

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 04-095916

Employee: Ricky Fielder
Employer: NBA (Settled)
Insurer: American Home 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. Having reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 13, 2010, as supplemented herein.

Introduction

Employee settled his claim against employer/insurer for the primary injuries. The administrative law judge heard this matter on the sole issue of the nature and extent of Second Injury Fund liability.

The administrative law judge concluded that employee sustained permanent partial disability of 15% of the left wrist and 15% of the right wrist as a result of the primary injury. The administrative law judge also found that employee suffered preexisting disabilities as follows: 35% of the right shoulder, 20% of the left shoulder, and 43% of the body as a whole for the low back. The administrative law judge did not make any conclusion as to whether these preexisting disabilities constituted hindrances or obstacles to employment for employee. After applying loading factors, the administrative law judge concluded that employee is entitled to 35.19 weeks of multiplicity compensation from the Second Injury Fund, which, at the stipulated permanent partial disability rate of \$354.05, amounts to \$12,459.00 total compensation.

We agree that employee is entitled to compensation from the Second Injury Fund in the amount determined by the administrative law judge. The award of the administrative law judge, however, lacks unequivocal findings of fact on pertinent issues, fails to resolve issues of credibility and weight to be given to the evidence, and proceeds directly from a summary of the evidence to the judge's conclusions without offering any analysis or rationale for those conclusions.

Section 287.460.1 mandates that an award in a contested workers' compensation case be accompanied by findings of fact and conclusions of law. The Missouri Supreme Court has declared that such statutory

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requirements contemplate an unequivocal affirmative finding as to what the pertinent facts are.

Stegman v. Grand River Reg'l Ambulance Dist., 274 S.W.3d 529, 533 (Mo. App. 2008) (citations omitted).

Because the award of the administrative law judge lacks the findings mandated by § 287.460.1 RSMo, we are constrained to issue this supplemental opinion.

Discussion

The primary injuries

The initial inquiry in any case against the Second Injury Fund is the extent of employer's liability for the primary injury. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003) overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).¹ “[P]re-existing disabilities are irrelevant until the employer's liability for the last injury is determined.” *Id.* (citation omitted). The primary claim in this matter is for repetitive trauma injuries to employee's bilateral upper extremities. Treating doctors diagnosed carpal tunnel syndrome and employee underwent carpal tunnel release surgeries in May and November 2006. Employee settled a workers' compensation claim against his employer for 15% of each wrist. Dr. Volarich opined that employee suffered a 35% permanent partial disability of each wrist as a result of the primary injuries, with a 15% multiplicity factor of the body as a whole. We agree with Dr. Volarich that employee suffered permanent partial disability as a result of the primary injuries, but find Dr. Volarich's ratings excessive; employee's limited testimony describing lingering discomfort does not convincingly support 35% permanent partial disability ratings for each wrist.

We find employee's settlement with his employer persuasive as to the extent of permanent partial disability employee sustained as a result of the primary injuries. We affirm the administrative law judge's finding that employee suffered 15% permanent partial disability of each wrist as a result of the primary injuries.

Preexisting permanent partial disability

In order to establish entitlement to compensation from the Second Injury Fund under § 287.220.1 RSMo, employee must demonstrate that he suffered from a preexisting permanent partial disability which constituted a hindrance or obstacle to employment.

[T]he basis for liability of the Fund is 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.

Loven v. Greene County, 63 S.W.3d 278, 283 (Mo. App. 2001).

¹ *Landman* is one of many cases that were partially overruled by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). We cite other cases herein that were partially overruled by *Hampton*; because these cases are cited for principles that were not overruled, we make no further mention of *Hampton's* effect.

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Employee has significant lower back problems dating back to 1983, when employee was injured while helping move a television at work. As a result of that injury, employee underwent a total laminectomy at L-5 with an iliac bone graft and fusion from L-4 to S-1. Employee was off work for approximately 4 to 5 years. Employee essentially changed career paths due to the 1983 fusion surgery; employee's limitations precluded him from the types of jobs he had previously done. In order to return to work, employee retrained himself and sought degrees in health care administration so that he could perform sedentary jobs.

Employee credibly testified that he experienced ongoing problems with his back following the 1983 surgery. Dr. Houchin credibly testified that he treated employee from 1988 to the present for back pain related to the 1983 surgery. Employee usually complained of a moderate exacerbation of pain, but occasionally complained of severe pain. Employee used Vicodin for his intermittent back pain. Dr. Volarich opined that employee's preexisting back condition was a hindrance or obstacle to employment at the time of the primary injury; we find Dr. Volarich credible in this regard. Dr. Volarich rated employee's preexisting low back disability at 45% of the body as a whole, and explained that his rating takes into account employee's chronic back pain syndrome, lost motion, and recurrent lower extremity radicular symptoms.

Given the foregoing, we find that employee's preexisting low back condition amounted to a hindrance or obstacle to employment as of August 18, 2004. Faced with the risk that employee's problematic low back condition might combine with a later work injury to further disable employee, a prospective employer, in the absence of the Second Injury Fund, would have an incentive not to hire employee. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995). We affirm the administrative law judge's finding that employee suffered a 43% preexisting permanent partial disability of the body as a whole referable to the low back.

Employee injured his right shoulder in 1991 when he fell down some icy steps at work. Dr. Morris performed an intra-articular debridement and arthroscopic subacromial decompression. Employee settled a workers' compensation claim against his employer for 30% permanent partial disability of the right shoulder. As a result of the 1991 right shoulder injury and surgery, employee continues to feel discomfort and pain in his right shoulder when he lifts heavy objects. Employee treats these complaints with aspirin. Employee can't lift over his head or open jars. Employee has difficulty carrying things with his right hand. Employee also has trouble sleeping on his right side. Dr. Volarich rated employee's preexisting right shoulder disability at 35%. Dr. Volarich's rating accounts for pain, lost motion, crepitus, and weakness, as well as atrophy in employee's dominant arm. Sherry Browning, the Second Injury Fund's vocational expert, acknowledged that employee's shoulder condition was a hindrance and obstacle to employee's returning to work as a nurse or another physically demanding job. Dr. Volarich opined that employee's preexisting right shoulder disability was a hindrance or obstacle to employment at the time of the primary injury; we find Dr. Volarich credible in this regard.

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Given employee's credible testimony, the evidence of his workers' compensation settlement for 30% permanent partial disability of the right shoulder, and Dr. Volarich's credible testimony, we find that employee suffered from a preexisting right shoulder disability that was a hindrance or obstacle to employment as of August 18, 2004. We affirm the administrative law judge's finding of a 35% preexisting permanent partial disability of the right shoulder.

Employee injured his left shoulder on June 5, 1997. Employee underwent surgery in connection with that injury. Employee settled a workers' compensation claim against his employer on March 28, 2000, for 20% of the left shoulder. As a result of the 1997 left shoulder injury, employee experiences ongoing discomfort, has difficulty lifting items, and experiences pain if he turns his left arm in certain ways. Employee also has difficulty working overhead and is unable to pull out file cabinets above his shoulder. Dr. Volarich opined that employee's 1997 left shoulder injury left him with disability that constituted a hindrance or obstacle to employment; we find Dr. Volarich credible in this regard. Dr. Volarich rated employee's disability at 25% of the left shoulder. Dr. Volarich's rating accounts for pain, lost motion, crepitus, and weakness.

We find employee's settlement with his employer more persuasive than Dr. Volarich's testimony as to the extent of permanent partial disability employee sustained as a result of the 1997 left shoulder injury. We affirm the administrative law judge's finding that employee suffered a 20% preexisting permanent partial disability of the left shoulder. We find that employee's left shoulder condition was a hindrance or obstacle to his employment as of August 18, 2004.

We note that employee's vocational expert, James England, admitted on cross-examination that he was not aware of employee missing any work related to his preexisting back and shoulder conditions. We do not find this testimony determinative on the issue whether employee suffered preexisting permanent partial disabilities that were hindrances or obstacles to employment.

The Second Injury Fund statute recognizes that employers have a financial incentive to discriminate against individuals who have a condition which renders them more susceptible to a greater degree of disability compared to workers who have no such condition. That incentive to discriminate is precisely the same whether the condition has previously caused the employee to miss work or not.

Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo. App. 1995).

We proceed to consider the nature and extent of Second Injury Fund liability.

Nature and extent of Second Injury Fund liability

In cases against the Second Injury Fund for permanent partial disability, § 287.220.1 RSMo, imposes minimum thresholds of fifteen percent permanent partial disability for major extremity injuries, and fifty weeks for injuries to the body as a whole. Both the

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primary injury and the preexisting permanent partial disability must meet these thresholds:

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, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability ...

Section 287.220.1 RSMo.

Given our findings in the foregoing sections, employee has met the minimum thresholds. The only remaining question is whether employee met his burden of proving that his preexisting and primary injuries and disabilities combined to result in greater disability than that which would have resulted from their simple sum.

Under § 287.220, when the combination of a preexisting disability with a compensable disability results in a greater disability than the sum of the two disabilities considered independently, the Second Injury Fund is liable for the difference between the sum of the two disabilities and the disability resulting from their combination.

Nance v. Treasurer of Mo., 85 S.W.3d 767, 772 (Mo. App. 2002) (quotations and citations omitted).

Dr. Volarich opined that employee's preexisting disabilities combine with the primary injuries to create greater disability than their simple sum. Dr. Volarich was the only doctor to specifically opine as to the combinative effect of employee's preexisting permanent partial disabilities and the effects of the primary injuries, and we find his opinion persuasive. We find that employee's preexisting disabilities combine with the primary 2004 repetitive trauma injuries to create more disability than the simple sum of employee's conditions considered independently.

Employee has met his burden of demonstrating his entitlement to compensation from the Second Injury Fund for permanent partial disability.

We affirm the administrative law judge's calculation of Second Injury Fund liability.

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Decision

The Commission supplements the award of the administrative law judge with the foregoing findings, analysis, and conclusions. Because the Commission otherwise agrees with the findings, conclusions, and analysis of the administrative law judge, the award dated April 13, 2010, is affirmed. Employee is entitled to 35.19 weeks of multiplicity at the rate of \$354.05 per week, which amounts to \$12,459.00 in compensation from the Second Injury Fund.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued April 13, 2010, is affirmed, and is attached and incorporated by this reference.

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 8th day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

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

Injury No.: 04-103449

Employee: Ricky Fielder
Employer: NBA (Settled)
Insurer: American Home 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. Having reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record, the Commission finds that the award of the administrative law judge, except as modified herein, is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 13, 2010, as modified herein.

Introduction

Employee previously settled his claim against employer/insurer for the primary injury. The administrative law judge heard this matter to determine the sole issue of the nature and extent of Second Injury Fund liability.

The administrative law judge ordered the Second Injury Fund to pay permanent total disability benefits to employee as follows: beginning April 22, 2005 to June 16, 2006, for 60 weeks at a rate of \$261.34 per week, for a total of \$15,680.40, and thereafter at a rate of \$615.39 per week for employee's lifetime.

It appears that the administrative law judge determined employee was permanently and totally disabled due to a combination of preexisting disabilities and his disability resulting from the primary injury; the award, however, contains no conclusions of law as to this issue. The award sets forth certain credibility determinations, but fails to provide affirmative factual findings as to key issues such as the extent of disability resulting from the last injury alone, and the date that employee reached maximum medical improvement.

Section 287.460.1 mandates that an award in a contested workers' compensation case be accompanied by findings of fact and conclusions of law. The Missouri Supreme Court has declared that such statutory requirements contemplate an unequivocal affirmative finding as to what the pertinent facts are.

Stegman v. Grand River Reg'l Ambulance Dist., 274 S.W.3d 529, 533 (Mo. App. 2008) (citations omitted).

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We agree that employee is entitled to compensation from the Second Injury Fund for permanent total disability benefits. Because the award of the administrative law judge lacks the findings mandated by § 287.460.1 RSMo, we are constrained to write this supplemental opinion.

Discussion

The primary injury

Although the administrative law judge summarized the testimony of Dr. Volarich regarding the primary injury, the award contains no affirmative findings to resolve the issue of employer's liability for the primary injury or when employee reached maximum medical improvement following that injury. By ordering the Second Injury Fund to begin payment of permanent total disability benefits on April 22, 2005, the administrative law judge impliedly determined that employee reached maximum medical improvement from the primary injury on that date. We have searched the record for evidence as to when employee reached maximum medical improvement. We find no medical significance to the date April 22, 2005.

Although the statutes involving temporary total disability and permanent disability do not set out a specific time line, there is an intended timing of benefits paid by employers. Temporary total disability benefits are due from the date of the injury through the date the condition has reached the point where further progress is not expected. Courts have used various terms to determine when an employee's condition has reached the point where further progress is not expected, including the term maximum medical improvement. *Vinson v. Curators of the University of Missouri*, 822 S.W.2d 504, 508 (Mo. App. E.D. 1991)(interpreting a doctor's testimony of employee's maximum treatment potential to mean maximum medical improvement); *Cooper*, 955 S.W.2d at 575 (using the term maximum medical progress to define the point where no further progress is expected for an employee's condition).

After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. Furthermore, an employers' liability for permanent partial or permanent total disability does not run concurrently with their liability for temporary total disability.

Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

Cardwell v. Treasurer of Mo., 249 S.W.3d 902, 910 (Mo. App. 2008).

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Correspondence from employee's treating doctors suggests employee reached maximum medical improvement in July 2005. Dr. Randolph determined that employee was at maximum medical improvement on July 12, 2005, in his correspondence dated that day. After that date, employee underwent an MRI, a nerve conduction study/EMG, and two CT scans. Dr. Coyle, in a letter dated November 9, 2005, opined that he would agree with Dr. Randolph that employee was at maximum medical improvement, pending a review of the CT scan results. Dr. Coyle reviewed those results and, in a letter dated December 16, 2005, opined that he was in agreement with Dr. Randolph that employee was at maximum medical improvement.

We find Dr. Coyle's and Dr. Randolph's findings persuasive on this issue. We find that employee reached maximum medical improvement in relation to the primary injury on July 12, 2005. We turn now to the question of the nature and extent of disability resulting from the primary injury. The employer's liability for the primary injury must be determined before we consider whether employee is entitled to compensation from the Second Injury Fund. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003) overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).¹ "[P]re-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Id.* (citation omitted).

Following the October 8, 2004, work injury, Dr. Houchin diagnosed cervical, thoracic, and lumbar spasm with lumbar radiculopathy and MRI findings consistent with severe spinal stenosis. Dr. Houchin's course of treatment included a Toradol injection and Percocet (employee also had a prescription for Vicodin in connection with a preexisting chronic back pain condition). Dr. Houchin took employee off work and recommended physical therapy. Dr. Houchin acknowledged that there was not a significant change in pathology demonstrable on findings from an MRI taken in August 2005 compared to an MRI taken in June 1997. Dr. Houchin opined, however, that the October 8, 2004, work injury caused a significant change in employee's back condition; we find Dr. Houchin credible in this regard. Dr. Houchin explained that he treated employee from 1988 to present for pain related to a 1983 back surgery, and each time, employee responded in a reasonable amount of time to therapy. Dr. Houchin explained that, during this long-term course of treatment for intermittent back complaints, there was never a time that employee had a loss of functional ability to the degree seen after the 2004 work injury. Dr. Houchin recommended further medical treatment and did not indicate that employee was at maximum medical improvement or issue permanent partial disability ratings specific to the 2004 work injury.

Dr. Volarich provided an independent medical evaluation on behalf of the employee. With regard to the October 8, 2004, work injury, Dr. Volarich diagnosed aggravation of employee's lumbar syndrome due to neuroforaminal narrowing at the L5-S1 level, with mild disc bulging causing recurrent L5 radiculopathy and worsening of lumbar radicular symptoms. Dr. Volarich opined that employee was at maximum medical improvement

¹ *Landman* is one of many cases that were partially overruled by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). We cite other cases herein that were partially overruled by *Hampton*; because these cases are cited for principles that were not overruled, we make no further mention of *Hampton's* effect.

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and assigned a 20% permanent partial disability of the body as a whole referable to the lumbo-sacral spine due to the aforementioned progression and aggravation of employee's lumbar syndrome. Dr. Volarich explained that his rating accounts for worsening of employee's back pain syndrome as well as loss of motion and lower extremity radicular symptoms.

We find Dr. Volarich's diagnosis credible. We also find Dr. Volarich credible to the extent that we agree that employee sustained permanent partial disability referable to the primary injury. We find his rating, however, somewhat excessive. We find that employee suffered a 15% permanent partial disability of the body as a whole referable to the lumbo-sacral spine due to the primary injury.

Permanent total disability

The Second Injury Fund is liable for permanent total disability benefits only if employee establishes that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability or disabilities to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). "[I]f claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004).

The administrative law judge noted correctly that employee's vocational expert, James England, opined that employee is permanently and totally disabled due to a combination of the primary injury and his preexisting disabilities. The award makes no mention of the Second Injury Fund's vocational expert, Sherry Browning. Ms. Browning agreed that employee is permanently and totally disabled, but opined that employee's inability to return to employment is due to the effects of the primary injury alone. Ms. Browning opined that, assuming the restrictions of Dr. Volarich, employee would be employable if it were not for the last injury to the low back.

On cross-examination, Ms. Browning acknowledged that employee's preexisting shoulder, bilateral wrists, and right knee conditions would all be hindrances or "inhibitors" to employee's returning to work. Ms. Browning also acknowledged that employee's preexisting back fusion from 1983 caused him to have to pursue more sedentary work. Ms. Browning denied, however, that employee's preexisting back condition plays a factor in his current permanent and total disability.

We find Mr. England's opinion more credible than Ms. Browning's. Ms. Browning's opinion that employee was permanently and totally disabled due to the primary injury alone appears to be premised solely on the fact that employee was able to maintain employment prior to that injury. Ms. Browning admits that employee's 1983 fusion essentially restricted employee to sedentary work, but steadfastly refuses to acknowledge that this restriction plays a key role in employee's current inability to return to any employment. We find Ms. Browning's opinion unrealistic and contrary to the evidence of employee's fusion surgery, longstanding chronic back pain, and resultant work history which was primarily limited to sedentary positions after 1983.

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In sum, we conclude that employee is permanently and totally disabled due to the combined effect of his preexisting disabilities and the effect of the primary work injury. Employee has met his burden of demonstrating entitlement to permanent total disability benefits from the Second Injury Fund.

Decision

The Commission modifies the award of the administrative law judge with the foregoing findings, analysis, and conclusions. Employee is entitled, and the Second Injury Fund is hereby ordered to pay, weekly benefits commencing July 12, 2005, and thereafter for 60 weeks at the rate of \$261.34 (the difference between the stipulated rates for permanent total and permanent partial disability). Thereafter, employee is entitled, and the Second Injury Fund is hereby ordered to pay, \$615.39 per week for employee's lifetime, or as provided by law.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued April 13, 2010, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

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 8th day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary