

**FINAL AWARD DENYING COMPENSATION**  
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 05-066788

Employee: John Deibel  
Employer: United Parcel Service (Settled)  
Insurer: Liberty Mutual Insurance (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. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated November 13, 2009.

**Preliminaries**

On July 18, 2005, employee suffered an injury to his left eye while working for employer. Employee settled his claim against employer. The administrative law judge heard this matter to consider the nature and extent of any Second Injury Fund liability.

The administrative law judge found that employee sustained a 67.6% permanent partial disability measured at the 260-week level as a result of the left eye injury. The administrative law judge also found that employee established a 72% preexisting permanent partial disability of the right eye at the 140-week level. The administrative law judge found that the two injuries combine in a synergistic fashion and applied a loading factor of 60% of the underlying disabilities. As a result of these findings, the administrative law judge found the Second Injury Fund liable for 165.84 weeks of permanent partial disability. The administrative law judge also found that a preexisting knee injury does not combine in a synergistic fashion with the eye injuries.

The Second Injury Fund filed an Application for Review with the Commission alleging the administrative law judge erred in awarding permanent partial disability benefits against the Second Injury Fund because: (1) employee is bound by the disability ratings set forth in the settlements between employee and employer; (2) employee's pre-existing disability did not reach the minimum thresholds to trigger Second Injury Fund liability; (3) employee failed to prove that his pre-existing eye disability was a hindrance or obstacle to his employment; (4) the administrative law judge improperly substituted his own medical opinion on the issues of MMI and medical diagnoses; and (5) the award of a 60% load factor is excessive in light of employee's testimony that his corrected vision is 20/20 in both eyes.

The issue currently before the Commission is the nature and extent of any Second Injury Fund liability.

Employee: John Deibel

- 2 -

### **Findings of Fact**

Employee works as a parcel delivery driver for employer. On average, employee delivers 300 or more packages per day.

In February 1999, employee suffered a detached retina in his right eye as a result of a work injury. Employee underwent laser surgery as a result of this injury. Employee did not provide any treatment records related to this injury. Within six to nine months following the initial surgery for his right eye, employee experienced cloudiness in that eye. Employee eventually underwent lens replacement surgery to correct cataracts in his right eye. Employee did not provide any treatment records connected to the cataract surgery. Employee settled a claim for compensation against employer for 10% permanent partial disability of the right eye at the 140-week level on April 14, 2000.

In April 2005, employee injured his knee when he stepped off a package inside his delivery truck. On October 12, 2005, employee settled a claim for compensation against employer for 20% of the right knee. Currently, the skin of employee's knee is always numb, but employee does not experience any functional limitations as a result of the April 2005 knee injury.

On July 18, 2005, employee suffered injury to his left eye while pulling a roll of carpet from his delivery truck. Employee underwent surgery to repair a torn retina. Employee did not provide any treatment records related to this injury. At some point following the surgery to repair employee's torn retina, employee developed a cataract in his left eye, which was treated surgically. Employee did not provide any treatment records from the cataract surgery. Vision in employee's right eye worsened progressively following the July 2005 left eye injury.

On March 29, 2006, Dr. Joan Pernoud examined employee for the purpose of assessing the nature and extent of any permanent disability of employee's left eye. Dr. Pernoud diagnosed bilateral retinal detachments. Dr. Pernoud noted that the implant in employee's right eye increased an asymmetry between his two eyes requiring employee to use contact lenses, rather than glasses, to achieve normal binocularity. Dr. Pernoud determined that employee was at maximum medical improvement and rated his disability at 21.6% permanent partial disability of the left eye. Dr. Pernoud opined that employee's left eye condition complicates and worsens his pre-existing visual asymmetry. Dr. Pernoud did not provide any opinion as to the extent of any preexisting permanent partial disability in employee's right eye.

On May 18, 2006, Dr. Pernoud opined, in a letter to employee's counsel, that it would be prudent to leave medical treatment open for at least an additional year in light of the fact that the cataract in employee's right eye did not need to be removed for two years following the retinal detachment repair. Dr. Pernoud recommended that employee be evaluated again in the summer of 2007, if not earlier, in order to determine whether "his cataract has become worse." Dr. Pernoud did not specify whether she was speaking of a cataract in employee's right or left eye.

Employee: John Deibel

- 3 -

On June 28, 2006, employee settled a claim for compensation against his employer for 21.6% permanent partial disability of the left eye at the 140-week level. Employer agreed to leave medical treatment open until 2007 for cataract repair of the left eye.

On October 3, 2007, Dr. Pernoud again examined employee. Dr. Pernoud issued a supplemental report on October 4, 2007, addressing the condition of both of employee's eyes. Dr. Pernoud diagnosed traumatic cataract formation and removal in each eye, and issued new disability ratings. Dr. Pernoud rated employee's right eye at 72% permanent partial disability at the 140-week level, and employee's left eye at 67.6% permanent partial disability at the 260-week level. Dr. Pernoud provided little in the way of explanation or elaboration to support the assigned ratings. Dr. Pernoud merely filled out a Division of Workers' Compensation Form 9-A Physician's Report on Eye Injuries, without authoring a narrative report to explain her findings and ratings. Due to the summary nature of her report, we are unable to determine whether her ratings are meant to identify the extent of right eye disability as of the date of her report or whether the right eye rating is to be understood as pre-existing the primary injury. Dr. Pernoud's report indicates that employee has 20/20 vision with correction.

### **Conclusions of Law**

#### *Preexisting Right Knee Injury*

Initially, we note that we agree with the finding of the administrative law judge that the preexisting right knee injury does not combine in a synergistic fashion with the primary injury. We further find that employee failed to establish that the preexisting right knee injury constituted a hindrance or obstacle to employment at the time of the primary injury: employee admitted that he experiences no functional limitations as a result of the knee injury. Given these findings, we conclude that employee is not entitled to benefits from the Second Injury Fund on the basis of any combinative disability stemming from the right knee injury and the primary injury. See *E.W. v. Kan. City Sch. Dist.*, 89 S.W.3d 527, 537 (Mo. App. 2002). We will now address employee's claim that his preexisting right eye injury combines with the primary injury to trigger Second Injury Fund liability.

#### *Preexisting Right Eye Injury*

The sole issue before the Commission is the nature and extent of any Second Injury Fund liability. 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." Here, employee seeks an award of permanent partial disability benefits from the Second Injury Fund. The Second Injury Fund is liable for permanent partial disability benefits 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, 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,

Employee: John Deibel

- 4 -

receives a subsequent compensable injury resulting in additional permanent partial disability ... 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 ....

#### Section 287.220.1 RSMo

Under the foregoing section, in order to recover permanent partial disability benefits from the Second Injury Fund, an employee is required to prove the existence of a preexisting permanent partial disability that equals a minimum of fifty weeks compensation for injuries to the body as a whole or fifteen percent permanent partial disability of a major extremity. Here, employee argues that he is entitled to benefits from the Second Injury Fund on the basis of his preexisting right eye injury. "An injury to the eye is also a partial injury to the body as a whole for purposes of fund liability." *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004). Therefore, in assessing the nature and extent of Second Injury Fund liability in this case, we must examine the record to determine whether, on the date of the primary injury, employee's right eye disability met the statutory threshold of fifty weeks compensation for an injury to the body as a whole.

Employee provided little evidence of the degree of disability of his right eye at the time of the primary injury. Employee provided evidence of his April 14, 2000, settlement with employer for 10% permanent partial disability of the right eye at the 140-week level. The settlement is relevant evidence of the extent of right eye disability. See *Conley v. Treasurer*, 999 S.W.2d 269, 275 (Mo. App. 1999). Clearly, though, the settlement does not provide evidence of a permanent partial disability equal to or greater than fifty weeks. Although employee provided his testimony that he developed cataracts in his right eye six to nine months following his surgery for a detached retina, and that he underwent a subsequent surgery to address the cataracts, employee failed to provide any treatment records whatsoever related to his right eye.

The only expert medical evidence related to employee's right eye comes from Dr. Pernoud's report dated October 4, 2007, providing a rating of 72% permanent partial disability at the 140-week level. Under § 287.220.1, employee is required to prove, and we are required to assess, the degree of *preexisting* disability. Dr. Pernoud's rating was issued more than two years after the date of primary injury and offers no explanation as to causation or a timeline for the deterioration of vision in employee's right eye.

Employee: John Deibel

- 5 -

Employee testified that the vision in his right eye deteriorated *after* July 2005. This testimony renders Dr. Pernoud's ratings effectively useless on the question of preexisting right eye disability, as this Commission cannot be sure when, why, and to what extent employee's right eye vision deteriorated. Given these limitations and deficiencies, we do not consider Dr. Pernoud's rating probative as to the extent of right eye disability as it existed on July 18, 2005, the date that employee sustained the primary injury.

Faced with a stipulated disability rating in April 2000 that does not meet the statutory threshold, the lack of any treatment records related to the right eye, and Dr. Pernoud's report rating right eye disability more than two years after the primary injury and providing no elaboration or explanation for her ratings, we conclude that employee has provided insufficient evidence to prove his entitlement to permanent partial disability benefits from the Second Injury Fund.

We conclude that employee did not suffer a preexisting right eye disability that met the minimum threshold required under § 287.220.1 RSMo. We must reverse the decision of the administrative law judge and deny benefits.

**Conclusion**

Based on the foregoing, the Commission concludes and determines that employee failed to prove that his preexisting right eye disability met the requisite statutory thresholds to establish Second Injury Fund liability under § 287.220.1 RSMo. Accordingly, employee's claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued November 13, 2009, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 20<sup>th</sup> day of July 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
**DISSENTING OPINION FILED**  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

Employee: John Deibel

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

As noted by the administrative law judge, eye injuries are unique and as such they are treated separately under Missouri Workers' Compensation Law. The Division of Workers' Compensation (Division) has designed and promulgated rule 8 CSR 50-5.020 imposing guidelines for medical evaluation of the extent of disability stemming from work related eye injuries. Specifically, 8 CSR 50-5.020(9) (F) provides:

Compensable disability shall not be computed until all adequate and reasonable operations and treatment known to medical science have been offered to correct the defect. Final examination on which compensation is to be based shall not be made until at least three (3) months shall have elapsed after all visible evidences of inflammation have disappeared, except in cases of disturbance of extrinsic ocular muscles, optic nerve atrophy, sympathetic ophthalmia, traumatic cataract and paralysis of accommodation; in such cases at least twelve (12) months and preferably not more than sixteen (16) months shall intervene before the examination shall be made on which final compensable disability is to be computed.

The foregoing rule requires delaying the computation of compensable disability in cases of traumatic cataract until at least twelve months following the date of injury. This rule takes into account the unique nature of eye injuries and the possibility for significant complications or deterioration following surgery. The case at hand involves post-surgery development of traumatic cataracts and provides a perfect example of the wisdom behind the Division's rule.

Employee suffered a detached retina in his right eye as a result of a work injury in February 1999. Employee underwent laser surgery. Within six to nine months, employee developed cataracts and so had to undergo another right eye surgery. Although employee settled his claim against employer for 10% of the right eye in April 2000, Dr. Pernoud's report of October 4, 2007, provides the better evidence of the extent of right eye disability because it takes into account the subsequent development of traumatic cataracts and the related surgery. The majority discounts Dr. Pernoud's rating because it came two years after the primary injury. In light of 8 CSR 50-5.020(9) (F), and given the circumstances of this case, I must disagree with the majority's analysis. I find nothing in Dr. Pernoud's report that would preclude this Commission from accepting her ratings as the best evidence of the extent of employee's preexisting right eye disability. Employee obviously could not have foreseen the July 2005 left eye injury. It is unjust to penalize him for not having obtained a disability rating for his right eye before that date. The majority's decision in this matter sends the absurd message that employee should have undergone the significant expense and inconvenience of periodically seeking right eye disability ratings from a medical expert on the off chance that he would sustain another

Employee: John Deibel

- 2 -

eye injury that would require him to provide such a rating in proving a case against the Second Injury Fund.

Given the foregoing, I would affirm the award of the administrative law judge of 165.84 weeks at the compensation rate of \$365.08 against the Second Injury Fund. Because the majority has decided otherwise, I respectfully dissent.

---

John J. Hickey, Member

## AWARD

Employee:	John Deibel	Injury No.: 05-066788
Dependents:	N/A	Before the
Employer:	United Parcel Service (settled)	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	Liberty Insurance Corporation	Department of Labor and Industrial
Hearing Date:	August 13, 2009	Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDV:cw

### 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: July 18, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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: (settled)
12. Did accident or occupational disease cause death? No Date of death?
13. Part(s) of body injured by accident or occupational disease: eyes
14. Nature and extent of any permanent disability: settled
15. Compensation paid to-date for temporary disability: \$6,173.22
16. Value necessary medical aid paid to date by employer/insurer? \$12,089.05

Employee: John Deibel

Injury No.: 05-066788

17. Employee's average weekly wages: \$1168.08

18. Weekly compensation rate: \$696.97/\$365.08

19. Method wages computation: agreed

**COMPENSATION PAYABLE**

20. Amount of compensation payable: (previously settled)

21. Second Injury Fund liability: Yes

165.84 weeks of permanent partial disability from Second Injury Fund

TOTAL: \$60,544.87

22. Future requirements awarded: None

Said payments to begin 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: Ted Pashos

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	John Deibel	Injury No: 05-066788
Dependents:	N/A	Before the
Employer:	United Parcel Service (settled)	<b>Division of Workers'</b>
Additional Party: Second Injury Fund (only)		<b>Compensation</b>
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Liberty Insurance Corporation (settled)	Checked by MDV:cw

### **ISSUES PRESENTED**

The issues presented for resolution by way of this hearing are the nature and extent of any Second Injury Fund liability for the combinative disability between the primary eye injury and a prior eye injury. The Second Injury Fund contends that neither injury meets the fifty-week threshold required as a minimum for these eye injuries to be considered serious enough for synergistic disability.

### **FINDINGS OF FACT**

1. Claimant originally injured his right eye on February 16, 1999, and settled that case on April 14, 2000 for 10% of the right eye at the 140-week level. Claimant injured his left eye on July 18, 2005 and settled that claim against the employer UPS for 21.6% of the left eye on June 28, 2006, that injury forms the primary injury in this case. A report from Dr. Pernoud dated March 31, 2006; calculated Claimant's left eye impairment at 21.6%.
2. Another report a year and a half later by Dr. Pernoud on October 4, 2007, assesses a 72% disability against Claimant's right eye or the poorer eye calculated against 140 weeks and also finds a 67.6% disability to the better left eye calculated against the remainder of 260 weeks.
3. The Second Injury Fund contends that neither the 10% right eye injury or the 21.6% left eye impairment constitutes the equivalent of a 12.5% permanent partial disability of the body as a whole or 50 weeks of disability which is necessary to qualify for Second Injury Fund payment. Claimant contends that it is obvious that his condition got worse and wants to calculate his disability against the Second Injury Fund using the October 4, 2007 report. Second Injury Fund wants to use the disability recited in the settlement stipulations as of the date of settlement of the primary claim. Second Injury Fund contends that Claimant's injury on both left and right deteriorated after the date of July 18, 2005 accident and also following the March 31, 2006 report relied upon by Claimant and the Employer to settle the July 18, 2005 left eye injury. The Second Injury Fund contends that Claimant suffered from post accident worsening and that combinative disability should be calculated as of the date of the accident on July 18, 2005.

4. 8 C.S.R. 50-5.020 (9) (F), provides that compensable disability shall not be computed until all adequate and reasonable operations and treatment known to medical science have been offered to correct the defect. Final examination on which compensation is to be based shall not be made until at least three months shall have elapsed after all visible evidences of inflammation have disappeared, except in cases of disturbance of extrinsic ocular muscles, optic nerve atrophy, sympathetic ophthalmia, traumatic cataract and paralysis of accommodation; in such cases at least twelve months and preferably not more than sixteen months shall intervene before the examination shall be made on which final compensable disability is to be computed.
5. Claimant did suffer traumatic cataract in this case January 15, 2007 would be sixteen months after the injury itself. Although not many medical records are in evidence, the records that I do have disclose that Claimant underwent retinal detachment repair surgery and the Examination Form 9 dated March 31, 2006 indicated scarring from the surgery.
6. Applying the above-mentioned regulations the March 31, 2006 report should not have been used to calculate impairment from the July 18, 2005 injury. That report was much too soon under the regulations. I also note, however that the June 14, 2007 report (Second Pernoud report) is two months past the sixteen month date mentioned in the same statute.
7. "Nevertheless, by the terms of the statute, the twelve-month date is mandatory; the sixteen-month date is preferable".
8. The question becomes does the special nature of eye injuries require that disability of both the primary and the pre-existing injury be allowed to age and settle before they are calculated.
9. The fact that eye injuries have a special method of calculation and an entire disability calculation section in the regulations imbues these types of disabilities with special treatment. The law takes recognition that eye injuries often progress severely in their disabling and deteriorating qualities for a good two years following the original injury. In this case, the original right eye injury settled for 10% impairment, but by October 4, 2007, the impairment was scored at a whopping 72% of the right eye. On March 31, 2006, the left eye injury was scored at 21.6% impairment of the remaining 260 weeks, but by October 4, 2007, the date of the second report, it now deteriorated to 67.6% impairment of the left eye (at the 260 week level used to calculate secondary injuries of the better eye when two eyes are involved.) See, 8 C.S.R. 50-5.020 (8).

**FINDINGS OF FACT**

1. Claimant has sustained a 67.6% impairment measured at the 260-week level for the primary injury or 175.6 weeks of disability. Pre-existing that eye injury, claimant suffered from a 72% permanent partial disability of the right eye at the 140-week level for 100.84 weeks of disability. The two injuries are working in a synergistic fashion best represented by a loading factor of 60% of the underlying disabilities. This provides 165.84 weeks of disability at the compensation rate of \$365.08.
2. The knee injury does not combine in a synergistic fashion with the eye injuries.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Matthew D. Vacca  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest: