

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

Injury No. 10-012307

Employee: Abby Couch
Employer: Missouri Department of Corrections (Settled)
Insurer: C A R O (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.

Discussion

Statute of limitations

The administrative law judge determined that employee's claim against the Second Injury Fund is not barred by the statute of limitations, based on an application of the holding in *Treasurer of the State - Custodian of the Second Injury Fund v. Cook*, 323 S.W.3d 105 (Mo. App. 2010). The Second Injury Fund argues that *Cook* and a predecessor case, *Grubbs v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 298 S.W.3d 907 (Mo. App. 2009), are inapplicable here because those cases involved injuries that predated the legislative adoption, in 2005, of the strict construction mandate found in § 287.800.1 RSMo. We disagree.

In both *Cook* and *Grubbs*, the courts did not rely on a liberal construction of Chapter 287 in reaching their holdings; rather, they provided interpretations of what they described as the plain and ordinary meaning of the language contained in § 287.430 RSMo. See *Cook*, 323 S.W.3d at 108-10, and *Grubbs*, 298 S.W.3d at 910-11. Employee also correctly notes that in the case of *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714 (Mo. 2004), the Missouri Supreme Court specifically held that "a claim" does not mean "the claim" or "original claim," but rather any claim that is timely filed. *Id.* at 717.

The statutory language at issue in this matter remains unchanged, and so the holdings in *Cook*, *Grubbs*, and *Elrod* continue to provide the controlling judicial precedent interpreting the meaning of the word "claim" in § 287.430.

Conclusion

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

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The award and decision of Administrative Law Judge Hannelore D. Fischer, issued August 4, 2014, is attached and incorporated by this reference.

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 31st day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Abby Couch Injury No.: 10-012307

Dependents: N/A

Employer: Mo Department of Corrections (previously 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,
Custodian of the Second Injury Fund

Insurer: N/A

Hearing Date: July 14, 2014

Checked by: HDF/scb

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: February 22, 2010
5. State location where accident occurred or occupational disease was contracted: Randolph 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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See award
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 hand
14. Nature and extent of any permanent disability: 10% right hand
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$379.23 for all benefits
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Employer previously settled
- 22. Second Injury Fund liability: Yes. 15.6 weeks of permanent partial disability from Second Injury Fund
15.6 x \$379.23 = \$5,915.99
- 23. Future Requirements Awarded: None

Said payments to begin immediately 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: Christine Kiefer/Van Camp Law Firm.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Abby Couch

Injury No: 10-012307

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Mo Department of Corrections (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

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

Insurer: N/A

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on July 14, 2014. Memoranda were filed by July 25, 2014.

The parties stipulated that on or about February 22, 2010, the claimant, Abby Couch, was in the employment of the Missouri Department of Corrections. Ms. Couch sustained an accident of occupational disease arising out of her employment. The parties stipulated that all facts relevant to the claimant's relationship with her employer are resolved in the claimant's favor in her pending claim against the Second Injury Fund. The compensation rate is \$379.23 per week for all benefits.

The parties stipulated that the claim against the employer/insurer settled based on a permanent disability of ten percent of the right wrist; the parties do not, however, agree that this stipulation for settlement represents the extent of permanent disability resulting from the injury of February 22, 2010, in the pending claim against the Second Injury Fund.

The issue to be resolved by hearing is the liability of the Second Injury Fund, including the issue of the bar of the statute of limitations. Permanent partial disability is alleged.

FACTS

Ms. Couch injured her right hand when she fell on the ice at work on February 22, 2010. Ms. Couch received conservative medical treatment and now has loss of grip strength along with tremors and shaking on occasion. Ms. Couch testified that she has difficulty turning keys with her right hand.

In 2007, Ms. Couch had a left knee injury requiring surgery; Ms. Couch still has swelling in the knee when she is on her feet for a while.

Also in 2007, Ms. Couch was harassed by a supervisor who wanted to have a relationship with her. Ms. Couch received psychiatric treatment and still has depression and anxiety for which she takes medications. The resulting workers' compensation claim settled based on a permanent disability of 15 percent of the body.

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In 1989, Ms. Couch had melanoma requiring facial reconstructive surgery in which half of her nose was removed and the area under her right eye is hollow; Ms. Couch testified that she may need additional surgery as some of the screws in her face have broken. Ms. Couch testified to difficulty breathing out of the right side of her nose and tenderness in her face as well as sensitivity to fumes as the result of the cancer and facial reconstruction

Dr. Cohen evaluated Ms. Couch and issued a report corresponding to his evaluation dated November 27, 2012. Dr. Cohen opined to a permanent partial disability of 25 percent of the right hand as the result of the February 22, 2010 accident. Dr. Cohen opined to preexisting permanent partial disability of 45 percent of the body referable to the facial cancer and a 15 percent permanent partial disability as the result of the 2007 work related psychological trauma. Dr. Cohen said that Ms. Couch's "pre-existing conditions or disabilities combine synergistically with the primary work-related injury of 6/22/11. Due to the multiplistic effect of her preexisting injuries, she has a load factor of 20%. Her preexisting conditions or disabilities are industrially disabling." (Cohen report 11/27/12)

Ms. Couch filed her initial claim for compensation against both the employer/insurer and Second Injury Fund in this case on March 24, 2010, and settled the claim against the employer/insurer on March 28, 2013. Employee counsel, in briefing this matter, admits that the claim against the Second Injury Fund was dismissed. A new claim against the Second Injury Fund only was filed on December 5, 2013.

APPLICABLE LAW

RSMo Section 287.220.1 There is hereby created in the state treasury a special fund to be known as the "Second Injury Fund" created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

RSMo Section 287.430 Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing

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reactivate or revive the period of time in which a claim may be filed. 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. In all other respects the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a conservator shall be deemed the termination of the legal disability from minority or disability as defined in chapter 475. The statute of limitations contained in this section is one of extinction and not of repose.

AWARD

The claimant, Abby Couch, has sustained her burden of proof that the Second Injury Fund is liable for her increased permanent partial disability as the result of the combination of her right hand injury combined with her preexisting disabilities to her face and attributable to psychiatric issues. Ms. Couch has proven that the February 22, 2010 injury to the right hand and the preexisting facial and psychiatric disabilities are each serious enough to be a hindrance or obstacle to employment. Ms. Couch has proven that her permanent disability attributable to the February 22, 2010 accident is ten percent of the right hand based on Ms. Couch's testimony and the opinion of Dr. Cohen. Similarly, Ms. Couch has proven that her permanent disability attributable to her face is 20 percent of the body and the psychiatric issues represent permanent disability of 15 percent of the body, again based on Ms. Couch's testimony and the opinion of Dr. Cohen. The synergistic effect or permanent disability above and beyond the disability to the right hand as the result of the 2010 right hand injury and the preexisting disabilities is 3.9 percent of the body.

The statute of limitations is not a bar to recovery in this case where the claim against the Second Injury Fund was filed with one year after the settlement of the claim with the employer/insurer. The decision in Treasurer v Cook, 323 S.W.3d (Mo W.D. 2010) rests on the distinction between a "claim" and a "claim for compensation", noting that the term "claim" is used in Section 287.430, referring to the time bar of Second Injury Fund claims. The court then goes on to say that for purposes of determining timeliness of Second Injury Fund benefit filing a settlement between the claimant and the employer/insurer constitutes a claim.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation