

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 08-108094

Employee: William A. Foster
Employer: Morton Buildings, Inc.
Insurer: Zurich American Insurance Company
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.¹ We have read the briefs, reviewed the evidence, and considered the whole record. We find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the award and decision of the ALJ. We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The ALJ found that before employee sustained the left shoulder injury that is the subject of this claim, employee was performing a very physical job and had no physician-imposed restrictions on his work activities. Consequently, the ALJ concluded that the primary injury, considered in isolation, rendered employee permanently and totally disabled. We disagree that this particular shoulder injury singlehandedly resulted in employee's total disability.

Employee credibly testified about many limitations on his physical activities that affected the way he did his job. When employee was approximately thirty-five years old, he fractured his ankle while at work. Later, he injured his right knee while working on a muddy job site, and in 2005 or 2006 employee injured his left knee. Employee required surgeries on both knees. Employee was able to continue working despite the effects of those injuries, but he had to alter the way he worked. Employee testified that when jobs required crawling, bending, and squatting, he would try to do something else and have another crew member do that task. If there wasn't anybody to help, employee did the job but in pain.

Additionally, in 1999, employee injured his neck while at work, which necessitated a spinal fusion. In 2004, employee injured his right shoulder by slipping on ice at work, which necessitated two surgeries. Finally, in 2007, employee injured his lower back while at work. Thereafter, employee had aching and burning pain in his lower back when he was physically active. Although employee continued working after these injuries, the effects of these injuries also altered the way employee was able to work. Employee was limited in his ability to do overhead work so he had crew members do those tasks for him. The effects of the right shoulder injury limited employee's ability to extend his arms, lift, use a screwdriver, and hammer. The pain from these conditions caused employee to be sore and stiff, whether he was using manual tools (like hammers), power tools, or just driving.

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

Employee: William A. Foster

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Employee testified that before the primary injury, he had to lie down at work three to four times per week, to alleviate his symptoms.

Section 287.220 creates the Second Injury Fund and provides when and what compensation shall be paid in “all cases of permanent disability where there has been previous disability.” As a preliminary matter, the employee must show that he suffers from “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...” *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a “hindrance or obstacle to employment”:

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (internal citation omitted).

Employee’s credible testimony is that prior to the 2008 injury, he avoided many job duties when possible, and was able to pass those duties to other crew members. Although employee had no physician-imposed restrictions before he sustained his left shoulder injury, the facts in this case show us that employee had real, self-imposed restrictions. Employee testified that he believed if he had applied for his job with employer in 2006 after the surgeries on his knees, right shoulder, and neck, but before his left shoulder injury, he would not have obtained his job.² However, employee was able to continue working until the primary injury in 2008, which impaired his only remaining uninjured limb.

Almost all of the experts in this case opined that employee is permanently and totally disabled due to the combination of the effects of the primary injury and his pre-existing conditions. Dr. Swaim and Dr. Pazell found that employee is permanently and totally disabled due to the combination of effects from the primary injury and employee’s pre-existing conditions. Additionally, they both found that employee sustained a 30% permanent partial disability in his left shoulder due to that injury alone. Dr. Pazell wrote that due to the arithmetic sum of employee’s disabilities, he “[could not] conceive of anything that [employee] could do that anyone would hire him for.” Mr. Swearingin, a vocational expert, found that employee is neither employable nor placeable in the open labor market due to the combination of his impairments, which were “vocationally disabling sufficient to constitute a hindrance or obstacle to employment.”

The substantial and persuasive evidence in the record supports a finding of permanent total disability due to a combination of the effects of employee’s 2008 work injury and his pre-existing disabilities. Therefore, it is appropriate to award employee permanent total

² While we recognize that total disability is not limited to the inability to return to the same job, employee had only done this one job his entire life and had no other job skills.

Employee: William A. Foster

disability benefits payable by the Second Injury Fund. We find that the nature and extent of employee's disability from the 2008 injury, the torn rotator cuff in his non-dominant shoulder, amounts to a 25% permanent partial disability at the 232 week level per § 287.190 payable by employer.

For these reasons, we modify the award of the ALJ. Employer is liable for \$23,470.28 in permanent partial disability benefits.³ Beginning February 3, 2010, the date employee reached maximum medical improvement, the Second Injury Fund is liable for permanent total disability benefits at the differential rate of \$120.19 for 58 weeks.⁴ Thereafter, the Second Injury Fund is liable for permanent total disability benefits at the stipulated permanent total disability rate of \$524.85 per week, which shall continue for employee's lifetime or until modified by law.

This award is subject to a lien in favor of James Johns, employee's attorney, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Mark Siedlik, issued August 12, 2013, is attached for reference.

Given at Jefferson City, State of Missouri, this 13th day of June 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

³ \$404.66 PPD rate x 232 weeks x 25% = \$23,470.28.

⁴ \$524.85 PTD rate – \$404.66 PPD rate = \$120.19 per week.

FINAL AWARD

Employee: William A. Foster Injury No: 08-108094
Dependents: N/A
Employer: Morton Building, Inc.
Insurer: Zurich American Insurance Company, c/o ESIS
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Hearing Date: March 28, 2013
Briefs Filed: May 1, 2013 Checked by: MSS/lh

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: December 3, 2008
5. State location where accident occurred or occupational disease was contracted:
Clinton, Henry 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, while in course and scope of her employment fell and tore left rotator cuff
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: left shoulder
14. Nature and extent of any permanent disability: Permanent and Total Disability
15. Compensation paid to-date for temporary disability: 20 weeks \$10,497.00
16. Value necessary medical aid paid to date by employer/insurer? \$25,683.34
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$524.85/\$404.66
20. Method wages computation: stipulation
21. Amount of compensation payable: from the employer \$524.85 from the end of the TTD period on.
22. Second Injury Fund liability: None
23. Future requirements awarded: None
24. Medical Treatment: None
25. Past Medical Treatment: None

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: James Johns

FINDINGS OF FACT AND RULINGS OF LAW

Employee: William A. Foster Injury No: 08-108094
Dependents: N/A
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On March 28, 2013, the final hearing in this claim was held before Honorable Mark Siedlik, Administrative Law Judge. The employee, Mr. Foster, appeared in person and through counsel, James Johns. The Employer/Insurer was represented by Samantha Benjamin and the Second Injury Fund was represented by Laura Van Fleet. The parties stipulated to the following:

STIPULATIONS

1. On December 3, 2012 the claimant was an employee of Morton Building's Inc.
2. On December 3, 2012, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

EXHIBITS

Employee Exhibits A-I

- A Deposition, Vocational Expert Swearingin with exhibits
- B Report of Swearingin
- C Deposition, Dr. Swaim, with exhibits
- D Report of Dr. Swaim
- E Second Swearingin Deposition
- F Supplemental Swearingin report

Employer Exhibits 1-6

- 1 Rating Report of Dr. Zarr
- 2 60 Day Letter of Dr. Zarr
- 3 Deposition of Dr. Zarr
- 4 Report of Dr. Phillips
- 5 60 day Dr. Phillips
- 6 Deposition of Dr. Phillips

ISSUES

The parties requested the Division to determine:

1. The nature and extent of permanent disability
2. The liability of the Second Injury Fund

FINDINGS OF FACT

William Foster, the employee, is a 53 year old white male. Mr. Foster graduated from high school in 1978 and has no further education.

Mr. Foster has held only one job for his entire career, as a construction crewman for Morton Buildings (Employer). He worked on a crew with four men or less. He would drill hole, set poles and then put a building and cover with sheet metal and shingles. In 2004 he became a sales consultant for the same company but it didn't work out due to his lack of sales skills and he returned to the crew job. In 2007, following a back strain, he switched to a delivery type position where he delivered equipment and supplies for the building jobs. He was still required to do some loading and unloading of materials in his new position.

Mr. Foster reported pre-existing injury to his ankle. He had to wear a cast for a fracture but returned to full time work. In 1999 Mr. Foster injured his neck and had surgical treatment. He was able to return to full time regular work. Mr. Foster had arthroscopic surgery on both of his knees, but returned to his full-time heavy job. In 2004, Mr. Foster injured his right rotator cuff. He had a surgical repair, twice and returned to his full time regular employment. In 2007, Mr. Foster sustained an on the job injury to his back. He had conservative treatment from Dr. Zarr and was released to full-time regular duty work without restrictions. In 2009 he had an MRI of his lumbar spine and it was essentially normal (Exhibit B, page 6). Mr. Foster reported that due to his pre-existing injuries he would sometimes ask one of the other three guys on the four man crew to assist him in lifting overhead, but that the whole crew would help each other out and share duties. He also reported that he tried to limit crawling, but would still do the task in pain. He would sometimes kneel on cardboard to make it less painful or use a tractor to lift something very heavy.

Mr. Foster fell on his left shoulder in 2008 and tore his left rotator cuff. He initially treated conservatively, but then had surgery by Dr. Phillips in August of 2009. On November 11, 2009 he was allowed to return to light duty and still had pain with therapy. He was noted as being at MMI on February 3, 2010. He was doing full duty work, but was having some pain with increased activity. He had full motion.

Mr. Foster reports ongoing problems in his shoulder, back, and knees. He does not currently take any prescription pain medications, but takes Tylenol. He left his employment after his shoulder injury in 2008. Up until that injury he was working moving building supplies and equipment and was doing a full regular job.

MEDICAL EVIDENCE

On December 3, 2008, the Claimant was moving a scissor lift when he fell off injuring his left shoulder. The Claimant was initially treated with his primary care physician, Dr. Kenny, who referred the Claimant to Dr. Thomas Phillips. Dr. Phillips first saw the Claimant on March 16, 2009, and treated the Claimant conservatively. After the symptoms in the left shoulder did not resolved an MRI was performed which revealed a rotator cuff tear. The Claimant underwent surgery to repair the rotator cuff on August 25, 2009. The Claimant was released to maximum medical improvement on February 3, 2010, where Dr. Phillips was of the opinion the Claimant could return to work with no restrictions and felt the Claimant had a permanent partial disability of 10 percent to the left shoulder.

The Claimant was seen by Dr. John Pazell and evaluated in April of 2010. Dr. Pazell took a history from the Claimant, reviewed medical records to date and performed his examination. Dr. Pazell was of the opinion the Claimant had a permanent partial disability of 30 percent of the left shoulder. Dr. Pazell met his untimely death which prevented his deposition in this case. The Claimant thereafter was referred to Dr. Truett Swaim by counsel who evaluated the Claimant on November 14, 2011. Dr. Swaim reviewed the Claimant's medical history and treatment records to date and performed his examination. Dr. Pazell was of the opinion the Claimant had a 30 percent permanent partial disability to the left shoulder.

RULINGS OF LAW

At issue in this case is the nature and extent of disability. The Missouri Supreme Court in the case of Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966) explained the procedure, which must be undertaken when there is a dispute as to whether the employer or the Second Injury Fund is liable for permanent total disability benefits. The Court explained that the first consideration is the disability resulting from the last injury alone. Otherwise, the words in §287.220 "considered alone and of itself" were meaningless.

Therefore, a claimant's pre-existing disabilities are irrelevant until employer's liability for the last injury is determined. And if a Claimant's last injury in and of itself renders a claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. See Huey v. Chrysler Corporation, 34 S.W.3d 845 (Mo.App. 2000); Keysior v. TransWorld Airlines, 5 S.W.3d 195, 201 (Mo.App. 1999); Maas v. Treasurer of Missouri, 964 S.W.2d 541 (Mo.App. 1998); Roller v. Treasurer of Missouri, 935 S.W.2d 739, 741 (Mo.App. 1996).

The test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the employer in the usual course of business would reasonably be expected to employ the Employee in his present physical condition. Isaac v. Atlas Plastic Corporation, 793 S.W.2d 165 (Mo App. 1990). The critical question is whether Employer could reasonably be expected to hire the Claimant, considering her present physical condition, and reasonably expect her to successfully perform the work. Forshee v. Landmark Excavating and Equipment, et al, No.85582 (Mo app. E.D. 2005); Sutton v. Vee Jay Cement Contracting Company, 37 S.W.3rd 803, 811 (Mo App. 2000). Total disability means the inability to return to any reasonable or normal employment. It does not require that the employee be completely inactive or inert. Isaac, 793 S.W.2d 165 (Mo App. 1990).

One factor in determining whether a person is permanently and totally disabled under the Missouri Workers' Compensation Law is the Claimant's physical condition. See generally Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo App. 1990); Isaac, 793 S.W.2d 165 (Mo App. 1990). First the Court must look at the physical effects of the primary work injury in isolation. Mr. Foster reported that since his 2008 rotator cuff injury, he no longer works. He reports since this injury he has pain when he wakes up and uses the shower to loosen up. He can't put his belt through the back loops of his pants. He used to help on his parents farm, but has drastically cut that back since his 2008 shoulder injury. After his 2008 shoulder injury, he no longer received bonuses because he was working slower. He continued to work into the spring of 2009 when he finally left. Mr. Foster continued to occasionally lift heavy equipment, fifty to a hundred pounds, once or twice a week until March of 2009. There is no evidence that he was missing work prior to his left shoulder injury for his physical problems. He also had no permanent restrictions from a physician that limited his ability to work in any way prior to his left shoulder injury. In comparing his physical ability before the last work injury in 2008, to his physical ability after his injury in 2008, I find that the effects of the last injury were much higher. Mr. Foster was performing a very physical job prior to his last injury. I also find based on the medical records and Claimant's history that he now has limitations to doing work. Due to his left shoulder injury he avoids reaching out and picking things up.

While I find that the Claimant had medical conditions pre-dating the 2008 left shoulder injury, I find that the effects of the 2008 left shoulder injury alone remove Mr. Foster from the work force.

I find that Mr. Foster is permanently and totally disabled as the result of his December 3, 2008 injury to his left shoulder in isolation. Therefore I order the Employer/Insurer to pay permanent and total benefits in the amount of \$524.85 weekly from the date of maximum medical improvement, February 3, 2010 for the remainder of Mr. Foster's lifetime. As I find the cause of the permanent and total disability to be the last accident in isolation, I find that no workers' compensation benefits are due from the Second Injury Fund.

Made by: _____

Mark Siedlik
Administrative Law Judge
Division of Workers' Compensation