right lower extremity at the 160 week level, a 17.5% permanent partial disability of his body as a whole referable to the neck, a 7.5% permanent partial disability of his body as a whole referable to the mid back, and a 12.5% permanent partial disability of his body as a whole referable to the lower back.

Employee has offered medical records along with the medical opinion of Dr. David Volarich in support of his primary injury to his right wrist and left wrist. At the time of the hearing, Employee testified that he continued to have problems with his right wrist and left wrist that included intermittent numbness, decreased grip strength, and problems during weather changes. After examining Employee and reviewing the medical records, Dr. David Volarich opined that Employee suffered a 35% permanent partial disability of his right upper extremity at the 175 week level, a 35% permanent partial disability of his left upper extremity at the 175 week level, and a 15% permanent partial disability of the body as a whole as a multiplicity factor due to the combination of injuries to both upper extremities.

Based on the credible testimony of Employee and the evidence submitted, I find that Employee's primary injury to his right wrist and left wrist and pre-existing disabilities referable to his left knee, left elbow, right knee, neck, mid back, and lower back were of such seriousness to constitute a hindrance or obstacle to employment or obtaining re-employment. With regard to his right wrist, I find that Employee suffered a 17.5% permanent partial disability of his right upper extremity at the 175 week level or 30.625 weeks of compensation. With regard to his left wrist, I find that Employee suffered a 17.5% permanent partial disability of his left upper extremity at the 175 week level or 30.625 weeks of compensation. With regard to his left knee, I find that Employee suffered a 32.5% permanent partial disability of left lower extremity at the 160 week level or 52 weeks of compensation. With regard to his left elbow, I find that Employee suffered a 17.5% permanent partial disability of left upper extremity at the 210 week level or 36.75 weeks of compensation. With regard to his right knee, I find that Employee suffered a 15% permanent partial disability of right lower extremity at the 160 week level or 24 weeks of compensation. With regard to his neck, I find that Employee suffered a 7% permanent partial disability of body as a whole referable to the neck or 28 weeks of compensation. With regard to his mid back, I find that Employee suffered a 3% permanent partial disability of body as a whole referable to the mid back or 12 weeks of compensation. With regard to his lower back, I find that Employee suffered a 5% permanent partial disability of body as a whole referable to the lower back or 20 weeks of compensation.

After considering all of the evidence, I further find that Employee's pre-existing injuries referable to his left knee, left elbow, right knee, neck, mid back, and lower back along with the primary injury to his right wrist and left wrist combined synergistically to create a total disability of 271.44 weeks. This total disability is based on a loading factor of 16%. After deducting the percentage of disability that existed prior to the primary injury (172.75 weeks), and the disability resulting from the primary injury, considered alone (61.25 weeks), from the total disability attributable to all injuries or conditions existing at the time of the primary injury (271.44 weeks), the remaining balance to be paid by the Second Injury Fund is equal to 37.44 weeks. The Second

Injury Fund is therefore directed to pay to Employee the sum of \$404.66 per week for 37.44 weeks for a total award of permanent partial disability equal to \$15,150.47.

ATTORNEY'S FEE:

Colleen Vetter, attorney at law, is allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation