

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

Injury No.: 11-026274

Employee: Robert Elder
Employer: O'Reilly Auto Parts (Settled)
Insurer: Safety National Casualty (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Permanent total disability

Employee seeks permanent total disability benefits from the Second Injury Fund. We agree with the administrative law judge's finding that employee is permanently and totally disabled as a result of the last injury considered in isolation, and that the Second Injury Fund therefore has no liability. We note, however, that the administrative law judge stated, on page 2 of her award, that "[t]he Second Injury Fund is not liable to employee for permanent total disability benefits since there is no synergistic effect." We write to make clear that a showing of synergy between one's preexisting conditions of ill-being and a subsequent work injury is not required to prove a claim against the Second Injury Fund for permanent total disability benefits. Instead, "[f]or a claimant to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD." *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144 (Mo. App. 2014).

However, the administrative law judge is clearly correct that the last accident alone caused employee's permanent total disability. This is the only determination that we need make, because "[i]f a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount." *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000).

Although employee asserts, in his brief, that his vocational expert, Michael Dreiling, was not able to offer an opinion about whether employee's permanent total disability resulted from the last injury alone or in combination with employee's preexisting conditions of ill-

Employee: Robert Elder

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being, Mr. Dreiling did, in fact, opine that employee is permanently and totally disabled based solely on the restrictions imposed by Dr. Koprivica referable to the last accident.

Employee also argues, in his brief, that we should credit the testimony from Dr. MacMillan suggesting employee is permanently and totally disabled owing to a combination of the primary injury and employee's preexisting conditions of ill-being. But Dr. MacMillan only rendered this opinion in response to a hypothetical question that did not provide sufficient information regarding employee's symptoms and limitations, and also admitted that he never examined employee regarding his prior injuries other than carpal tunnel syndrome, and that he did not review any prior medical records. For these reasons, we are not persuaded by Dr. MacMillan's opinion as to the cause of employee's permanent total disability.

In sum, although there may have been compelling reasons to settle with the employer/insurer, the overwhelming weight of the evidence on the record before us establishes that employee is permanently and totally disabled owing to the last accident considered alone.

Conclusion

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

The award and decision of Administrative Law Judge Lisa Meiners, issued April 16, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of September 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD AS TO THE SECOND INJURY FUND

Employee: Robert Elder

Injury No. 11-026274

Dependents: N/A

Employer: O'Reilly Auto Parts (Settled)

Insurer: Safety National Casualty (Settled)

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: April 2, 2014

Checked by: LM/lh

FINDINGS OF FACT AND RULINGS OF LAW

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: April 7, 2011.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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: While in the course and scope of employment, the Claimant sustained serious injury due to a motor vehicle accident while driving a truck for his employer.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Neck, left upper extremity, hearing loss, body as a whole due to severe burns.

14. Nature and extent of any permanent disability: Permanent total disability against the employer only.
15. Compensation paid to-date for temporary disability: \$34,879.35
16. Value necessary medical aid paid to date by employer/insurer? \$139,149.48
17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$634.17
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:
22. Second Injury Fund liability: The Second Injury Fund is not liable to Employee for permanent total disability benefits since there is no synergistic effect.

Said payments to begin as of the date of the award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Mr. Steven Effertz

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Elder

Injury No. 11-026274

Dependents: N/A

Employer: O'Reilly Auto Parts (Settled)

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FINDINGS OF FACT AND RULINGS OF LAW

The parties appeared for hearing on April 2, 2014. Robert Elder appeared in person and with counsel, Steven Effertz. The Employer and Insurer in this matter have reached a compromise settlement which leaves the remaining party as the Second Injury Fund who is represented by Richard Wiles.

STIPULATIONS

Regarding stipulations the parties stipulated to the following:

- 1) That the Employee and the Employer were operating subject to Missouri's compensation law on April 7, 2011;
- 2) That Mr. Elder was an employee working subject to the law;
- 3) That jurisdiction is proper in Kansas City, Missouri;
- 4) That Mr. Elder sustained an accident that arose out of and in the course of his employment on April 7, 2011;
- 5) That proper notice was given;
- 6) That the claim was filed within the time allowed by law;
- 7) That the Employee's permanent total disability rate was \$634.17;
- 8) That the Employer had provided 55 weeks of temporary total disability benefits in the amount of \$34,879.35;
- 9) That the Employer had provided medical expenses in the amount of \$139,149.48.

Claimant, age 65, has worked driving trucks since 1998. Prior to 1998, Claimant worked at unskilled positions within the open labor market. Claimant completed the 8th grade and never received a GED. On April 7, 2011, Claimant was involved in a severe motor vehicle accident when his truck swerved off the highway to avoid an oncoming car. The truck Claimant drove caught on fire and he was hospitalized for severe burns from April 7th to April 19th. He suffered burns over 6 percent of his body, as well as suffered respiratory insufficiency due to the trauma he suffered in the accident. Claimant also suffered from a cervical fracture of the C2 level, difficulty with vision due to floaters of the right eye, and traumatic cubital tunnel syndrome on the left. Claimant also was diagnosed with profound hearing loss on the right side secondary to the traumatic head injury from the accident.

Claimant saw various doctors after his release from the hospital on April 19. Claimant went to a Dr. Leibson who treated Claimant for detachment of the optic nerve. Claimant was also treated by Dr. MacMillan who performed a cervical fusion from C1-C2 levels on September of 2011. Dr. MacMillan also treated Claimant for left shoulder impingement syndrome, rotator cuff tear, and left cubital tunnel

syndrome as a result of the motor vehicle accident. Dr. MacMillan on April 26, 2012 rated Claimant 30 percent per impairment for the cervical spine with 5 percent pre-existing and 10 percent of the left upper extremity with respect to traumatic cubital tunnel syndrome. Dr. MacMillan then released Claimant with light/medium restrictions of occasional lifting of 20 to 35 pounds, lifting frequently up to 15 pounds, and lifting constant up to 7 pounds. Dr. MacMillan informed Claimant that he could not return driving commercial trucks.

Currently, Claimant has nightmares at least two to three times per week regarding the motor vehicle accident. Claimant avoids driving due to loss of motion of his neck and has ongoing neck pain to the point he is unable to rotate his neck and his ability to look up is limited. Claimant also has profound hearing loss on the right side since this injury and now wears a hearing aid, which at hearing he testified he lost his hearing aid device. Claimant has now medial left elbow pain with persistent tingling and numbness into the left and little fingers. Claimant as a result of the burn injuries has sensitivity of the sun and has difficulty with sun exposure on his arms and scalp. Claimant has severe weakness of his left shoulder and loss of motion, as well as ongoing left shoulder pain.

Prior to April 7, 2011, Claimant discussed his prior injuries and medical treatment. Claimant had prior low back complaints dating all the way back to 1998. Claimant took pain medication to alleviate the low back pain but testified he worked full time without restrictions as a truck driver. Claimant also sustained a 2008 injury of his forearm, a bypass surgery in 2003, and a right heel injury in 2007, that I find did not limit his ability to perform his job duties prior to April of 2011.

Claimant presented the experts of Dr. Brent Koprivica and vocational expert Michael Dreiling. Claimant's experts both state that Claimant is permanently and totally disabled based on the last accident alone. Dreiling, Claimant's vocational expert, found no reasonable employer would hire Claimant in the open labor market based on the restrictions of Dr. Koprivica and the authorized treating physician's restrictions. Indeed, Dr. Koprivica gave severe restrictions as outline in Claimant's Exhibit G, Deposition Exhibit 1. I agree with Claimant's own experts and find Claimant is permanently and totally disabled solely on the April 7, 2011 accident. This finding is based on the overwhelming weight of evidence presented including the medical testimony and records. Although Claimant sustained prior injuries that resulted in permanent partial disability, I find based on the evidence presented that it is the sequela of the April 7, 2011 accident which caused him to be unemployable in the open labor market. The Second Injury Fund is not liable to Claimant for permanent total disability benefits or permanent partial disability benefits because I find no synergistic effect of the primary injury with his pre-existing conditions.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation