

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

Injury No.: 08-099255

Employee: William Fletcher
Employer: Fulton State Hospital (Settled)
Insurer: CARO (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

I. Introduction

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 Having heard oral argument, reviewed the evidence, read the briefs and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) 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 ALJ dated October 20, 2010, as supplemented and corrected herein.

II. Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

III. Conclusions of Law

In this case, it is undisputed that employee sustained a substantial work-related injury, suffered from preexisting disabilities, and is now permanently and totally disabled.

On appeal, the Second Injury Fund argues that employee is permanently and totally disabled due to the post-accident worsening of his preexisting disabilities. Based on this allegation, the Second Injury Fund denies liability for employee's permanent total disability benefits.

We disagree with the Second Injury Fund's assessment of this case. While it is true that at the time of the primary injury employee suffered from preexisting disabilities that are progressive by nature, there is simply no evidence that said disabilities progressed wholly independently of the primary injury to result in employee's permanent total disability.

Dr. Volarich noted in his deposition that there was the *possibility* that employee's preexisting disabilities could progress to result in greater disability, but there was no evidence that any post-accident progression had occurred at the time he evaluated employee and opined that he is permanently and totally disabled as a result of a

¹ Statutory references are to the Revised Statutes of Missouri 2008 unless otherwise indicated.

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combination. Therefore, it is irrelevant if employee's preexisting conditions have now progressed following the primary injury because employee was already permanently and totally disabled prior to any post-accident progression.

Under § 287.220.1 RSMo, when an employee is permanently and totally disabled by a combination of the primary injury and preexisting disabilities, the employer is responsible for only the disability benefits attributable to the primary injury and the remainder of the disability benefits are the responsibility of the Second Injury Fund. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo. App. 2000).

We find, as did the ALJ, that the primary injury resulted in 20% permanent partial disability of the right shoulder and 16% permanent partial disability of the body as a whole referable to his lumbar spine. Employee's preexisting diabetes and heart condition prevented his treating physicians from being able to provide the ordinary medical treatment typically used to alleviate said injuries. Therefore, employee's right shoulder and lumbar spine injuries combined with employee's preexisting diabetes and heart condition to render employee permanently and totally disabled.

In addition to the aforementioned, we also note a typographical error in the ALJ's award. On page 2 of the award under "21. Amount of compensation payable," the ALJ stated that employee previously settled his claim against employer for 20% permanent partial disability of the right shoulder and **15%** permanent partial disability of the body as a whole referable to the lumbar spine. It is clear from the record and all of the calculations in the award that the 15% permanent partial disability of the body as a whole referable to the lumbar spine should actually be listed as **16%** permanent partial disability of the body as a whole. Therefore, we find that employee settled his claim against employer for 20% permanent partial disability of the right shoulder and 16% permanent partial disability of the body as a whole referable to the lumbar spine.

IV. Decision

We affirm the ALJ's award with supplementation as provided herein. Thus, employee is awarded permanent total disability benefits and liability is imposed on the Second Injury Fund.

We find that employee reached maximum medical improvement on November 2, 2009 (the date of Dr. Volarich's independent medical evaluation). Therefore, going forward from November 3, 2009, the Second Injury Fund is liable for the difference between the PTD benefits and the PPD benefits (\$407.18 PTD rate - \$404.66 PPD rate) for 110.4 weeks (= 20% PPD of the right shoulder (46.4 weeks) + 16% permanent partial disability of the body as a whole referable to the lumbar spine (64 weeks)). Thereafter, the Second Injury Fund shall be liable for employee's weekly PTD benefit of \$407.18 for the remainder of employee's life, or until modified by law.

The award and decision of Administrative Law Judge Henry T. Herschel, issued October 20, 2010, is affirmed, as supplemented and corrected herein, and is attached and incorporated by this reference.

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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.

Given at Jefferson City, State of Missouri, this 30th day of June 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: William Fletcher

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I did not participate in the June 15, 2011, oral argument; however, having reviewed the evidence and considered the whole record, I join in and adopt the majority's supplementation awarding permanent total disability benefits against the Second Injury Fund.

Curtis E. Chick, Jr., Member