

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 02-148591

Employee: Jody Durbin
Employer: Ford Motor Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of the 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.¹ We have heard oral argument, reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge (ALJ) dated October 18, 2010, by issuing a separate opinion allowing compensation in the above-captioned case.

Preliminaries

The ALJ heard this matter to consider the following issues: 1) nature and extent of permanent partial disability; and 2) nature and extent of any Second Injury Fund liability.

The ALJ found that employee's November 22, 2002, work-related injury resulted in 15% permanent partial disability of the upper left extremity rated at the shoulder. The ALJ found that employee suffered from preexisting disabilities in the amount of 17.5% permanent partial disability of the body as a whole as a result of her June 16, 1999, work-related injury. Lastly, the ALJ found that employee's primary injury combined with her preexisting disabilities to result in an enhancement of 35% permanent partial disability. The ALJ found that the Second Injury Fund is liable for this 35% permanent partial disability enhancement.

Employee appealed to the Commission alleging that the ALJ erred in denying her claim for permanent total disability benefits against the Second Injury Fund.

Findings of Fact

Primary Injury

On November 22, 2002, employee sustained an injury to her left shoulder. This injury occurred while she was working for employer on the assembly line installing grills on cars. She testified that she reached for a grill across the frame of a car and her left shoulder "locked up."

Employee immediately notified employer of her injury and was referred to Dr. Van Ryn. Dr. Van Ryn diagnosed employee with adhesive capsulitis. Employee was treated with glenohumeral injections and physical therapy. Dr. Van Ryn released employee from treatment on April 1, 2004, and gave employee permanent restrictions of no lifting over

¹ Statutory references are to the Revised Statutes of Missouri 2002 unless otherwise indicated.

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20 pounds, no lifting over 5 pounds with the left arm, no work above chest height, no use of grease or drill "guns," and to refrain from doing overhead work.

On October 6, 2004, employer placed employee on long-term disability. Employee has not worked since that date.

Dr. Musich evaluated employee on October 7, 2004 and October 13, 2008. Dr. Musich opined that as a result of the November 22, 2002, injury, employee sustained 25% permanent partial disability of the upper left extremity rated at the shoulder.

Employer offered the deposition of Dr. Hulsey, who examined employee on July 13, 2009. Dr. Hulsey opined that the November 22, 2002, injury was a substantial factor in the development of employee's adhesive capsulitis. Dr. Hulsey further opined that as a result of this injury, employee sustained 10% permanent partial disability of the upper left extremity rated at the shoulder.

Employee testified that she continues to experience persistent pain in her left shoulder, and has weakness and loss of use.

Preexisting Disabilities

On June 16, 1999, employee sustained a back injury while working on the assembly line. Employee testified that when the accident occurred she was installing casing into a car for seat mounting. At some point, the vehicle in which she was working "jumped off the line" and approximately five vehicles struck it from behind. The striking vehicles caused employee's body to be jarred, resulting in immediate pain.

Employee was taken off work and paid temporary total disability benefits for the period from June 29, 1999 to December 14, 1999. Employee returned to work in mid-December 1999. Employee testified that she continued to experience pain and had significant symptoms of tightness and pressure in her mid-back and torso area. Employer sent employee to Dr. Randolph, who performed an independent medical evaluation on March 28, 2000. Dr. Randolph diagnosed employee with nonspecific mid-back pain with a component of myofascial pain being present and opined that employee was at maximum medical improvement. Dr. Randolph limited employee to lifting 30 pounds occasionally. Lastly, Dr. Randolph opined that employee sustained no more than 3% permanent partial disability of the body as a whole as a result of the June 16, 1999, injury.

In Dr. Musich's October 7, 2004, report, he opined that employee sustained 25% permanent partial disability of the body as a whole as a result of the June 16, 1999, injury. However, Dr. Musich opined in his October 13, 2008, report, that employee sustained 50% permanent partial disability of the body as a whole as a result of the same injury.

Dr. Wilkey provided testimony regarding an independent medical evaluation he performed on July 14, 2009. Dr. Wilkey testified that employee sustained 6% permanent partial disability due to chronic low back pain associated with the June 1999, injury.

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Employee testified that she still has lifting restrictions due to her cervico-thoracic back pain. She is unable to kneel, squat, or stoop without pain.

Combination

Dr. Musich opined that if employee was unable to maintain employment, it was his medical opinion that she would be permanently and totally disabled due to a combination of her injuries, her ongoing symptoms and her ongoing need for pain management.

Mr. England, a vocational rehabilitation counselor, evaluated employee on March 30, 2009. As part of this evaluation, Mr. England reviewed employee's entire medical file related to both the June 1999, injury and the November 2002, injury. Mr. England opined that employee was not employable and would not be able to successfully compete for or sustain any kind of work activity.

At the time of the hearing, employee testified that she is able to drive her children to school, drive to medical appointments, and do some grocery shopping.

Conclusions of Law

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." In order to trigger liability of the Second Injury Fund, employee must show the presence of an actual and measurable disability at the time the work injury is sustained and that work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In this case, it is clearly based upon prior medical records, medical reports, medical expert testimony, and employee's own testimony, that at the time of her November 22, 2002, injury she had preexisting disabilities resulting from the June 16, 1999, injury that caused a hindrance and obstacle to her continued employment or reemployment.

In evaluating cases involving preexisting disabilities, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – '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'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability

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resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

Kizior, 5 S.W.3d at 200.

1. Primary Injury

Based upon the steps provided in *Kizior*, to determine employer's liability we must first establish the degree or percentage of disability that resulted from the November 22, 2002, injury had there been no preexisting disabilities.

The ALJ concluded that the record supports a finding of 15% permanent partial disability of the left shoulder. We agree. We find that the weight of the evidence supports a finding that Dr. Musich's 25% rating is slightly exaggerated and Dr. Hulseley's rating of 10% is slightly understated. Based upon the medical records, medical reports, medical testimony, employee's testimony, and the record as a whole, we find that employee sustained 15% permanent partial disability of the left shoulder as a result of the November 22, 2002, injury.

2. Preexisting Disabilities

With respect to employee's preexisting disabilities suffered as a result of the June 16, 1999, injury, the experts' ratings range from no more than 3% to 50% permanent partial disability of the body as a whole.

We find that the 50% permanent partial disability rating by Dr. Musich is the most unreliable. This opinion was given more than nine years after the injury (October 2008). It in no way reflects employee's history of being able to return to work in December 1999 or the other experts' opinions and records. In addition, this 50% rating is inconsistent with Dr. Musich's own prior rating of 25% permanent partial disability, given in October 2004.

While we find that Dr. Musich's 50% permanent partial disability rating far exceeds employee's actual permanent disability sustained as a result of the June 1999, injury, we also find that Dr. Randolph's rating of "no more than 3% permanent partial disability" and Dr. Wilkey's rating of 6% permanent partial disability do not adequately account for employee's ongoing complaints and restrictions.

We find that in light of the medical records, medical reports, medical testimony, employee's testimony, and the record as a whole that the ALJ's initial finding of 15% permanent partial disability of the body as a whole is fully supported by the competent and substantial evidence. Therefore, we find that at the time of the November 22, 2002, accident, employee suffered from 15% permanent partial disability of the body as a whole.

3. Combination

Employee argues that she is permanently and totally disabled as a result of the primary injury combining with her preexisting disabilities. Section 287.020.7 RSMo defines "total disability" as the "inability to return to any employment"

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

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

In Dr. Musich's October 2004 report, he very generally concluded that the "combination of the present and past disabilities is significantly greater than their simple sum and will continue to produce a chronic hindrance in her routine activities of daily living." Dr. Musich came to this same conclusion in his October 2008 report, but added that if employee "is unable to obtain and maintain employment in the open job market [he] would consider her permanently disabled based upon the combination of the above noted injuries."

After employee sustained the November 22, 2002, injury, she continued working for nearly two years before being placed on long-term disability. Although employee is no longer working, she continues to drive her children to school, drive to medical appointments, and complete some grocery shopping.

We do not find that employee is permanently and totally disabled.

Although Dr. Musich hinted at an opinion of permanent and total disability in his report, he stated that he would only come to that conclusion "if employee is unable to obtain and maintain employment in the open job market." In addition, Dr. Musich generally concluded that the primary injury and preexisting disabilities combine to produce significantly greater permanent disability than their simple sums, but did not explain how the shoulder injury combined with the cervico-thoracic injury to result in this synergistic combination. For the foregoing reasons, we do not find Dr. Musich's prefaced opinion of permanent total disability to be credible.

We find Mr. England's opinion that employee is unable to compete in the open labor market is not supported by the medical record. As stated above, we find that employee is 15% permanently partially disabled of her left shoulder referable to the primary injury and 15% permanently partially disabled of the body as a whole referable to the June 1999, injury. The aforementioned ratings are predominantly based on employee's subjective pain complaints, not objective medical findings. We find that the record as a whole may support a finding that employee is unable to return to her physical job with employer; however, we do not find that she is unable to return to any employment. Her disabilities are simply not severe enough to prevent her from competing in the open labor market.

While we do not find that employee is permanently and totally disabled, we do find that employee's November 22, 2002, injury combines with her June 16, 1999, injury to result in greater disability than the simple arithmetic sum of the two resultant disabilities. This

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synergistic effect derives from employee's inability to use her left shoulder in moderate or heavier work, and her limitation of compensatory back movements in general work activities.

We find, based upon the medical records, medical reports, medical testimony, employee's testimony, and the record as a whole, that employee's 15% permanent partial disability of the left shoulder referable to the primary injury and the 15% permanent partial disability of the body as a whole referable to the June 16, 1999, injury, combine to result in an enhancement of 10% permanent partial disability.

Award

Employee's claim for permanent total disability benefits is denied.

The parties stipulated that employee's permanent partial disability rate is \$340.12.

As stated above, we find that employee sustained 15% permanent partial disability of the left shoulder (232 week level) as a result of the November 22, 2002, work injury. Therefore, we award from employer to employee permanent partial disability benefits of \$11,836.18.²

The Second Injury Fund shall be liable for an enhancement of 10% permanent partial disability benefits (or 9.48 weeks), which amounts to \$3,224.34.³

The Commission further approves and affirms 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.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued October 18, 2010, is attached.

Given at Jefferson City, State of Missouri, this 1st day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

² 34.8 weeks x \$340.12 PPD rate = \$11,836.18.

³ 9.48 weeks x \$340.12 = \$3,224.34

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CONCURRING OPINION

I write separately to disclose the fact that I did not participate in the April 6, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I concur with the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member