

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

Injury No.: 03-102872

Employee: Joe Edwards
Employer: Honeywell International Inc. (Settled)
Insurer: Zurich North America Insurance Company (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the April 14, 2010, award and decision of the administrative law judge.

Preliminaries

The only issue at the hearing was the nature and extent of Second Injury Fund liability, if any.

The administrative law judge found that employee's permanent total disability is a result of the physical residuals from his primary injury and subsequent 2004 injury at home, and not a combination of employee's primary injury and preexisting disabilities. Given these findings, the administrative law judge determined that there is no Second Injury Fund liability.

Employee submitted a timely Application for Review with the Commission alleging the administrative law judge erred in the following ways: (1) the administrative law judge could not assign a different percentage of permanent partial disability where employee settled his claim with employer for a specific percentage of disability and the administrative law judge took judicial notice of the settlement; (2) the administrative law judge's findings regarding the injury at home were based on hearsay; (3) the Second Injury Fund did not produce a medical expert to contradict the testimony of employee's expert; and (4) the administrative law judge's findings on the issue of permanent total disability were contrary to the evidence of employee's preexisting disabling conditions.

For the reasons set forth in this award and decision, the Commission reverses the award of the administrative law judge.

Findings of Fact

Preexisting conditions

Employee has cervical neck problems stemming back to 1979. In October 2001, employee sought treatment for radicular-type neck pain. Employee's symptoms included tingling in the right arm, severe pain, and trouble with activities such as taking his shirt off, lifting objects overhead, and lying supine. An MRI on October 5, 2001, revealed degenerative changes including bulging discs at C5/C6 and C6/C7 with impingement. Employee's treatment included physical therapy, epidural injections, and intermittent prescriptions for medications such as Vicodin, Hydrocodone, and Celebrex.

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Employee missed work and declined a lot of overtime due to his neck pain and radicular symptoms. Dr. Stuckmeyer opined that employee's preexisting cervical spine condition resulted in a 20% permanent partial disability of the body as a whole.

Employee has other preexisting injuries and conditions, such as a childhood right arm injury; low back injuries in 1979, 1980, 1997, and 2000; and a left foot injury in November 2002. Employee testified that these other injuries and conditions did not really hinder or prevent him from doing his job, however, his right arm injury did affect the way he held power tools and left him with a loss of grip strength and pain. Dr. Stuckmeyer assigned a 20% permanent partial disability of the right elbow referable to employee's preexisting right arm condition.

We find Dr. Stuckmeyer credible and adopt his ratings with regard to employee's preexisting cervical spine and right arm disabilities.

Primary injury

On August 15, 2003, employee was at work rolling paper up from the floor. In the process of performing a bending and twisting motion, employee hurt his back. An MRI on October 2, 2003, revealed a herniated disc at L4-5. Employee received epidural injections and was warned by his doctor not to go back to the same job. Notwithstanding the doctor's warnings, employee worked full duty between August 15, 2003, and his surgery on February 11, 2004. On the latter date, employee underwent an L4-L5 microdiscectomy performed by Dr. Jackson. He was released to return to work with restrictions on July 16, 2004. Employee worked various light duty jobs until September 2004, when employer informed him he could no longer do his old job due to his restrictions. Employer offered employee a job as a console operator but employee didn't take it because he didn't think he could do it.

In November 2004, employee reinjured his back getting up from a sofa. He sought treatment and was ultimately referred to Dr. Takacs, who recommended a second surgery. Employee opted for epidural injections instead. At the time of hearing, employee was still receiving epidural injections and was on Oxycodone and Fentanyl patches.

On April 27, 2007, an administrative law judge approved employee's settlement of his claim against employer for the August 15, 2003, injury for "15 to 16%" permanent partial disability of the body as a whole.

Dr. Stuckmeyer opined that the November 2004 incident flowed from the same chain of events as the August 2003 work injury and opined that employee sustained a 40% permanent partial disability of the body as a whole as a result of the work injury. The Second Injury Fund offered no evidence to contradict Dr. Stuckmeyer's opinion. We disagree with the administrative law judge that a stray comment in employee's settlement agreement with employer is more reliable than the testimony of the sole medical expert in this case. Likewise, we find no medical relevance in employee's admissions that employer denied liability and refused to pay any compensation for the November 2004 event. These factors are not probative on the issue of medical

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causation and do not permit us to disregard the uncontradicted and unimpeached medical testimony on the record.

We find Dr. Stuckmeyer credible. We find that the November 2004 sofa incident was a continuation of the August 2003 work injury.

After an exhaustive search of the medical record (necessitated due to both parties' failure to cite or otherwise direct us to any evidence of employee's date of maximum medical improvement for the primary injury), it appears to us that there is no record of any treatment for employee's lumbar spine after April 27, 2005. Dr. Laughlin's note for that date mentions positive results from two recent epidural steroid injections at L4-5, notes the doctor's opinion that employee needs to undergo surgery, and states: "We opted not to do anything else." This evidence, combined with employee's testimony that he opted not to undergo surgery, is sufficient to convince us that employee was at maximum medical improvement on April 27, 2005.

We find that employee reached maximum medical improvement from the work injury on April 27, 2005. We adopt Dr. Stuckmeyer's opinion that employee sustained a 40% permanent partial disability of the body as a whole as a result of the work injury.

Permanent total disability

Both Dr. Stuckmeyer and Mr. Cordray testified that employee is permanently and totally disabled due to a combination of the disability from his primary injury and his preexisting disabling conditions. The Second Injury Fund offered no expert testimony contra.

We find Dr. Stuckmeyer and Mr. Cordray credible. We find that employee is permanently and totally disabled due to a combination of his primary injury and his preexisting disabilities.

Conclusions of Law

Second Injury Fund's Liability for Permanent Disability

Generally

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'" *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000) (citations omitted). "In order to be entitled to Fund liability, the claimant must establish either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).

Hindrance or Obstacle

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999). To implicate the Second Injury Fund, the employee must have an actual and measurable preexisting disability at the

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time the work injury is sustained of such seriousness as to constitute a hindrance or obstacle to employment. Section 287.220.1 RSMo.

We acknowledge that employee performed extremely heavy work for employer up until September 2004, despite pain and difficulty related to his cervical spine and right forearm. Nevertheless, we disagree that this evidence compels a finding that employee did not suffer from preexisting disabling conditions. “[T]he proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past, it is on the potential that the condition 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.” *Loven v. Greene County*, 63 S.W.3d 278, 287 (Mo. App. 2001). We have found that employee suffered from preexisting disabling conditions of his cervical spine and right forearm. Given the potential for both conditions to combine with work-related injuries to create greater disability than in their absence, we conclude that both conditions were hindrances or obstacles to employment as of August 13, 2005.

Given the foregoing, we conclude that employee has met his burden of proving the presence of actual and measurable disabilities at the time the work injury was sustained.

Calculation of Liability

Having determined that the Second Injury Fund is implicated in this matter, we must determine the amount of Second Injury Fund liability.

[W]here a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1.

Vaught v. Vaughts, Inc./Southern Mo. Constr., 938 S.W.2d 931, 939 (Mo. App. 1997) (citations omitted).

We have found that employee is permanently and totally disabled as a result of the combination of his preexisting disabling conditions and the effects of the primary injury. Accordingly, the Second Injury Fund is liable for permanent and total disability benefits. Because employee reached maximum medical improvement on April 27, 2005, and sustained a 40% permanent partial disability of the body as a whole attributable to the work injury, the Second Injury Fund is liable for weekly payments of \$282.33 (the difference between the stipulated permanent partial and permanent total disability

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rates), commencing April 27, 2005, and following thereafter for 160 weeks. The Second Injury Fund will then be liable for weekly payments of \$629.38 for employee's lifetime, or until modified by law.

Award

We reverse the award of the administrative law judge.

Employee is entitled to permanent total disability benefits from the Second Injury Fund. For the period April 27, 2005 to May 21, 2008, the Second Injury Fund owes to employee the weekly amount of \$282.33. Beginning on May 21, 2008, the Second Injury Fund shall pay to employee a benefit of \$629.38 weekly for his lifetime, or until modified by law.

Jerry Kenter, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

The award and decision of Administrative Law Judge Mark S. Siedlik, issued April 14, 2010, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 13th day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary