

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 08-070355

Employee: Michael Davis
Employer: City of Chaffee (Settled)
Insurer: Missouri Rural Services Workers' Comp Insurance Trust (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. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and award set forth below.

Discussion

The parties asked the administrative law judge to consider the issue of Second Injury Fund liability for permanent total or permanent partial disability benefits. The administrative law judge found that employee is permanently and totally disabled, but not due to a combination of the employee's primary injury and preexisting disabilities, and denied employee's claim against the Second Injury Fund. Employee filed an Application for Review arguing that the award is erroneous because the administrative law judge failed to resolve the issue of Second Injury Fund liability for permanent partial disability benefits. We agree and write to address this issue.

Second Injury Fund liability for permanent partial disability

Section 287.220.1 RSMo creates the Second Injury Fund and provides, as follows:

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

Employee: Michael Davis

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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.

We find that employee sustained a primary injury of the low back that left him with a 25% permanent partial disability of the body as a whole referable to the lumbar spine. We credit Dr. Cohen and find that, at the time employee sustained the primary injury, employee suffered from preexisting permanent partial disabling conditions of both hands. In light of the distinct potential that employee's bilateral hand conditions may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition, we find that these conditions were serious enough to constitute hindrances or obstacles to employment at the time the last injury was sustained. See *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

Employee's preexisting permanent partial disability is not referable to "a major extremity injury only," for purposes of the foregoing language from § 287.220.1. Instead, employee suffered preexisting conditions of ill affecting both of his upper extremities, so we will apply the 50-week "body as a whole" threshold. *Id.*

We credit Dr. Cohen and find that employee suffered a preexisting permanent partial disability of 30% at the 175-week level at the time he sustained the primary injury. Converting employee's preexisting disabilities into weeks of compensation yields a total of 52.5 weeks for each hand. The sum of employee's preexisting disabilities is 105 weeks. Employee has met the 50-week threshold.

We credit Dr. Cohen and find that employee's preexisting disabling conditions combine synergistically with the effects of the primary injury to render him more disabled than in the absence of such conditions. We note also Dr. Cohen's uncontradicted opinion that employee's preexisting hypertension, heart disease, and depression do not combine with the primary work related injury; in his brief, employee does not argue that these conditions combine with the work injury, and only requests that we consider the preexisting bilateral hand conditions. Accordingly, we adopt Dr. Cohen's opinion (and so find) that employee's preexisting hypertension, heart disease, and depression do not combine with the work injury.

Employee: Michael Davis

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We find that a 10% load factor is appropriate to represent the synergistic combination of employee's preexisting and primary disabilities. Employee's primary injury resulted in 25% permanent partial disability of the body as a whole referable to the lumbar spine, or 100 weeks of permanent partial disability. Employee's bilateral hand condition amounts to 105 weeks of permanent partial disability. The sum of preexisting and primary permanent partial disability is 205 weeks. When we multiply the sum by the 10% load factor, the result is 20.5 weeks.

We conclude that the Second Injury Fund is liable for 20.5 weeks of permanent partial disability benefits.

Award

We issue the foregoing findings, conclusions, award, and decision as to the issue of Second Injury Fund liability for permanent partial disability benefits.

The stipulated rate of compensation is \$341.90. The Second Injury Fund is liable to employee for \$7,008.95 in permanent partial disability benefits.

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

The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued December 21, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 21st day of June 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Michael Davis Injury No. 08-070355
Dependents: N/A
Employer: City of Chaffee (settled)
Additional Party: Second Injury Fund
Insurer: Missouri Rural Services Workers' Comp Insurance Trust (settled)
Appearances: Chris Weiss, attorney for employee.
Jonathan Lintner, Assistant Attorney General for the Second Injury Fund.
Hearing Date: September 21, 2011 Checked by: LCK/rf

SUMMARY OF FINDINGS

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? February 19, 2008.
5. State location where accident occurred or occupational disease contracted: Scott 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 happened or occupational disease contracted: The employee stepped off a truck and injured his low back.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Low back and body as a whole.
14. Nature and extent of any permanent disability: Undetermined.
15. Compensation paid to date for temporary total disability: \$8,984.76
16. Value necessary medical aid paid to date by employer-insurer: \$10,080.46
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$512.85
19. Weekly compensation rate: \$341.90 for permanent partial and permanent total disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A.

FINDINGS OF FACT AND RULINGS OF LAW

On September 21, 2011, the employee, Michael Davis appeared in person and with his attorney, Chris Weiss, for a hearing for a final award. The Second Injury Fund was represented at the hearing by Assistant Attorney General Jonathan Lintner. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issue that was in dispute. These undisputed facts and issue, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The City of Chaffee was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by the Missouri Rural Services Workers' Compensation Insurance Trust.
2. On February 19, 2008 Michael Davis was an employee of the City of Chaffee and was working under the Workers' Compensation Act.
3. On February 19, 2008 the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim for compensation was filed within the time allowed by law.
6. The employee's average weekly wage was \$512.85. The rate of compensation for permanent total disability and permanent partial disability is \$341.90 per week.
7. The employee's injury was medically causally related to the accident.
8. The employer-insurer paid \$10,080.46 in medical aid.
9. The employer-insurer paid \$8,984.76 in temporary disability benefits representing 26 2/7 weeks of compensation. The time periods paid were March 3 through March 13, 2008; May 5 through July 23, 2008; and September 9 through December 16, 2008. The parties agreed that the employee's maximum medical improvement date was on December 16, 2008.

ISSUE

1. Liability of the Second Injury Fund for permanent partial disability or permanent total disability.

EXHIBITS

Employee's Exhibits

- A. Medical records of Dr. Law.
- B. Medical records of Barnes Jewish Hospital.
- C. Medical records of Dr. Whistler.
- D. Medical records of Orthopaedic Associates.
- E. Medical records of Dr. Whistler.
- F. Medical records of Cape Radiology Group.
- G. Medical records of Orthopaedic Associates.

- H. Medical records of Dr. Coyle.
- I. Medical records of Southeast Missouri Hospital.
- J. Deposition of Dr. Cohen including his CV, four reports and a letter from the employee's attorney. (All the Second Injury Fund's objections in the deposition are overruled.)
- K. Medical records of Southeast Missouri Hospital

The Second Injury Fund did not offer any exhibits. Judicial notice of the contents of the Division's files for the employee was taken.

WITNESSES: Michael Davis, the employee and Michael Oberman.

BRIEFS: Both the employee and Second Injury filed briefs on October 21, 2011.

FINDINGS OF FACT

The employee testified that he has lived with Robert Oberman, his step son, since June of 2009. The employee left high school in the 12th grade, got a GED, and went into the military for two and a half years. He was an aircraft mechanic and was honorably discharged. After he was discharged he worked at a variety of different jobs. He worked as a cook; as a bricklayer helper; constructing houses; and laying gas lines. He moved to Arkansas and worked as a maintenance person; building furniture; and at a paper and plastic bag plant. He moved to Chicago and worked at a car dealership, a furniture plant and chemical factories. All of his jobs were construction, factory or manual labor.

The employee testified that he moved to Missouri and for two years worked on the line at Havco which makes hardwood flooring. In 1999, he had an injury at Havco. As he was pulling the plastic ball of a wood planer with a sharper; the plastic ball shattered, and cut his hands. In addition to the cuts, it took off 1/16 or 1/8 of an inch off his right index finger. He received stitches to repair the injury. The employee did not receive a workers' compensation settlement. In 2000, he started working for the City of Chaffee and basically did everything including working on water leaks, chasing dogs and snow removal. He worked there for about eight years before got hurt on February 19, 2008. While working for the City he used a heater to warm his hands when he was outside. When it turned cold, his hands turned white, became numb and hurt. He had trouble holding tools including hammers and screwdrivers. The hands hurt constantly which was worse in the cold; and had trouble feeling. When it was really cold the pain was an 8-9 out of 10. He wore 2-3 pairs of gloves in the winter to keep warm, and had trouble fixing water lines since he could not feel the nuts and wrenches. It was hard to do anything in the winter due to using controls with a backhoe. Since 1999 he has taken a lot of Tylenol due to his hands. He usually takes three Tylenol several times a day. After the 1999 Havco injury, he did not have any permanent restrictions.

In June of 2002, the employee had a catheter ablation of lesion/tissues of the heart; a cardiac eletrophysiologic stimulation, recording studies and cardiac mapping for a diagnosis of cardiac dysrhythmia; and essential hypertension, unspecified benign or malignant. In November

of 2002, the employee saw Dr. Law for supraventricular tachycardia with a rapid heartbeat and dizziness. An echocardiogram on November 5, 2002 showed mild left ventricular hypertrophy.

The employee testified that on February 19, 2008, he volunteered to work on the trash truck due to the regular person being out. He stepped off the truck and twisted his low back. He was referred to Dr. Whistler.

The employee saw Dr. Whistler on February 21, 2008. An MRI was ordered due to low back pain and pain in both legs. The February 26 lumbar MRI showed a left foraminal disc herniation at L4-5. At L5-S1 there was a diffuse disc bulge with a modest sized disc extrusion contacting the ventral thecal sac in both S1 nerve roots. On February 28, the employee saw Dr. Whistler for additional pain medication. On March 7 Dr. Whistler noted the employee had an orthopedic consultation.

The employee saw Dr. Coyle on March 11, 2008, who noted that the February 26 MRI showed a L4 left-sided disc herniation and a L5-S1 disc bulge. The employee was having left-sided low back pain with radiation to his left lateral thigh. Past surgical history was significant for surgery on his right fifth digit. The employee smoked two packs of cigarettes per day and had done so for twenty four years. Dr. Coyle's impression was lumbar disc herniation; and he ordered aquatic physical therapy and referral to a physiatrist for epidural steroid injections.

On April 3, 2008, Dr. Burns stated that the MRI showed that the only clinical significance was at L4-5 and L5-S1 which was compatible with his pain distribution. Dr. Burns diagnosed an axial spinal injury with corresponding disc changes at L4-5, L5-S1, T11-12 and T12-L1; pre-existing significant degenerative joint disease and pre-existing degenerative disc disease of the lumbar spine. Dr. Burns continued Hydrocodone and Flexeril; and added Arthrotec. On April 11 Dr. Burns performed a L4-5 lumbar epidural steroid injection. On May 6, Dr. Burns noted that the employee had fairly significant pain reduction after the epidural injection and then a slow return in discomfort. Last week the employee was reading meters and the combination of walking and bending caused exacerbation. Dr. Burns diagnosed degenerative disc disease with worsened radicular pain and new left radiculopathy with neurologic signs at L4-5; and referred the employee back to Dr. Coyle.

On May 7, 2008 Dr. Coyle noted the employee did not get any appreciable improvement from the steroid injection. Since the employee smoked two packs of cigarettes a day, surgery would be contraindicated. The employee did not note any appreciable improvement from physical therapy. On presentation, the employee was significantly worse and was using a wheelchair. He had anterior thigh numbness bilaterally with tingling in his feet, left greater than right and pain across his lumbar spine from L3-S1. Dr. Coyle noted that significant changes in his symptoms; and ordered another lumbar MRI that was done that day. The lumbar MRI was performed due to low back pain with lower extremity pain and numbness with difficulty ambulating. The radiologist noted that there was a disc herniation at L4-5 which was suspected to produce a left L5 radiculopathy; and a central disc bulge at L5-S1 with a very small focal protrusion which lateralized to the left. The conclusion was degenerative disc disease at L4-5 with a disc herniation centrally and lateralizing to the left extending into the foramen on the left;

with a possible left L5 or L4 radiculopathy. There was degenerative disc disease at L5-S1 with slight lateralization to the left. Dr. Coyle noted that the MRI was of high quality and showed an L4-5 extruded disc herniation centrally and left-sided that was compressing the nerves. There was a L5-S1 disc herniation with fluid in the facet joints. Dr. Coyle recommended a lumbar decompression at L4 and L5 with fusion. Dr. Coyle stated that surgery would be predicated on the employee completely stopping smoking. The employee understood that it was imperative to completely stop smoking to minimize the risk of non-union of a two-level fusion.

The employee testified that he went back to work until the first part of May of 2008 and was on light duty and someone helped him check meters. The employer told him not to come back until he was fixed. He was unable to have the L4-5 and L5-S1 surgery recommended by Dr. Coyle. He got a prescription to stop smoking and tried to quit but was unable to do so; and since he continued to smoke Dr. Coyle would not perform the procedure.

The employee saw Dr. Whistler in May for smoking cessation and on June 9, 2008. On June 13 Dr. Whistler prescribed a cane for assistance in walking. In June of 2008, Dr. Burns refilled Oxycodone and Flexeril. In July and August Dr. Burns refilled Hydrocodone.

The employee was admitted to Southeast Missouri Hospital on August 11, 2008 and was discharged on August 17. The past medical history included chronic back pain, tobacco abuse, opiate dependence, and chronic alcoholism. The employee was admitted to intensive care to start on an alcohol withdrawal protocol and seizure precautions. The employee was diagnosed with alcohol withdrawal seizures, history of chronic pain, opiate dependence and tobacco abuse. The discharge diagnosis included alcohol withdrawal, delirium tremens, chronic obstructive pulmonary disease, low back pain and opiate dependence.

The employee testified that he lost his license in 2007 for DWIs and has not driven since then. In 2008, he had a lot of things going on including his wife having cancer. She passed away in 2009. In 2008, he drank 18-20 beers a day, and was smoking 2.5 to 3 packs of cigarettes a day. Now he is smoking a little over a pack a day, and drinking a lot less.

On August 18, 2008 the employee saw Dr. Whistler after being released from Southeast Hospital. On August 27 the employee's wife called Dr. Whistler's office and Dr. Whistler would not provide any more pain medication until he saw the employee.

On September 9, 2008 Dr. Coyle kept the employee off work until he saw Dr. Cantrell to evaluate and treat the employee for lumbar pain. In September Dr. Whistler noted that the employee was non-compliant and had new numbness from his waist down to his legs and toes. On September 16 x-rays of the thoracic spine showed mild scoliosis and a compression fracture at T6 with approximate 50% anterior wedging and 10% anterior wedging at T11. A CT was recommended. Dr. Whistler in September noted that the surgery was denied by Dr. Coyle because the employee could not quit smoking. The employee has now developed thoracic pain and x-rays showed a 50% wedge fracture at T6. He referred the employee to Dr. Moore for pain relief. On September 24 Dr. Moore performed a lumbar epidural steroid injection.

Dr. Whistler noted on September 29, 2008 that the employee went to the emergency room on September 27 with complete paralysis from the chest down and was transferred to St. Louis University with a questionable diagnosis of a cyst/tumor at T6. In a September 29, 2008 letter, Dr. Whistler stated the employee had a lumbar injury with radiculopathy and the workers' compensation physician would not operate due to the inability to quit smoking. The pain escalated leading to the abuse of pain medication and alcohol which resulted in the employee being hospitalized. The employee had fallen and had a thoracic spine wedge fracture with marked pain. In a sense, the delay in surgery indirectly lead to additional injuries.

The employee testified that in the fall of 2008, after he was admitted to the hospital, he began having mid back problems and developed a staph infection. He was at home and lost all feeling from his waist down. An ambulance took him to Southeast Hospital and he was transferred to St. Louis University Hospital. He had two surgeries on his mid back with placement of rods due to multiple fractures. The first surgery was in October of 2008 and the second was in May of 2009 due to the staph not being completely gone. He was released in June of 2009. The problems with his mid back were never proven related to his work accident and he settled his claim for 25% of the body as a whole referable to his low back.

The employee saw Dr. Cohen on March 2, 2009. With regard to the primary work injury, it was Dr. Cohen's opinion that the employee had a left L4-5 posterior disc protrusion with moderate left neural foraminal narrowing; and L5-S1 broad based disc bulge with moderate left neural foraminal narrowing; and chronic low back pain secondary to both of the above and to the aggravation of lumbar degenerative joint disease which by history was clinically asymptomatic prior to the primary work related injury. With regard to pre-existing conditions or disabilities, it was Dr. Cohen's opinion that the employee had vasospastic disorder of the hands with significant involvement with cold exposure; a history of depression, hypertension and cardiac valvular surgery; and a long standing history of alcohol and cigarette abuse.

With regard to subsequent conditions, it was Dr. Cohen's opinion the employee had multiple thoracic surgical procedures due to thoracic epidural infection. The last of the surgeries was an extensive fusion from T3 thru T10 with instrumentation with thoracic myelopathy. It was Dr. Cohen's opinion that the employee would benefit from being on appropriate medications for pain and should continue on his current medications and that the need for the medications was partly for thoracic pain and partly for lumbar pain.

It was Dr. Cohen's opinion that the employee has a 35% whole person disability at the level of the lumbar spine. Of the 35%, approximately 5% is pre-existing due to the age-related changes that were present prior to the primary work related injury. Per the patient's history and from the review of the records, the employee was clinically asymptomatic referable to the lumbar spine and lower extremities before February 19, 2008. Dr. Coyle was planning on performing surgery but did not due to the employee not being able to stop smoking. The employee developed the subsequent thoracic spine infection and had multiple surgeries at that level. With regard to his pre-existing conditions or disabilities, it was Dr. Cohen's opinion the employee had a 30% permanent partial disability of the left hand and a 30% permanent partial disability at the right hand and that his pre-existing conditions or disabilities combined with the primary work related

injury on February 19, 2008 synergistically to form a greater overall disability than their simple sum. Dr. Cohen stated that the employee had several other pre-existing conditions including hypertension, heart disease and depression but it was his opinion that they do not combine with the primary work related injury. It was Dr. Cohen's opinion that the employee at that time was permanently and totally disabled. The permanent total disability included the subsequent development of the thoracic infection and extension fusion/instrumentation and thoracic myelopathy.

The employee settled his Claim for Compensation against the employer-insurer by Stipulation for Compromise Settlement on December 3, 2009. The settlement was based upon 25% permanent partial disability of the body as a whole referable to the low back. An additional amount was paid to fund a Medicare Set Aside Agreement.

The employee's attorney sent Dr. Cohen a letter on January 21, 2010, requesting that Dr. Cohen give his opinion as to whether or not the employee was permanently and totally disabled without regard to the thoracic condition and treatment.

On January 25, 2010 Dr. Cohen performed a supplemental rating. It was Dr. Cohen's opinion that the employee was permanently and totally disabled at the time that Dr. Coyle determined that he was not a surgical candidate. Dr. Coyle in his September 8, 2008 record noted that he was at maximum medical improvement from a surgical standpoint as surgery was definitely contraindicated. The employee was unable to quit smoking and therefore, Dr. Coyle was unable to perform the lumbar surgery. It was Dr. Cohen's opinion that the employee was permanently and totally disabled once Dr. Coyle placed the employee at maximum medical improvement. Based on the patient's history as well as a review of the medical records Dr. Coyle stated the employee's condition was only becoming worse subsequent to the time that Dr. Coyle was unable to do the lumbar surgery. Dr. Cohen stated that if the employee had not had the subsequent thoracic infection and subsequent surgeries, the severe lumbar pathology at L4-5 and L5-S1 in and of itself would have permanently and totally disabled the employee based on the continued deterioration of his condition.

Dr. Cohen performed a supplemental medical rating on March 15, 2010. He noted that he was in receipt of the May 7, 2008 MRI. Dr. Cohen stated that his medical opinion remained the same as previously stated on March 9, 2009.

On October 4, 2010 Dr. Cohen performed a supplement medical rating. It was his opinion that the employee's pre-existing conditions or disabilities referable to his hands combined with the primary work related injury of February 19, 2008 to his lumbar spine to create a greater overall disability than their simple sum. Due to the synergistic effect, the employee is permanently and totally disabled and not capable of gainful employment in the open labor market. Otherwise, Dr. Cohen stated his medical opinions remained as stated in his previous report.

Dr. Cohen's deposition was taken on March 7, 2011. Dr. Cohen assessed a pre-existing disability of 30% permanent partial disability of the left hand and a 30% permanent partial

disability at the right hand. The basis for that opinion is that the employee had a very significant history as to the effect on his hands and his ability to work due to the vasospastic disorder. That effect on his hands and fingers was a very significant problem and was disabling with the type of work he did. That condition is known to cause significant problems and was a disabling condition in his opinion. With regard to the other pre-existing conditions, he did not find any significant disability. It was Dr. Cohen's opinion that the employee's pre-existing conditions or disabilities combine with the primary work related injury of February 19, 2008 to create a greater overall disability than their simple sum and due to the combination of disabilities he is permanently and totally disabled and not capable of gainful employment in the open labor market. Dr. Cohen stated that the employee's permanent total disability did not include the subsequent thoracic spine disorder and surgeries.

Dr. Cohen stated that at the time of the thoracic injury the employee was receiving pain medications from Dr. Whistler for his low back; and had numbness and tingling in his lower extremities. In mid August of 2008, the employee had a seizure at home and was taken to the hospital. Dr. Cohen stated that the employee did not have an alcohol withdrawal seizure and he fell from trying to get up and down in an attempt to get some relief of his back pain. Dr. Cohen felt that the subsequent thoracic injury was indirectly related to the lumbar spine injury. The employee had an IV in his hand and there was some source of infection to the thoracic vertebrae. When Dr. Cohen received the January 21, 2010 letter asking whether the employee was permanently and totally disabled without regard to the thoracic condition, he went back through Dr. Coyle's records. Dr. Cohen stated that the employee had continued deterioration to his low back and was disabled even without the thoracic condition. It was Dr. Cohen's opinion that without regard to his thoracic condition the employee was disabled from the combination of the hands and low back conditions. His October 4, 2010 report was that the employee was permanently and totally disabled from the combination and synergistic effect of the lumbar spine along with his hands.

Dr. Cohen agreed that it was Dr. Coyle's opinion that the thoracic aspects were not related to his work injury. Dr. Cohen agreed that the employee did not have any complaints of thoracic or neck pain until six to seven months after the February 19, 2008 accident. Dr. Cohen listed the thoracic issues as a subsequent condition. Dr. Cohen did not have any records from the 1999 hand injury and relied on the employee's history of a laceration or a cut to both of his hands. The only treatment he received was stitches. His opinion on disability is from the employee stating that he had a significant history of functional restrictions.

Dr. Cohen stated that he had no new medical information between the time he saw the employee on March 9, 2009 and preparing the January 25, 2010 report. He did not see the employee again and had the same information when he wrote the January 25, 2010 report as he did when he wrote the March 9, 2009 report.

Dr. Cohen testified that his October 4, 2010 opinion as to permanent total disability is the same as his January 25, 2010 supplement which was the employee's thoracic problems were not part of the picture regarding permanent total. The only additional medical record he saw between the March 9, 2009 report and the October 4, 2010 report was the May 7, 2008 MRI.

Dr. Cohen stated that he is not a vocational specialist and does not hold himself out to be a vocational expert as far as job placement. He agreed that as far as someone's placeability or employability in the open labor market, that is a vocational question, and he typically would defer to a vocational expert since that's their area of expertise.

Dr. Cohen testified that his opinion on March 9, 2009 was that the employee was permanently totally disabled as a combination of all conditions pre-existing from the accident and subsequent. When he issued his January 25, 2010 report it was his clarification and opinion that the employee was permanently totally disabled from the accident and the pre-existing conditions. Dr. Cohen stated that his opinions have not changed anywhere throughout the reports.

The employee testified that he has separate low back and mid back pain. With regard to his low back, he has numbness from his waist down, tingling in both legs, and numbness in his feet. He has constant low back pain which gets worse especially with weather changes. He has problems with sitting and is up and down. He can sit about 30-45 minutes before he has to get up. He has tried to do some chores but bending over a sink bothers him. He tries to use push mower but has to stop before he can finish. He is still taking pain medication every six hours. He has trouble getting out of chairs, and has to push to get up and down. He has trouble picking things up off the floor. He uses a cane all the time which helps stabilize him. He has trouble sleeping and walking more than a couple of blocks due to pain. He has pain from his mid back to his neck. He is on pain medication for both his mid and low back. He started taking hydrocodone after his low back injury and the prescription has increased over time. He has not worked since he was let go by the City of Chaffee; and cannot work due to problems sitting and walking. He tinkers with puzzles, reads and watches TV. He did not have any sleeping problems before the low back injury. Now he has trouble sleeping due to restless leg syndrome and pain.

Robert Oberman is the step son of the employee. Mr. Oberman testified that the employee has lived with him since June of 2009, and spends a lot of time with him. The employee tries to do what he can but then has to sit down. He attempts to do mowing and can do that for awhile before it hurts him. He has trouble with his hands if it is cold, and has to run warm water over them. The employee has good and bad days with his back but never has a really good day. At the end of a bad day, he will go to bed early. Mr. Oberman will sometimes help him up out of the chair; and has had to almost get him out of bed. He has a loss of feeling in his lower extremities. The employee cannot lift heavy items and he does not cook at home. He can stand up for 15-20 minutes, and does his laundry but does not fold his clothes. The employee has to lie down at times.

RULINGS OF LAW

Issue 1. Liability of the Second Injury Fund for permanent partial disability or permanent total disability.

The employee is claiming that he is permanently and totally disabled. The term "total disability" in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of

the accident. The phrase “inability to return to any employment” has been interpreted as the inability of the employee 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. See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). 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 labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the “inability to return to any reasonable or normal employment.” An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person’s present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question to be addressed is whether the employee is permanently and totally disabled.

In his March 2, 2009, January 25, 2010, and October 4, 2010 reports; and March 7, 2011 deposition, Dr. Cohen’s opinions were consistent that the employee was permanently and totally disabled and unemployable in the open labor market.

I find that the employee’s testimony was credible on the issue of permanent total disability. His testimony supports a conclusion that the employee will not be able to compete in the open labor market. The employee was observed during the hearing and exhibited behavior and physical patterns including using a cane and moving around in his seat, standing up, sitting down and rubbing his back which supports a finding that the employee is suffering from a significant level of pain and discomfort.

Based on a review of all the evidence, I find that the opinion of Dr. Cohen is credible on whether the employee is permanently and totally disabled. I find that no employer in the usual course of business would reasonably be expected to employ the employee in his present condition and reasonably expect the employee to perform the work for which he is hired. I find that the employee is unable to compete in the open labor market and is permanently and totally disabled.

For his permanent total disability claim against the Second Injury Fund, the employee has the burden of proof that his permanent and totally disability resulted from the primary accident and injury in combination with his pre-existing conditions.

Unlike his consistent opinions in his reports and deposition that the employee was permanently and totally disabled; Dr. Cohen's opinions regarding the cause of the employee's permanent total disability were very inconsistent and contradictory.

In his March 2, 2009 report, it was Dr. Cohen's opinion that that the employee's permanent total disability included the subsequent development of the thoracic vertebral infection, extensive fusion/instrumentation and thoracic cord myelopathy. In his January 25, 2010 report it was Dr. Cohen's opinion that the lumbar pathology at L4-5 and L5-S1 in and of itself permanently and totally disabled the employee. In his March 15, 2010 report, Dr. Cohen stated that his medical opinion was the same as it was in the March of 2009 report. In the October 4, 2010 report, it was Dr. Cohen's opinion that that the pre-existing bilateral hand condition combined with the primary February 19, 2008 work injury to create a greater overall disability and made the employee permanently and totally disabled and not capable of gainful employment in the open labor market.

In his March of 2011 deposition it was Dr. Cohen's opinion that the employee's pre-existing conditions or disabilities combine with the primary work related injury of February 19, 2008 to create a greater overall disability than their simple sum and due to the combination of disabilities that he is permanently and totally disabled and not capable of gainful employment in the open labor market; and the permanent total disability did not include the subsequent thoracic spine disorder and surgeries.

Based on the evidence, I find that Dr. Cohen's testimony that his October 4, 2010 opinion as to permanent total disability is the same as his January 25, 2010 opinion; and that his opinions did not change throughout his reports is not credible. Based on his inconsistencies and contradictions, I find that Dr. Cohen's opinions as to the cause of the employee's permanent total disability are not persuasive or credible.

I find that there is no credible opinion that the cause of the employee's permanent total disability is the combination of the employee's primary injury and his pre-existing conditions/disabilities. Based on a review of the evidence, I find that the employee failed in his burden of proof that the Second Injury Fund is responsible for the employee's permanent total disability benefits. The employee's claim against the Second Injury Fund is hereby denied.

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation