

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

AWARD

Employee:	William Fletcher	Injury No.:	08-099255
Dependents:	N/A		Before the
Employer:	Fulton State Hospital		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Previously Settled		
Hearing Date:	July 22, 2010	Checked by:	HTH/sb

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: October 31, 2008.
5. State location where accident occurred or occupational disease was contracted: Callaway 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? N/A.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was monitoring a hallway when a patient attacked a staff member. During the ensuing scuffle, the claimant fell to the floor and hurt his right shoulder and lower back.
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: Right shoulder and lower back.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: \$ - 0 -.
16. Value necessary medical aid paid to date by employer/insurer? \$15,875.91.

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17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$529.33.
19. Weekly compensation rate: \$407.18 TTD/ \$404.66 PPD.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Employer previously settled:

20% PPD of right shoulder and 15% PPD of the body as a whole (lumbar back) \$44,674.46.

22. Second Injury Fund liability: Yes. \$407.18 per week.

23. Future requirements awarded: Yes.

Said payments to begin immediately 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% all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Christine Kiefer.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Fletcher

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Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Fulton State Hospital

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

Additional Party: Second Injury Fund

Insurer: Previously Settled

Checked by: HTH/sb

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on July 22, 2010, for a final hearing to determine the liability of the Second Injury Fund in the matter of William Fletcher (Claimant). Attorney Christine Kiefer represented Claimant. Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund. The Employer, Fulton State Hospital, and its Insurer previously settled with Claimant and did not participate in the hearing.

The parties stipulated to the following:

1. On or about October 31, 2008, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant. The accident occurred in Callaway County at Fulton State Hospital.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Cole County, Jefferson City, Missouri.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. The average weekly wage at the date of injury was \$529.33, resulting in compensation rates of \$407.18 for temporary total disability (TTD), and \$404.66 for permanent partial disability (PPD).
7. Employer paid TTD of \$ - 0 - and medical expenses totaling \$15,875.91.

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The issues to be determined are:

1. What is the nature and extent of Claimant's disability?
2. What is the liability of the Second Injury Fund?
3. Whether Claimant needs future or further medical care?

SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Exhibits

Claimant offered the following exhibits, which were received into evidence without objection:

- A Harry S. Truman Memorial Veterans' Hospital Records
- B Metro Imaging South Records
- C Tesson Heights Orthopedic Records
- D Select Physical Therapy Records
- E Peak Performance Physical Therapy Records
- F Callaway Community Hospital Records
- G Select Physical Therapy Records
- H ROEP, Dr. Runde Records
- I Deposition of James M. England
- J Deposition of Dr. David Volarich
- K Stipulation for Compromise Settlement for Injury No. 08-099255

The Second Injury Fund offered the following exhibits, which were received into evidence without objection:

- 1 Tesson Heights Orthopedic Records, Drs. Lee and Fagan,

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FINDINGS OF FACT

William Fletcher (Claimant) is a 61-year-old man who has done a variety of jobs during his adult life, including a four-year period at the Fulton State Hospital.

Claimant was a Security Aide I at the Fulton State Hospital. A Security Aide I meets the social needs of the patients who are housed at the institution, but they also have the unique duty of subduing patients who act out in the form of fighting with other patients or attacking staff.

On October 31, 2008, Claimant was a "hall monitor." In this position, a security aide sits at the end of a hallway and monitors one or two halls for any disturbances. On this day, the cleaning lady was carrying out her duties mopping and tidying the patients' rooms. One of the patients, a young lady, walked past Claimant carrying a pile of clothes to the laundry. Suddenly, the patient dropped the clothes that she was carrying and attacked the cleaning lady. Claimant jumped from his chair, grabbed the patient's arms and pinned them to her sides and both fell to the concrete floor. After the patient was subdued and returned to her room, Claimant felt sharp pains in his lower back and right shoulder that resulted from his scuffle with the patient.

Claimant went to the emergency room (ER) for treatment of his injuries. He was given an x-ray and pain medicine for his right shoulder and lower back. (Cl. Exh. F, pp3-7.)

When the symptoms in his right shoulder did not subside, Claimant was referred to Dr. E. Runde. Dr. Runde initially treated Claimant for right shoulder, but later treated his lower back. (Cl. Exh. H.) Claimant was treated with conservative treatment for both his back and shoulder. He received pain medication and performed physical therapy. (*Id.* at pp7-40.) Dr. Runde diagnosed Claimant with an aggravation of the underlying degenerative disc disease at the sacroiliac joint. (*Id.* at report dated 11/19/08.)

Dr. T. Lee was consulted in regard to Claimant's treatment of his back. Although Claimant improved somewhat with conservative treatment, Claimant was ordered to have two MRIs in January 2009. (Cl. Exh. B, pp1-2.) The first MRI was of his right shoulder. The results did not present evidence of a torn rotator cuff, although it did show damage to the rotator cuff. (*Id.* at p2.) The results of the second MRI of Claimant's lower back revealed a bulging disc at L3 and L4-5 without herniation. (*Id.* at p2.) Injections were ordered for Claimant's back but were discontinued when the medication interacted badly with Claimant's pre-existing diabetes, causing some concern for Claimant's pre-existing heart disease. (Cl. Exh. C, pp4-21.) Claimant was eventually released as reaching maximum medical improvement on June 15, 2009.

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Claimant settled the primary injury to his right shoulder and lower back for 20% of the right shoulder and 16% BAW referable to the lower back. (Cl. Exh. K.) A lump sum for both the injuries was \$44,674.46. (*Id.* at p5.)

Mr. J. England testified via deposition that Claimant had a 6th grade level of math and 7th grade in reading proficiency. (Cl. Exh. I, p16.) Mr. England noted that Claimant was constantly in pain and unstable in his balance. (*Id.* at p17.) Claimant also needed crutches to avoid falling when he went from place to place in his daily life. (*Id.* at p17.) Mr. England found Claimant to be without transferable skills to compete in the open labor market. (*Id.* at pp17-18.) Mr. England opined that he was not employable in the open labor market. (*Id.* at p18.)

Dr. D. Volarich prepared a report and testified via deposition that Claimant had a 30% permanent partial disability (PPD) at the right shoulder and 25% PPD of the BAW at the lumbosacral spine due to disc protrusion at L4-5. (Cl. Exh. J, Depo. Exh. 2, p12.)

Dr. Volarich also opined that Claimant had pre-existing PPD for 20% at his lumbosacral spine due to degenerative disc disease; 50% PPD of the BAW due to his severe diabetes; 20% PPD of the BAW for his cardiac disease, which included a stent in the diagonal artery; and finally 15% PPD of the BAW for chronic obstructive pulmonary disease (COPD). (*Id.* at p13.)

Claimant also testified that due to a war injury suffered in Vietnam, he had significant loss of hearing in both ears. He cannot take telephone calls because he cannot hear the other person's voice. He also found that he was susceptible to unexpected attacks at his employment because he could not hear patients approach him. He was treated for his hearing loss for years at the Veteran's Hospital. (Cl. Exh. A.)

Claimant received medical care as described in Exhibits A to J.

Claimant and Employer settled the workers' compensation claim arising out of the accident for \$44,674.46 for lump sum settlement for lower back and right shoulder.

In light of all Claimant's injuries and medical conditions, Claimant has a hard time with his daily life chores. He needs help to enter and exit his shower. He uses a hose attached to his shower to avoid bending over while showering. (Cl. Exh. J, Depo. Exh. 2, p5.) He cannot do yard work or household chores for longer than fifteen minutes. He does not sleep much longer than three hours at a time at night. He uses pain pills regularly. (*Id.* at p5.) His diabetes causes numbness in his hands and feet. His numb feet and lower legs also cause problems with his balance so he uses crutches to travel around his home and on short shopping trips. (*Id.* at p6.)

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CONCLUSION OF LAW

It is the claimant's burden of proof to prove all the issues that are alleged in the hearing under Chapter 287. As noted by the Court in Cook:

Claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and injury. Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo.App.E.D. 1996) citing: Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute, 793 S.W.2d 195 (Mo.App.E.D. 1990) overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. Banc 2003).

Claimant is requesting a determination that he is permanently and totally disabled (PTD) by his back and his various pre-existing conditions.

PERMANENT TOTAL DISABILITY

Claimant asserts that his lower back and right shoulder injury in 2008 in synergy with his pre-existing injuries result in permanent total disability. The Second Injury Fund (SIF) asserts that if Claimant is PTD, that it is from the 2008 injuries alone.

To determine if a person is PTD, there must be a finding that the person is unable to find any job in the open labor market. The test for PTD is the worker's ability to compete in the open labor market. Sutton v. Vee Jay Cement Contracting Co., 37 S.W.3d 803, 811 (Mo.App. 2000) (overruled in part by Hampton, 121 S.W.3d at 225). The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. Id.; Gassen, 134 S.W.3d at 80. ABB Power T&D Co. v. Kempker, 236 S.W.3d 43, 49 (Mo. App. E.D. 2007).

Claimant's primary injuries to his lower back and right shoulder are relatively serious. The right shoulder still causes pain and weakness. Claimant's lower back injury has been aggravated by his degenerative disc disease. I believe that Dr. Volarich PPD ratings of 30% PPD for the right shoulder and 30% PPD for the lower back are high. After a review of the medical

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files and listening to his testimony, I find that the rating of 20% PPD of the right shoulder and 16% PPD of the BAW referable to the lower back, which is consistent with Claimant's settlement. (Cl. Exh. K, p3.)

Dr. Volarich found that Claimant had a number of other disabilities. In many ways, the onset of diabetes in 2004 has exacerbated Claimant's disabilities. (Cl. Exh. A, p65.) Any surgery that could alleviate Claimant's lumbar disc injury and disease was considered too risky in light of his diabetic condition. (Cl. Exh. C, pp10-17; Cl. Exh. J, pp12-13.) In fact, conservative treatment such as a simple epidural injection elevated his blood sugar to the degree that they had to be discontinued. (*Id.* at p33.) In his present condition, Claimant cannot resolve any of his spinal problems with surgery so that he is left only with managing his condition with pain medication and physical therapy. The lack of remedial resources leaves Claimant substantially disabled with little hope to improve beyond the margins of his pain and disability.

Further, the diabetes reduces Claimant's sense of feeling in his legs and feet. This leaves him prone to accidental injury and, in Claimant's case, a problem with his balance. (*Id.* at p30.) In everyday situations, Claimant has to use crutches to assist in navigating his daily chores. The diabetes will also pose challenges to Claimant's heart condition. The mixture of Claimant's heart condition and moderate to severe diabetes detrimentally affects the condition of Claimant's heart health.

The October 2008 injuries had a severe impact on Claimant's physical well being. But these were not the sole cause of the collapse of Claimant's health. I believe the pre-existing diabetes was the greatest cause of the almost complete disability of Claimant's health. The October 2008 back injury aggravated the pre-existing lumbar degeneration and rendered Claimant severely disabled. But the diabetes rendered a recovery for Claimant impossible. These injuries and medical conditions in conjuncture with his heart and shoulder conditions render Claimant an invalid.

I find that Claimant's October 2008 injury was not the sole cause of Claimant's disability.

On the occupational front, Mr. England found Claimant has almost no transferrable work skills and with his physical and educational disabilities cannot compete in the open labor market. Mr. England noted:

- Q. What about the possibility of transferable skills at the sedentary level, what did you feel were the possibilities for him there?
- A. I don't think he really has any transferrable skills that could be usable at the sedentary level of exertion at all.

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Q. How would you define transferable skills?

A. Well, that's knowledge that's been acquired in one type of job from the past that can be utilized in alternative employment at a less physically demanding level of activity. And I think really the only skill that he acquired in the past, per se, would be operation of these various types of equipment and the mechanical kinds of work. And I think in order to use those you would have to be able to function at a medium level at the lowest and probably even into the heavy range at times.

Q. Was it your ultimate conclusion that he was not employable in the open labor market?

A. Yes.

(Cl. Exh. I, pp17-18.)

I find that Claimant's physical and occupational disabilities render him PTD for the rest of his life.

CONCLUSION

Claimant should receive \$407.18 per week for the rest of his life. Claimant settled with Employer/Insurer for \$44,674.46. This amount should be prorated for the first 110.4 weeks. ($44,674.46/404.66 = 110.4$ weeks.) The first 110.4 weeks he should receive \$2.52 dating from June 15, 2009. Subsequently, he should receive \$407.18 per week.

Made by: _____

Henry T. Herschel
Administrative Law Judge
Division of Workers' Compensation

This award is dated and attested to as of this _____ day of _____, 2010.

Naomi Pearson
Division of Workers' Compensation