

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

Injury No.: 08-090760

Employee: David Faerber
Employer: Schwan's Food Industries (Settled)
Insurer: Hartford Fire Insurance Co. (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 parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. 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 modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the sole issue whether the Second Injury Fund is liable for permanent partial disability benefits.

The administrative law judge rendered the following findings and conclusions: (1) employee sustained a compensable last injury which resulted in 30% permanent partial disability of the right shoulder; (2) at the time of the last injury, employee suffered from a preexisting 20% permanent partial disability of the left shoulder, and a preexisting 20% permanent partial disability of the right knee; (3) the credible evidence establishes that the primary right shoulder injury combined with the preexisting left shoulder and right knee injuries and that a loading factor should be added to that combination; and (4) the Second Injury Fund is liable for 14.8 weeks of permanent partial disability benefits.

The Second Injury Fund filed a timely Application for Review with the Commission alleging that employee's preexisting conditions were not disabling until after the primary injury.

Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact as to the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

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Preexisting permanent partial disability

In 1978, employee suffered a right knee injury which resulted in some internal derangement that required a surgical intervention. On November 29, 1978, Dr. T. J. Ryan performed an arthroscopy and arthrotomy surgery with removal of torn lateral semilunar cartilage. Employee missed about five weeks of work after that surgery.

The administrative law judge determined that employee's preexisting right knee condition amounted to a 20% permanent partial disability as of September 8, 2008, the date of the primary right shoulder injury. After reviewing the evidence, we disagree with this finding.

At the hearing before the administrative law judge on June 26, 2012, employee testified on direct examination about his "current physical complaints" with respect to his right knee. *Transcript*, page 11. But employee did not testify as to the degree of disability affecting his right knee condition as of September 8, 2008. On cross-examination by counsel for the Second Injury Fund, employee testified that his right knee problems worsened significantly after the September 2008 injury, because he is no longer able to pull himself up into his truck with his arms, so a greater strain is placed on his knees. Employee also testified that he did not have to wear a knee brace until after the primary injury. Then, on redirect examination, employee's counsel asked if employee had physical complaints as to his right knee between 1978 and 2008. Employee forthrightly acknowledged: "Not really. I mean, no more than old age, you know, you get older, but nothing like what it is now." *Transcript*, page 20.

Employee presented the expert medical testimony of Dr. Musich, who rated employee's right knee condition at 20% permanent partial disability of the right lower extremity at the level of the knee. But notably, Dr. Musich did not rate employee's right knee condition "as of" September 8, 2008, and in fact did not provide any temporal indicators in his opinion other than to state that, "[s]ubsequent to" employee's 1978 surgery, employee "has continued to complain of chronic intermittent activity related right knee pain." *Transcript*, page 33. To the extent that these temporally vague comments from Dr. Musich can be read as rating a preexisting permanent partial disability of the right knee, this opinion tends to conflict with employee's testimony that he had virtually no complaints (other than what would be expected with aging) with respect to his right knee until after the primary injury in 2008. Given these circumstances, we find Dr. Musich's opinion lacking credibility to the extent he assigns 20% preexisting permanent partial disability to employee's right knee condition. Rather, we credit employee's own testimony as to his physical limitations referable to the right knee. We find that employee's right knee condition did not constitute a permanent partial disability until after the primary injury.

We affirm and adopt the administrative law judge's findings with respect to the nature and extent of disability referable to the primary injury and to employee's preexisting left shoulder condition.

Clerical error

We wish to correct a typographical or clerical error that appears in the award of the administrative law judge in the fourth paragraph on page 3. In the first sentence of that

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paragraph, the administrative law judge states: "When Claimant did not improve, he underwent a second surgery in August 2008..." The surgery to which the administrative law judge refers took place in August 2009.

Conclusions of Law

Section 287.220.1 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." That section provides that a preexisting disability must be permanent in nature and meet certain thresholds before Second Injury Fund liability is triggered. *Id.* For purposes of § 287.220.1 RSMo, we are concerned only with the extent of preexisting permanent partial disability that existed "at the time the last injury was sustained." *Id.*

We have found that employee's right knee condition did not constitute a permanent partial disability at the time the last injury was sustained. While employee's testimony would seem to support a finding that the primary injury caused employee's right knee condition to worsen because he had to rely more on his knees when he couldn't use his arms to pull himself up into his truck, this (if proven) would constitute an aspect of the primary injury itself, or in other words, this evidence would tend to support an award of permanent partial right knee disability as against employer. See *Pace v. City of St. Joseph*, 367 S.W.3d 137, 147 (Mo. App. 2012) (noting the rule in Missouri that "every natural consequence that flows from the injury, including a distinct disability in another area of the body, is compensable as a direct and natural result of the primary or original injury"). But where employee testified that he did not experience any real problems with his right knee before the primary injury, and where his expert rendered a temporally vague and ultimately non-credible rating, there is no basis for a finding that employee's right knee condition constituted a preexisting permanent partial disability.

It follows that the right knee condition cannot be included in the calculation of Second Injury Fund liability. We have affirmed and adopted the administrative law judge's findings with respect to the nature and extent of the primary injury and employee's preexisting left shoulder condition. Accordingly, we calculate Second Injury Fund liability as follows: 69.6 weeks (for the primary injury) + 46.4 weeks (for the left shoulder) = 116 weeks x 10% load factor = 11.6 weeks.

We conclude that the Second Injury Fund is liable for 11.6 weeks of permanent partial disability benefits at the stipulated rate of \$404.66, for a total of \$4,694.06.

Award

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability. The Second Injury Fund is liable for \$4,694.06 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued September 20, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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The Commission further approves and affirms the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 17th day of April 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: David Faerber

Injury No.: 08-090760

Dependents: N/A

Employer: Schwans Food Industries (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Hartford Fire Insurance Co. (Settled)

Hearing Date: June 26, 2012

Checked by: MDL

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: September 8, 2008
5. State location where accident occurred or occupational disease was contracted: Gasconade 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:
Employee was opening the door on a truck when he felt a burning sensation down his right arm.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: 30% PPD of the right shoulder previously settled with Employer
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$404.66 for PPD
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:	SETTLED
22. Second Injury Fund liability: Yes	
14.8 weeks of permanent partial disability from Second Injury Fund	\$5,988.97
TOTAL:	\$5,988.97
23. 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: Mr. D. Andrew Weigley

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Faerber

Injury No.: 08-090760

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Schwans Food Industries (Settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Hartford Fire Insurance Co. (Settled)

Checked by: MDL

PRELIMINARIES

A hearing was held on June 26, 2012 in Hermann, Missouri. David Faerber ("Claimant") was represented by Mr. D. Andrew Weigley. Swans Food Industries ("Employer") and its insurer Hartford Fire Insurance Co. previously settled their liability with Claimant, and this matter proceeded to a hearing against the Second Injury Fund ("SIF") which was represented by Assistant Attorney General Curtis Schube. Mr. Weigley requested a fee of 25% of Claimant's award.

The parties stipulated that on or about September 8, 2008, Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in Gasconade County, Missouri; Employer received proper notice of the injury; the claim was timely filed; Claimant's Permanent Partial Disability ("PPD") rate is \$404.66; and in the event the SIF is found liable for PPD benefits due to the combination of the primary and pre-existing injuries, a loading factor of 10% shall apply. The only issue for resolution by hearing is whether the SIF is liable for PPD benefits.

SUMMARY OF EVIDENCE

Claimant works for Employer as a customer service manager. On September 8, 2008, Claimant injured his right shoulder when he was lifting the door on his truck and felt pain in his right shoulder. Following a course of conservative treatment, Claimant underwent a right shoulder examination under anesthesia; diagnostic arthroscopy; debridement of frayed superior anterior and posterior labrum; rotator cuff repair with mini-deltoid splitting approach; and biceps tenodesis. Following surgery he underwent physical therapy.

When Claimant did not improve, he underwent a second surgery in August 2008 which included a right shoulder arthroscopic intraarticular debridement of the undersurface; recurrent tear of the rotator cuff; debridement of peripheral fraying of the labrum followed by arthroscopy subacromial decompressive procedure with excision of remaining CA ligament; removal of multiple foreign bodies in the form of free sutures floating in the subacromial space, followed by open primary partial acromionectomy; and primary revision rotator cuff tear with repair and

removal of retained suture anchor. After this surgery Claimant underwent another course of physical therapy and was released from treatment in December, 2009.

Since his injury and treatment, Claimant continues to have pain and weakness in his right shoulder. He is particularly symptomatic when doing the overhead work that is required by his job. Claimant settled his claim with Employer for 30% PPD of the right shoulder.

In 1978 Claimant injured his right knee at work. Claimant underwent an arthroscopy and arthrotomy with removal of a torn lateral semi lunar cartilage. Claimant's injury affected his ability to perform his daily job duties because he is required to climb in and out of his truck on a regular basis. He has pain and discomfort in his knee. He wears a brace or wrap when his knee flares up. Using stairs causes pain.

Claimant injured his left shoulder at work in 2002. An MRI showed a questionable tear of the anterior glenoid labrum and questionable tear of the superior glenoid labrum and some degenerative changes at the acromioclavicular joint with mild impingement of the supraspinatus muscle belly. Claimant also had some tendonopathy of the rotator cuff and the supraspinatus tendon but no full thickness tear. Claimant had conservative treatment in the form of an injection and physical therapy. Claimant's left shoulder injury caused him problems at work, especially with overhead work. Claimant continues to have pain and discomfort in the left shoulder.

Dr. Musich examined Claimant and prepared a report. Dr. Musich opined that Claimant had 60% PPD of the right shoulder referable to the September 8, 2008 work injury. Dr. Musich also opined that prior to September 8, 2008 Claimant had 20% PPD of the left shoulder, and 20% PPD of the right knee. Dr. Musich found that the combination of Claimant's past and present disabilities is synergistically greater than their simple sum and will continue to produce a chronic hindrance in his routine activities of daily living.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at the hearing, and the application of Missouri law, I find:

Claimant established a right to recover from the Second Injury Fund. A claimant in a workers' compensation proceeding has the burden of proving all elements of her claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W. 3rd 902, 911 (Mo.App.E.D.2008). In order for Claimant to recover against the SIF, she must prove that she sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to her employment or reemployment should she become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole of 15% for a major extremities, *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W. 3d 267, 272 (Mo.App. E.D. 2008)(Citations omitted). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, she must prove that

the last injury, combined with her pre-existing permanent partial disabilities, and causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W. 3d 714, 717-18 (Mo banc 2004). Claimant has met the burden imposed by law.

Claimant sustained a compensable last injury which resulted in 30% PPD of the right shoulder (69.6 weeks). At the time the last injury was sustained, Claimant had the following preexisting disabilities that were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment and met the statutory threshold for Second Injury Fund liability: 20% of the left shoulder (46.4 weeks); and 20% PPD of the right knee (32 weeks).

The credible evidence establishes that the primary right shoulder injury, combined with the preexisting left shoulder and right knee injuries, and a loading factor of 10% should be added to that combination.

The Second Injury Fund liability is calculated as follows: 69.6 weeks + 46.4 weeks + 32 weeks =148 weeks, with a loading factor of 10% equals 14.8 weeks x 404.66, and = \$5,988.97..

This award is subject to an attorney lien of 25% in favor of Claimant’s attorney, Mr.D. Andrew Weigley.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation