

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

Injury No.: 07-100923

Employee: William Cook
Employer: Buckley Powder Company (Settled)
Insurer: Commerce & Industry Insurance Company (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. 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge by this supplemental opinion. The award and decision of Administrative Law Judge Mark Siedlik, issued July 13, 2010, is attached and incorporated by this reference.

The administrative law judge concluded that employee was unable to compete in the open labor market before he suffered the work-related rotator cuff injury. We agree. We offer this supplemental opinion to highlight some of the issues that sealed our agreement with the conclusions of the administrative law judge.

Employee's primary contention on appeal is that the administrative law judge erred in concluding that no employer would reasonably be expected, in the ordinary course of its business, to hire a worker in employee's physical condition as it existed in early June 2007. Employee asserts that two facts prove he was not permanently and totally disabled before he was hired by employer; employee competed for the position in the same manner as other applicants, and, employer selected employee for the position.

If the evidence on the issue were limited to proving only the facts recited above, employee's argument might be persuasive. But the evidence proved much more.

Employee did not tell employer about his significant back problems. Not surprisingly, the reason that employee did not tell employer about his back problems was because employee was concerned that employer would not hire him for the position if employer knew about the back problems. Further, employee did not tell employer he was receiving social security disability on account of his back condition or that employee took Darvocet daily to cope with his pain. Without knowing these details, employer did not know employee's true physical condition. It cannot be said that employer purposefully hired employee in his then-present physical condition. We think it highly unlikely that employer would have hired employee to handle explosive materials had employer known employee was on a daily regimen of narcotic pain medication.

Employee: William Cook

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An acquaintance told employee about the material handling job opening at employer. The acquaintance told employee it was supposed to be an easy job. Employee admitted he was stir crazy staying at home and pursued the job to "see if [he] could go back to work." Employee testified that after a two-week training period, the job was a part-time job only requiring employee to work 2½ - 3 hours in the morning and 2 hours in the afternoon. Employee's job was to pass out explosive supplies to miners that weighed 5 pounds or less.

Employee only had to lift significantly heavier weight on two occasions when a trailer load shifted and tipped over stacks of bags containing supplies. On both occasions, employee testified that he injured his arm lifting the bags to re-stack them. On the second occasion, employee told his co-worker that he "was done," and he "couldn't do it."

At most, employee worked the part-time materials handler position for 2 weeks. Yet within that short span, employee had to double his dosage of Darvocet in order to tolerate the pain caused by the performance of his work duties. In addition, employee hurt himself both times he had to lift over a nominal weight.

We are not persuaded by the opinion of Mr. Dreiling, employee's vocational expert, that employee's hiring by employer was an example of an employer in the open labor market hiring employee in his then-present physical condition. Mr. Dreiling was not aware that employee withheld information from employer during the hiring process including information about the severity of employee's chronic back pain and employee's need to take narcotic pain relievers to cope with the pain of his back condition. Mr. Dreiling conceded that typically vocational experts do not encourage the use of narcotics while working.

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

Given at Jefferson City, State of Missouri, this 17th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: William Cook

CONCURRING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I agree with the decision of the majority of the Commission to deny compensation in this matter. However, I would affirm the award of the administrative law judge without supplementation.

John J. Hickey, Member

FINAL AWARD

Employee: William Cook Injury No: 07-100923
Dependents: None.
Employer: Buckley Powder Company
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: Commerce & Industry Insurance Company
Hearing Date: May 24, 2010
Briefs Filed: June 25, 2010

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: July 6, 2007
5. State location where accident occurred or occupational disease was contracted: Greenwood, 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? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was lifting a heavy bag when he felt a tear in his left shoulder.
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: Left shoulder
14. Nature and extent of any permanent disability: 22.5% permanent partial disability assessed against the Employer by compromise settlement agreement.
15. Compensation paid to-date for temporary disability: \$19,663.07 paid from July 20, 2007 through June 1, 2008.

16. Value necessary medical aid paid to date by employer/insurer? \$24,323.62

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: \$648.27

19. Weekly compensation rate: \$432.20 for TTD and PTD. \$389.04 for PPD

20. Method wages computation: By stipulation

21. Amount of compensation payable:

Medical Expenses

Medical already Incurred.....	\$24,323.62
Less credit for expenses already paid.....	(\$24,323.62)
Total medical owing.....	\$0

Temporary Disability

45.43 weeks (07/20/2007 through 6/1/2008).....	\$19,663.07
Less credit for benefits already paid.....	(\$19,663.07)
Total TTD owing.....	\$0

Permanent Partial Disability

\$21,207.89 previously paid by Employer by Stipulation for Compromise Settlement.

Total Award Against Employer.....\$0

22. Second Injury Fund liability None

23. Future requirements awarded.....None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Cook Injury No: 07-100923
Dependents: None
Employer: Buckley Powder Company
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: Commerce & Industry Insurance Company
Hearing Date: May 24, 2010
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On May 24, 2010, the employee and Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. William Cook, appeared in person and with counsel, Michael Haight. The Second Injury Fund appeared through Assistant Attorney General Andrew Dickson.

The parties requested the Division determine the nature and extent of disability and the liability of the Second Injury Fund for that disability. Employee alleges he is permanently and totally disabled as a result of the combination of the disability from his July 6, 2007 injury to his left shoulder in combination with pre-existing disabilities to his right shoulder, low back, and left knee. For the reasons noted below, I find that Mr. Cook was permanently and totally disabled before the work-related injury and therefore no liability is attributable to the Second Injury Fund.

STIPULATIONS

The parties stipulated that:

1. On or about July 6, 2007 (“the injury date”), Buckley Powder Company (“Buckley”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully insured by Commerce & Industry Insurance Company;
2. Mr. Cook was its employee working subject to the law in Greenwood, Jackson County, Missouri;
3. On or about July 6, 2007, Mr. Cook sustained an injury by accident arising out of and in the course of his employment;

4. The Employer had notice of the injury and a Claim for Compensation was filed within the time prescribed by law;
5. The average weekly wage was \$648.27 and the applicable compensation rate is \$432.20 for temporary and permanent total disability benefits and \$389.04 for permanent partial disability benefits;
6. Compensation has been paid by the Employer for temporary total disability benefits in the amount of \$19,663.07 commencing on July 20, 2007;
7. Medical aid was provided by the Employer in the amount of \$24,323.62; and
8. The Employee and Employer settled the claim regarding the Employer's liability for a lump sum of \$24,207.89. This reflects a 22.5% disability of the left shoulder with additional benefits paid to resolve a disputed compensation rate.

ISSUES

The parties requested the Division to determine:

1. What is the nature and extent of disability?
2. Whether Mr. Cook's permanent total disability is a result of his July 6, 2007 injury in combination with his pre-existing disabilities.
3. What is the liability, if any, for the Second Injury Fund?

FINDINGS OF FACT

Mr. Cook testified on his own behalf and presented the following exhibits which were admitted into evidence by the employee without objection:

- Exhibit A – Deposition transcripts of P. Brent Koprivica, M.D. and attached exhibits (January 4, 2010 and March 26, 2010).
- Exhibit B – Deposition transcript of Michael J. Dreiling and attached exhibits (March 22, 2010).

The Second Injury Fund did not call any witnesses but presented the following exhibit which was admitted into evidence without objection:

- Exhibit 1 - Deposition transcript of William Cook (April 17, 2009).

Based on the above exhibits and the testimony offered at trial, I make the following findings. Mr. Cook is a 62-year-old high school graduate. Following high school, in 1966, Mr. Cook worked for Frisco Railroad through the Machinist Union. Mr. Cook next worked for Armco Steel beginning in 1970. Following this, Mr. Cook worked for his father's concrete company in Springfield, Missouri for approximately a year. Mr. Cook then moved to Kansas City and joined the Concrete Finisher's Union. Mr. Cook primarily worked commercial jobs through the union. After approximately six years, Mr. Cook left the union and began doing residential concrete work.

Mr. Cook began having problems with his left knee between 1974-76. He left the concrete field "because [his left knee] wasn't getting any better." (Exhibit 1, page 11-12).

Mr. Cook then worked as a carpenter for about two years until returning to the concrete field because it paid better. His left knee began bothering him again so he left the concrete field again for about a year.

Next, Mr. Cook stated: "I jumped around from job to job, just odd jobs, trying to see what I could find to make a living. And then I went and started doing security work." (Exhibit 1, page 12).

Mr. Cook stated that one of his hobbies was bowling, but he has not bowled in twenty-five to thirty years. "Shoulders, just started to wear and tear on me." (Exhibit 1, page 33). Mr. Cook stopped hunting in the early 2000s. "Just got to be too much walking." (Exhibit 1, page 33).

Mr. Cook stated that he was put on social security disability since 2001 based on his back condition alone. (Exhibit 1, page 23). He has continued to receive social security disability since this time. In 2001, Mr. Cook's treating doctor described his back pain as "debilitating." In 2001, Mr. Cook began using a TENS Unit for pain back. Mr. Cook testified that he has taken Darvocet for back pain since 2001. He stated that if he does not take it: "I hurt bad, I'm lucky if I can walk then." (Exhibit 1, page 22).

Mr. Cook then worked part-time for about five years at Raytown Gun & Pawn. He obtained this job through knowing the owners and was paid cash. Even though his job duties were not physically demanding, Mr. Cook had difficulty performing this job: "[M]y back was bothering me then really bad, and I'd have to...stand up, sit down. And then this shoulder bothered me some. But I wasn't really doing physical work...it's not hard to hand people money and looking at a gun when they bring it in. So it wasn't really nothing physical about it." Mr. Cook stated that he left this employment because his "back just got too bad." (Exhibit 1, page 19).

Mr. Cook's last job before Buckley was a part-time job at Family Pawn where he worked three to four hours at a time. (Exhibit 1, page 31). He primarily cleaned guns and was paid in cash. (Exhibit 1, page 26). He was given a stool and was allowed to sit and stand at will. (Exhibit 1, page 31). Mr. Cook testified that did not have to perform the typical duties of a pawn broker. He left Family Pawn when his employer turned his position into full-time. "[T]hey wanted me to go on full time and I couldn't go full time, physically, I couldn't do it." (Exhibit 1, page 42).

After Family Pawn and before starting at Buckley, Mr. Cook did not work for six to seven years. (Exhibit 1, page 32). During this time period he spent most of his time watching movies and gardening. His knees and back gave him problems while gardening. (Exhibit 1, page 32-3). The primary chore that he was responsible for was giving his dogs food and water. (Exhibit 1, page 34). During this time period he lived with his ex-fiance, who worked from home and would provided assistance to him from time to time. “[S]he was always at the house. If I needed something, she would help me.” (Exhibit 1, page 34).

Several years before the work injury, Mr. Cook began using a cane from time to time, depending on the weather. (Exhibit 1, page 39). Mr. Cook has continuously received epidural shots in his back every two months since the early 2000s. (Exhibit 1, page 45).

On April 11, 2007, Mr. Cook had left knee arthroscopic surgery. Mr. Cook stated that “[his left knee] never has been right since [the surgery].” (Exhibit 1, page 36).

Mr. Cook began working as a material handler at Buckley approximately one month before his July 6, 2007 work injury. An acquaintance of Mr. Cook’s, who worked at Buckley, informed him of the material handler opening at Buckley. According to Mr. Cook, his friend told him that the job involved minimal physical requirements and that Mr. Cook “might try it and see if you can do it.” Mr. Cook stated that the reason he applied for the Buckley job: “I was feeling good and wanted to try it, see if I could go back to work.” (Exhibit 1, page 27). Mr. Cook testified that the Buckley job was part-time which required him to work for approximately two and a half hours, then take a two to three hour break, and then work again for approximately two hours. He was not at work, nor was he paid during the break.

While applying for the job at Buckley, Mr. Cook was not forthright regarding his physical condition. “I didn’t let them know that my back bothered me quite as bad as it was. I dealt with it. How many people is going to hire you if you walk into a job and tell them you’re boogered up? Nobody. And I wanted to try and see if I could go back to work.” (Exhibit 1, page 40). Mr. Cook testified that he did not inform anyone at Buckley that he was on social security disability. Mr. Cook testified that he did not inform anyone at Buckley that he had back problems or that he was on Darvocet.

Mr. Cook was involved with training during his first two weeks at Buckley. “I was riding with a fellow and he was showing me what we were going to be doing. I didn’t really do anything them days.” (Exhibit 1, page 38-9).

While employed at Buckley, Mr. Cook stated that his left knee “was bothering [him] some.” (Exhibit 1, page 36-7). He also stated that his back began to hurt more and he increased his pain medication dosage. “I just doubled up on it. My Darvocets don’t make me where I can’t function. They just stop the pain.” (Exhibit 1, page 37).

While picking up sixty pound bags at Buckley, Mr. Cook injured his left upper extremity. Mr. Cook continues to suffer from pain and numbness in his left upper extremity.

Mr. Cook has not looked for employment since leaving Buckley. (Exhibit 1, page 38).

Mr. Cook acknowledged that he would not have been able to physically perform any job even if his left arm had not been injured. “[P]robably not, with my knee like it is...and my back.” (Exhibit 1, page 42).

Michael Dreiling conducted a vocational evaluation on Mr. Cook. Mr. Dreiling opined that “no employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ [Mr. Cook] in his existing physical condition.”

Mr. Dreiling noted that at the time of Mr. Cook’s work injury, he was still to receiving social security disability benefits and was involved in a trial work program, which he describes as follows: “It’s an incentive program that the government has set up to encourage individuals or at least allow individuals who are receiving disability benefits the opportunity to return back to work in the labor market to determine if they can obtain employment, maintain employment and get off Social Security benefits.” (Exhibit B, page 21). Mr. Dreiling mentioned that Mr. Buckley’s job at Family Pawn was not full-time, but “on a fill-in basis” and that his job duties “were more lighter than what you traditionally see in a pawn shop.” (Exhibit B, page 22-3).

Mr. Dreiling thought that before the work injury, Mr. Cook was employable in the open labor market “because he demonstrated the ability to compete for and obtain that job in the open labor market. (Exhibit B, page 29).

Mr. Dreiling was not aware that Mr. Cook was taking prescription pain medication while working for Buckley. (Exhibit A, page 25).

Dr. Koprivica conducted an independent medical evaluation on Mr. Cook. Dr. Koprivica opined that based exclusively on the primary injury, Mr. Cook should be restricted from pushing, pulling, repetitive activities and above activities with his left shoulder. (Exhibit A, Volume II, pages 5-6, 2-2).

Dr. Koprivica noted that before the work accident, Mr. Cook “had profound industrial disability.” (Exhibit A, page 21). He opined that based on Mr. Cook’s pre-existing injuries, Mr. Cook has the following restrictions and recommendations: No activities with right shoulder, even if unweighted; No climbing tasks; Avoidance of forceful pushing or pulling activities involving his right shoulder girdle level; Only occasional lifting or carrying tasks below chest level with a 20 pound maximum; Avoidance of frequent or constant bending at the waist; Avoidance of pushing, pulling or twisting at the waist; Avoidance of sustained or awkward postures of the lumbar spine; No captive sitting over an hour; Standing and walking should be limited to 30-60 hour intervals with the flexibility of changing more frequently if necessary; and Avoidance of squatting crawling or kneeling entirely. (Exhibit A, Volume II, page 5-6, 21-2).

RULINGS OF LAW

There appears to be no credible argument in this case by any of the parties that Mr. Cook is not permanently and totally disabled. I agree. Based on the medical and vocational evidence provided and my own observations of Mr. Cook including his testimony about his physical conditions, I have no doubt Mr. Cook is unable to access the open labor market. I find that Mr. Cook is permanently and totally disabled.

Under the Missouri Worker's Compensation Act "total disability" is defined as the inability to return to any employment. Messex v. Sachs Elec. Co., 989 S.W.2d. 206, 210 (Mo. App. E.D. 1999). "Inability to return to any employment" means "the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sale, 631 S.W.2d. 919, 922 (Mo. App. S.D. 1982). The primary determination for permanent total disability is whether the employee is able to compete in the open labor market. Messex, at 210. A determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri-State Motor Transit, 908 S.W.2d. 849 (Mo. App. S.D. 1995).

Once the medical restrictions are provided, it is left for this tribunal to determine whether, and why, Mr. Cook is permanently and totally disabled. Again, "[t]he test for permanent total disability is the claimant's ability to compete in the open labor market." Forshee v. Landmark Excavating and Equip., 165 S.W.3d 533, 537 (Mo. App. E.D. 2005). "The pivotal question is whether an employer can reasonably be expected to hire this employee, given his present physical condition, and reasonably expect him to successfully perform the work." Sutton v. Vee Jay Cement Contracting Co., 37 S.W.3d 803, 811 (Mo. App. E.D. 2000).

Mr. Cook began receiving social security disability benefits in 2001, six to seven years before the work injury. He continued to receive benefits throughout his approximate month of employment. Not only did Mr. Cook continue to take narcotic pain medication (Darvocet) while working at Buckley, he "doubled up on it." (Exhibit 1, page 37).

Mr. Cook admitted that he was not forthright with Buckley. He never told them that he had debilitating back pain. He did not tell them that he had to take narcotic pain medication. He did not inform anyone at Buckley that he was on social security disability.

The job at Buckley was only part-time time. Mr. Cook only worked there for approximately one month before the injury and much of this month involved training in which he "didn't really do anything."

Mr. Cook, himself, acknowledged that he would not be able to physically perform any job even if his left arm had not been injured in the July 6, 2007 injury.

I find it commendable that Mr. Cook attempted to re-enter the labor market and get off of social security disability. However, I do not find that his short stint of part-time employment results in a finding that Mr. Cook was employable in the open labor market before the work injury.

I find Mr. Cook's disabilities before his July 6, 2007 injury so overwhelming that he was permanently and totally disabled before that injury. I therefore find no second injury fund liability.

Date: _____

Made by: _____

Mark Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Director
Division of Workers' Compensation