

CORRECTING AWARD

Correcting Final Award Allowing Compensation dated January 14, 2010

(Correction In Bold and Underlined)

Injury No.: 03-126427

Employee: Phillip Cook
Employer: Calmar – St. Gobain (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo (2003).¹ We have reviewed the evidence and considered the whole record. We find that the award of the administrative law judge was not made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of Administrative Law Judge Paula A. McKeon, dated February 24, 2009.

Is employee's claim against the Second Injury Fund barred by § 287.430 RSMo?

A threshold issue in this matter is whether employee's claim is barred by the provisions of § 287.430 RSMo. If it is, all other issues are moot.

Findings of Fact

Employee worked for employer from January 1994 through February 2006 as a toolmaker. The parties stipulated that on or about November 24, 2003, employee sustained an accidental injury arising out of and in the course of his employment. Employer accepted liability for the injury and provided medical treatment and temporary total disability benefits. On March 24, 2006, an administrative law judge of the Division of Workers' Compensation (Division) approved a Stipulation for Compromise Settlement entered into between employee and employer fully resolving employee's claimed entitlement to workers' compensation benefits from employer. On April 13, 2006, employee filed with the Division a document entitled *Claim for Compensation* on a Division-provided form designated as form WC-21 (03-04) AI. Employee checked the box stating "Second Injury Fund Only."

The Second Injury Fund answered the Claim for Compensation and raised the defense that employee's claim against the Second Injury Fund is time-barred because it was filed beyond the filing period set forth in § 287.430 RSMo.

The administrative law judge agreed and denied employee's claim. The administrative law judge found that employee did not file a claim for compensation against his employer. Consequently, the administrative law judge concluded that the period for

¹ All statutory references are to the Revised Statutes of Missouri 2003 unless otherwise indicated.

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filing a timely claim against the Second Injury Fund ended two years after the date of injury; i.e., November 24, 2005. We disagree.

Conclusions of Law

On December 1, 2009, the Missouri Court of Appeals, Eastern District issued its decision in *Grubbs v. Treasurer of Missouri*, No. ED92457, addressing the very question before the Commission in this case. In *Grubbs*, the employee sustained an injury in the course of his employment on July 30, 2003, and subsequently entered into a Stipulation for Compromise Settlement with the employer on November 15, 2004. *Id.* at pg. 1-2. On September 29, 2005, the employee filed a claim for compensation against the Second Injury Fund only, and the Fund filed an answer arguing that the employee's claim was time-barred by § 287.430 RSMo, because the employee did not file a claim against the Fund within two years after the injury or within one year after filing a claim against the employer. *Id.* at pg. 2. In rejecting the Fund's argument, the court stated as follows:

The phrase "claim for compensation" is not defined in Workers' Compensation Law. Black's Law Dictionary defines a "claim" as a (sic) "[t]he aggregate of operative facts giving rise to a right enforceable by a court." Black's Law Dictionary 240 (7th ed. 1999). A "claim" even in the barest of layman's language, includes not only a lawsuit but also a claim settled out of court ... [A]ccording to the plain and ordinary meaning of the words in Section 287.430, the Stipulation for Compromise Settlement in this case constitutes a claim for compensation.

Id. at pg. 5-6 (citations omitted).

The *Grubbs* court went on to find that because the employee's claim for compensation was filed within one year after the Stipulation for Compromise Settlement was entered between employee and employer, the employee's claim against the fund was not barred by the statute of limitations in § 287.430. *Id.* The court further explained the reasoning behind its decision as follows:

"... Section 287.390 provides "[n]othing in this chapter shall be construed as preventing the parties to claims hereunder from entering into voluntary agreements in settlement thereof." Section 287.390 provides the ALJ can only approve settlements entered into between "parties to claims." If "claim" only referred to the "Form WC-21 Claim for Compensation," then an ALJ could only approve a settlement entered into between parties to a dispute for which a Form WC-21 had been filed ... Because settlements are encouraged under the law, we decline to find that a party must make a formal filing of a Form-WC-21 before a settlement may be approved by an ALJ."

Id. (citations omitted).

We find such reasoning to be sound and directly applicable to the facts of the case at hand. Therefore, in light of the holding in *Grubbs*, we conclude that the March 24, 2006,

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submission of a Stipulation for Compromise Settlement in this case also served as the filing of a claim for compensation. The Second Injury Fund claim filed on April 13, 2006, was filed within one year of the filing of the claim for compensation, as required by § 287.430. Thus, employee's claim against the Second Injury Fund is not time-barred. We reverse the conclusion of the administrative law judge to the contrary.

What is the nature and extent of Second Injury Fund liability?

Because we have found that employee's claim against the Second Injury Fund was timely filed, we proceed to address the merits of employee's claim.

Findings of Fact

Employee worked as a toolmaker for 25 years. On November 24, 2003, employee sustained a right shoulder injury at work while lifting a mold from a rack. Employee has a significant history of injuries and health problems predating the work injury of November 24, 2003. Dr. Stuckmeyer evaluated employee and offered his opinions regarding permanent disability stemming from both the pre-existing conditions and the November 24, 2003, work injury. Dr. Stuckmeyer is a board-certified orthopedic surgeon based in Lee's Summit, Missouri. Below, we have set forth a summary of employee's conditions of ill as evaluated by Dr. Stuckmeyer, along with Dr. Stuckmeyer's disability ratings for each:

Heart

Dr. Stuckmeyer opined that the most significant health concerns pre-dating the November 24, 2003, injury were concerns relating to employee's cardiovascular system. Employee has a history of each of the following: coronary artery disease, hypertension, and ischemic cardiomyopathy. Employee underwent bypass graft surgery in 1982 with subsequent recurrence of coronary artery occlusions requiring multiple stints. Employee had bypass surgery in 2009. Employee takes medication for hypertension. Dr. Stuckmeyer opined that employee shows signs of congestive heart failure. Employee suffers shortness of breath on exertion and has likely experienced periods of angina. Dr. Stuckmeyer rated employee's disability as 25% permanent partial disability of the body as a whole attributable to employee's preexisting cardiovascular conditions.

Low Back

Employee underwent a lumbar laminectomy in 1982. Employee continued to experience lower back pain with radicular symptoms to his left lower extremity. In 2001, employee experienced left leg pain that led him to seek treatment. Diagnostic studies revealed disc degeneration and a disc bulge. In 2002, employee underwent a series of epidural injections to relieve his low back pain. Employee's symptoms failed to subside in response to epidural injections. Employee has difficulty with prolonged standing, walking, lifting, bending, and sitting. He also experiences periods of numbness and tingling in his left lower extremity. Dr. Stuckmeyer rated employee's disability as 25% permanent partial disability of the body as a whole for his preexisting low back condition.

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Neck

Employee has degenerative changes of his cervical spine dating back to 1995. Employee received cervical epidural injections in an effort to relieve chronic neck pain and radiculopathy. Employee continues to have daily neck pain but no longer experiences radicular symptoms in his upper extremities. Dr. Stuckmeyer assigned no permanent partial disability to employee's neck condition.

Feet

In 1996, foot and heel pain prompted employee to seek treatment. Employee was diagnosed with bilateral plantar fasciitis. Employee initially treated conservatively with steroid injections and orthotics but ultimately underwent bilateral plantar fascial releases on October 4, 1996. Following that surgery, employee continued to experience persistent symptoms of pain and dysfunction in the plantar fascial region as well as in the midtarsal region. On June 2, 1997, orthotics were recommended. Employee continues to experience bilateral heel pain. Dr. Stuckmeyer rated employee's disability as 15% permanent partial disability at the level of the ankle bilaterally for his preexisting foot problems.

Left Shoulder

Employee has experienced chronic problems with his left shoulder. In 2000, employee underwent a left rotator cuff repair. Following that surgery, employee had difficulty working overhead. Employee continues to have difficulty pushing, pulling, lifting, and reaching. Dr. Stuckmeyer rated employee's disability as 15% permanent partial disability at the level of the shoulder for his preexisting left shoulder condition.

Right Shoulder

Employee has long-standing right shoulder problems. As early as 1991, employee sought treatment for symptoms of pain and dysfunction in his right shoulder. On November 15, 1991, employee underwent right shoulder arthroscopy, debridement of the right labrum, and arthroscopic acromioplasty. On May 1, 1999, an MRI scan revealed hypertrophic changes of the AC joint with associated compression of the supraspinatus tendon consistent with an intrasubstance tear or degenerative changes. There was also high signal intensity in the distal clavicle consistent with bone marrow edema. On June 11, 1999, employee underwent right rotator cuff repair with acromioplasty and resection of distal clavicle. Dr. Stuckmeyer rated employee's disability as 15% permanent partial disability at the level of the shoulder for his preexisting right shoulder condition.

Primary Injury

On November 24, 2003, employee sustained the right shoulder injury that resulted in employee's filing the claim presently before this Commission when he was lifting a mold from a rack at work. Diagnostic studies were consistent with a full-thickness tear of the anterior aspect of the distal supraspinatus tendon. There was a moderate amount of fluid in the shoulder joint and periarticular bursa with mild bicipital tenosynovitis. Initially, employee was treated conservatively with exercise and injections of Depo Medrol. However, further diagnostic testing revealed that employee had a full-thickness rotator cuff tear along the anterolateral margin of the supraspinatus with thickening of

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the lateral margin of the subscapularis tendon. On April 26, 2005, employee underwent a surgical revision of the right rotator cuff repair with acromioplasty and a porcine xenograft augmentation of the rotator cuff tear. Dr. Frevert returned employee to regular duty status on August 26, 2005, and released employee from his care on October 7, 2005. We find employee reached maximum medical improvement on August 26, 2005.

After employee reached maximum medical improvement following treatment of his primary right shoulder injury, he attempted to return to work but was unsuccessful in performing his former duties. Employee found that it was a real struggle, from a physical standpoint, to come in every day and do his job. Currently, employee has difficulty working overhead. He also has difficulty pushing, pulling, lifting, and reaching. As time passes, employee believes his right shoulder is getting stiffer and weaker. Employee testified that some of the pain is gone from his right shoulder but his range of motion has not returned completely and that his strength is not 100 percent. Employee testified that in light of all the health problems previously described, and in addition to the problems with his right shoulder stemming from the 2003 injury, he did not feel that he was capable of working anywhere on a full-time basis. We find employee credible.

Dr. Stuckmeyer opined that employee's November 24, 2003, work accident was the prevailing factor in causing additional trauma to employee's right shoulder and his need for rotator cuff revision and xenograph. Dr. Stuckmeyer rated employee's disability as 20% permanent partial disability at the level of the shoulder attributable to the primary injury. In connection with employee's pre-existing disabilities, Dr. Stuckmeyer opined that he would place employee on the following permanent physical restrictions: no prolonged standing, no prolonged walking, no lifting greater than ten to fifteen pounds on an occasional basis, no repetitive traversing of steps, and no ladder climbing. In connection with the November 24, 2003, work injury, Dr. Stuckmeyer assigned the following restrictions: no overhead utilization of right arm, and no pushing or pulling with right arm greater than ten to fifteen pounds on an occasional basis. Dr. Stuckmeyer testified that he suspects employee is permanently and totally disabled but would defer to a vocational expert on this issue.

On October 16, 2007, Mary Titterington met with employee for the purpose of a comprehensive vocational evaluation. Ms. Titterington has practiced in the field of vocational rehabilitation for 31 years. Ms. Titterington's findings, as contained in her report and recounted by her testimony, are summarized as follows. Employee's educational background is limited to finishing the eighth grade. Employee never received his GED. Employee has no computer skills, and has never worked in an office setting. The results of an adult basic learning examination administered by Ms. Titterington at the October 16, 2007, evaluation suggest that employee would not be a good candidate for formal retraining. Employee's functional limitations as outlined by Dr. Stuckmeyer would prevent him from finding employment in any of his prior jobs, where physical exertion, standing, walking, pushing and pulling, frequent use of employee's hands, overhead lifting, and bending were required. Employee's limited math and academic skills and his lack of a GED would disqualify him for many sedentary jobs such as general office clerk, security monitor, and information clerk.

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Employee is not a good candidate for vocational retraining due to his age, restrictions, lack of a high school diploma, and limited educational skills. Ms. Titterington opined that employee is unemployable in the open labor market. Ms. Titterington opined that employee is permanently and totally disabled.

The Second Injury Fund did not provide testimony from a medical or vocational expert. As a result, there is no evidence on the record before this Commission that might contradict or otherwise cast doubt on the testimony, evaluation, and medical opinions of Dr. Stuckmeyer, or the testimony and vocational evaluation of Ms. Titterington. We find credible the medical opinions of Dr. Stuckmeyer as to each of employee's conditions of ill as summarized above, and we find that employee suffers disabilities as rated by Dr. Stuckmeyer. We also find credible the testimony of Ms. Titterington.

Conclusions of Law

Pre-existing Disabilities

Employee testified that each of the conditions of ill as summarized above affected his ability to work. Employee testified that these medical conditions caused him pain, limited his range of motion, and caused him shortness of breath and that each condition affected his ability to do his job. Dr. Stuckmeyer noted during his examination of employee that employee's prior conditions of ill caused the following symptoms: chronic problems with the use of his left shoulder including difficulty with overhead function along with difficulty pushing, pulling, lifting, and reaching; chronic problems with bilateral heel pain; longstanding history of lower back pain and related difficulty with prolonged standing, walking, lifting, bending, and sitting; symptoms of numbness and tingling in the left lower extremity; dyspnea on exertion in connection with his heart condition, and daily neck pain. Dr. Stuckmeyer provided competent medical testimony assigning disability ratings to employee based upon his pre-existing disabilities. We find that employee's heart, low back, neck, feet, and left and right shoulder conditions constituted hindrances or obstacles to employment or reemployment pre-dating the November 24, 2003, work injury.

Primary Injury

We believe employee has met his burden of demonstrating he sustained a compensable work injury in this case. The testimony offered by employee as well as the expert medical evidence introduced by employee was sufficient in convincing the Commission that the work injury of November 24, 2003, was the substantial factor in causing an additional disability of 20% permanent partial disability to employee's right shoulder, and the substantial factor in causing employee's need for surgery and additional treatment to his right shoulder.

Permanent and Total Disability

We believe the evidence supports a finding that employee is permanently and totally disabled due to the combination of the November 24, 2003, work injury and employee's pre-existing disabling conditions of ill.

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open

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labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo. App. 1995) (citations omitted).

The competent testimony of Ms. Titterington and Dr. Stuckmeyer was in agreement as to employee's lacking the ability to compete in the open labor market given employee's situation and condition after the November 24, 2003, work injury. Ms. Titterington opined that employee's medical restrictions would prevent him from returning to the type of jobs for which he has past experience and training. Ms. Titterington further opined that employee's limited verbal and mathematical skills as evinced by employee's scores on academic tests administered during her evaluation, in addition to employee's lacking a GED, were factors that would preclude employment in sedentary positions as well. Ms. Titterington opined that employee is permanently and totally disabled. There was no evidence to the contrary. We find that employee is unable to compete in the open labor market and that employee has met his burden of demonstrating that he is permanently and totally disabled.

Second Injury Fund

Section 287.220, RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." Section 287.220.1 RSMo provides as follows:

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 ... receives a subsequent compensable injury ... 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.

Section 287.220.1 RSMo accounts for cases, like that presently before the Commission, where an employee is permanently and totally disabled as a result of the previous disability considered together with the last, or primary injury:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability ... the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the

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compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

The Missouri courts have articulated the showing that must be made by an employee in order to trigger Second Injury Fund liability as follows:

To trigger the liability of the Second Injury Fund, an employee must have a pre-existing permanent partial disability, whether from a compensable injury or otherwise. The permanent disability pre-dating the injury in question must exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed. To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition. Liability of the Second Injury Fund is triggered only by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.

E. W. v. Kansas City, Missouri, School District, 89 S.W.3d 527, 537 (Mo. App. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) (citations omitted).

In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself.

Gassen v. Lienbengood, 134 S.W.3d 75, 79 (Mo. App. 2004), citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

We have adopted the ratings of Dr. Stuckmeyer as set forth earlier in this opinion. We have additionally found that each of employee's disabilities and conditions of ill-being were in existence, and were a hindrance or obstacle to employee's employment, at the time that employee sustained the November 24, 2003 work injury. Based upon the foregoing, and because we have found that employee is permanently and totally disabled as a result of the combination of his pre-existing work injuries and the November 24, 2003, work injury, we find that Second Injury Fund liability is triggered in this case.

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Conclusion

Based upon the foregoing, we find the Second Injury Fund liable to employee for permanent total disability benefits. The Second Injury Fund is liable in the amount of \$284.33 (\$631.35 – \$347.02), the difference between employee’s permanent total disability rate and permanent partial disability rate, for 46.4 weeks (20% of 232 weeks) beginning August 27, 2005. Thereafter, the Second Injury Fund is liable to employee for weekly permanent total disability benefits in the amount of \$631.35 for his lifetime, or until modified by law.

The award and decision of Administrative Law Judge Paula A. McKeon, dated February 24, 2009, is attached solely for reference.

Thomas Stein, Attorney at Law, is allowed a fee of 25% of all benefits awarded for necessary legal services rendered which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 20th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

SECOND INJURY FUND AWARD ONLY

Employee: Phillip Cook

Injury No. 03-126427

Dependents: N/A

Employer: Calmar – St. Gobain

Insurer: Self-Insured

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

Hearing Date: February 18, 2009

Checked by: PAM/lh

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: November 24, 2003.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, 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? No.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Phillip Cook injured his right shoulder getting a mold off a rack.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right upper extremity.
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary 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 wages: N/A
19. Weekly compensation rate: \$631.35/\$347.02
20. Method wages computation: By Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A
22. Second Injury Fund liability: No
23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Phillip Cook

Injury No. 03-126427

Dependents: N/A

Employer: Calmar – St. Gobain

Insurer: Self-Insured

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

Hearing Date: February 18, 2009

Checked by: PAM/lh

On February 18, 2009, the Employee and the Second Injury Fund appeared for final hearing. The Division had authority to hear this case pursuant to §287.110. The Employee appeared in person and with Counsel Tom Stein. The Second Injury Fund appeared through Assistant Attorney General Andrew Dickson.

STIPULATIONS

The parties stipulated to the following:

- 1) that both the Employer and the Employee were operating under and subject to the provisions of the Missouri workers' compensation law on November 24, 2003;
- 2) that Phillip Cook sustained an accident/occupational disease in the course and scope of his employment with Calmar – St. Gobain;
- 3) that Phillip Cook has a compensation rate of \$631.35/\$347.02.

ISSUES

The issues to be resolved by this hearing are:

- 1) whether Phillip Cook filed a timely claim for compensation against the Second Injury Fund;
- 2) whether Phillip Cook is permanently totally disabled against the Second Injury Fund.

FINDINGS AND RULINGS

The primary issue is whether this claim was filed within the statute of limitations for Second Injury Fund recovery. Section 287.430 governs limitations of actions for claims including Second Injury Fund. Section 287.430 specifically sets forth:

“A claim against the Second Injury Fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later.”

Mr. Cook did not file a claim for compensation against his employer. Therefore, the appropriate time for filing the claim should be within two years after the date of the injury. The parties stipulated the date of injury to be November 24, 2003. Therefore any claim for compensation against the Second Injury Fund must be filed by November 24, 2005.

Mr. Cook’s initial claim for compensation against the Second Injury Fund was filed on April 13, 2006, well after the time prescribed in §287.430.

Accordingly Mr. Cook’s claim for compensation against the Second Injury Fund is denied.

Date: _____

Made by: _____

Paula A. McKeon
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Peter Lyskowski
Acting Director
Division of Workers' Compensation