

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

Injury No.: 05-012276

Employee: Phillip Fulkerson
Employer: Ameren UE (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §287.480 RSMo. We have reviewed the evidence, read the briefs, and we have considered the whole record. Pursuant to §286.090 RSMo, we issue this final award and decision affirming the September 23, 2008, award and decision of the administrative law judge as supplemented herein.

Preliminaries

Employee settled his claim against employer. The administrative law judge heard this matter to consider the nature and extent of any Second Injury Fund liability.

The administrative law judge found that the employee sustained thirty-two percent (32%) permanent partial disability measured at the level of the body as a whole due to the primary injury. The administrative law judge further found employee to be permanently and totally disabled as a result of the permanent partial disabilities suffered from the primary injury combining with his preexisting permanent partial disabilities. As a result of this conclusion, the administrative law judge found the Second Injury Fund liable for employee's permanent and total disability benefits.

The Second Injury Fund appealed to the Commission alleging the administrative law judge erred in finding the Second Injury Fund liable for employee's permanent total disability benefits because employee's permanent and total disability results from the last injury alone.

Findings of Fact

The findings of fact and stipulations of the parties were recounted in the award of the administrative law judge; therefore, the pertinent facts will merely be summarized below.

In 1993, employee sustained an injury at work when he was thrown onto the concrete floor following an explosion. As a result, he injured his neck and right upper extremity. Following a right carpal tunnel release

and two cervical fusions, which were performed by Dr. David Kennedy, employee returned to work with Dr. Kennedy's permanent restrictions of no lifting greater than forty pounds, no vibrating tools, no welding, and no climbing ladders. Dr. Robert Margolis, a physician who provided an Independent Medical Evaluation of employee on April 7, 1998, agreed with Dr. Kennedy as to employee's permanent work restrictions and provided said endorsement in his report.

Employee testified that following the 1993 injury and subsequent surgeries, he was no longer able to participate in the recreational activities he once enjoyed, which included bow hunting, jogging, volleyball and softball. In addition, he testified that after the injury he wore a back brace to work.

As a result of the 1993 injury, employee received a settlement based on 40% permanent partial disability of the neck, 15% permanent partial disability of the right hand, and 10% permanent partial disability of the back.

Despite employee's restrictions and limitations incurred as a result of the 1993 injury, he was able to keep his welding certification by performing one certified weld every six months. By keeping his welding certification, his employer allowed him to maintain the same level of income. Employer further accommodated employee by only requiring him to perform jobs he was able to do. Employee testified that his foreman would assign him jobs, but if he could not do the jobs, he would let them know and they would reassign him. Employee stated that had his employer not provided the accommodations they did following the 1993 injury up until the primary injury, he would not have been able to remain employed by employer.

On February 7, 2005, the primary injury occurred. The injury occurred while employee was cleaning up at the end of the day and stepped out of a shower onto a rubber mat to dry off. As employee walked to his locker, he stepped on something sharp, reached down to pull it out of his foot and fell onto the hard concrete floor. He injured his neck and right upper extremity. Following this injury, employee had two additional cervical fusions performed by Dr. Kennedy on April 22, 2005 and December 15, 2005, respectively. As a result of this injury, employee received additional compensation based on 32% permanent partial disability of the neck. Employee remained off work for almost a year.

Following this primary injury, Dr. Kennedy imposed additional permanent restrictions on employee's work activities. These restrictions included no lifting greater than ten pounds, no repetitive overhead use or lifting, and no overtime. Employer worked with employee to accommodate him, but once he was able to return to work on April 5, 2006, his duties were relegated to merely pushing a broom 90% of the time. Employee was allowed 45 minute to 2 hour breaks at a time. However, eventually employee could no longer continue working, even with the breaks and other accommodations.

On November 8, 2006, employee was seen by Dr. David T. Volarich for the purpose of obtaining an Independent Medical Evaluation. Dr. Volarich opined that employee is permanently and totally disabled as a direct result of the work-related injury of February 7, 2005, in combination with his preexisting medical conditions.

Dr. Volarich testified that when the primary injury occurred employee had 45% preexisting permanent partial disability of the body as a whole rated at the cervical spine. Dr. Volarich stated that the preexisting 45% permanent partial disability accounted for employee's neck pain syndrome, lost motion, and continuing upper extremity paresthesias with neck stiffness and occasional headaches. Dr. Volarich further testified that employee had 15% preexisting permanent partial disability of the right upper extremity at the wrist due to the carpal tunnel syndrome that required open carpal tunnel release. Said 15% rating accounted for pain and paresthesias in the dominant hand. Lastly, Dr. Volarich testified that employee had 15% preexisting permanent partial disability of the body as a whole rated at the lumbosacral spine due to his chronic lumbar syndrome causing back pain and lost motion.

As for the February 7, 2005 primary injury, Dr. Volarich testified that said injury, in isolation, amounted to “a 50% permanent partial disability of the body as a whole rated at the cervical spine due to the recurrent disk herniation at C4-5 and C5-6 that required two surgical repairs....” The rating accounts for the primary injury’s contribution to employee’s neck pain syndrome, lost motion, right upper extremity weakness, and continuing radicular symptoms in the right arm, in addition to his headaches.

On December 13, 2006, employee was seen by Mr. James England, employee’s vocational consultant. Mr. England testified that employee was unemployable in the open labor market due to a combination of problems he had. The specific factors Mr. England listed as contributing to employee’s unemployability were the difficulty employee had functioning, the affects of the medication he was taking, his inability to get through the day without lying down periodically, and his stiff appearance. Based on employee’s day-to-day functioning, Mr. England does not feel employee would be able to sustain any type of work in the long-run.

Most importantly, Mr. England testified that he is of the opinion that employee’s unemployability is attributed to the combination of employee’s February 7, 2005 injury and his preexisting injuries.

Both Dr. Volarich and Mr. England reviewed all treatment records, and examined employee.

Dr. David Robson, a spine specialist, reviewed employee’s medical treatment records and determined that employee is permanently and totally disabled as a result of the February 7, 2005 injury alone. Dr. Robson did not meet or examine employee prior to issuing his opinion.

Conclusions of Law

As the administrative law judge correctly stated in the award, there is no doubt that the employee is permanently and totally disabled. The issue challenged in the Second Injury Fund’s Application for Review is whether the employee is unemployable in the open labor market as a result of the last accident alone or a combination of the last accident and employee’s preexisting conditions.

Second Injury Fund

Section 287.220 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." In order to trigger liability of the Second Injury Fund, employee must show the presence of an actual and measurable disability at the time the work injury is sustained and that work-related injury is of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *E. W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

In this case, it is clearly based on prior medical records, medical and vocational reports, medical and vocational expert testimony, a prior workers’ compensation claim settlement, and employee’s own testimony, that employee had preexisting disabilities at the time of the primary injury that caused hindrances and obstacles to his continued employment with employer.

Following employee’s 1993 injury and leading up to the primary injury, employee had suffered substantial hindrances and obstacles in his employment. Prior to this 1993 injury he had performed all of the duties of a Certified Repairman. However, when he returned to work following the 1993 injury, he was relegated to only the jobs his permanent restrictions, which were assigned to him by Dr. Kennedy, would allow him to perform. Employee’s foreman worked with him and only required him to do jobs that he was physically able to do. Employee was able to maintain the same level of income by completing only one certified weld every six months. Employer went to great lengths in accommodating employee and keeping him employed leading up

until the primary injury. Employee even testified that had employer not made these accommodations, he would not have been able to remain employed with employer.

Although employee clearly had preexisting disabilities prior to the primary injury, establishing preexisting disabilities is not the only burden for an employee asserting Second Injury Fund liability. To establish Second Injury Fund liability employee must also show either that (1) a preexisting partial disability combined with a disability from a subsequent injury to create permanent and total disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself. *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo.App. W.D. 2004), citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo.App. W.D. 2001).

Therefore, in evaluating cases such as this, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo.App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

In this case, Dr. Volarich provided in his report and testified that he is of the opinion that employee is 50% permanently partially disabled at the body as a whole rated at the cervical spine as a result of the last injury alone. In step (2) of the above analysis, Dr. Volarich went on to testify that he is of the opinion that prior to the last injury employee had 45% preexisting permanent partial disability of the body as a whole rated at the cervical spine, 15% preexisting permanent partial disability of the right upper extremity at the wrist, and 15% preexisting permanent partial disability of the body as a whole rated at the lumbosacral spine. Lastly, Dr. Volarich opined that the combination of employee's disabilities created a substantially greater disability than the simple sum or total of each separate injury and that employee is permanently and totally disabled as a direct result of combining the work-related injury of February 7, 2005 with his preexisting medical conditions.

In addition, the only vocational expert involved in this case, Mr. England, testified that he is of the opinion that employee's unemployability is attributed to the combination of employee's February 7, 2005 injury and his preexisting injuries.

Although Dr. Robson disagreed with both Dr. Volarich and Mr. England and concluded that employee was permanently and totally disabled based solely on the last injury, he based his opinion on a mere review of employee's medical records and never actually met with or examined employee.

For the foregoing reasons, the administrative law judge correctly gave more weight to Dr. Volarich and Mr. England's opinions and concluded that employee suffered from considerable preexisting permanent partial disabilities at the time of the primary injury and that employee is now permanently and totally disabled as a direct result of combining said preexisting disabilities with the last injury. The Commission, based on the totality of the opinions of Dr. Volarich and Mr. England and the record as a whole, agrees with the

administrative law judge and finds employee to be permanently and totally disabled as a result of combining employee's preexisting disabilities with the last injury.

The award and decision of Administrative Law Judge Matthew Vacca, issued September 23, 2008, is attached hereto and incorporated 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 9th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Phillip Fulkerson

Injury No.: 05-012276

Dependents: N/A

Before the
Division of Workers'
Compensation

Employer: Union Electric Company (Settled)

Department of Labor and Industrial
Second Injury Fund Relations of Missouri
Jefferson City, Missouri

Additional Party:

Insurer: Self-insured

Hearing Date: August 27, 2008

Checked by: MDV:cw

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: February 7, 2005
 - State location where accident occurred or occupational disease was contracted: St. Louis County
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
 - 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: Fell on shower floor.
12. Did accident or occupational disease cause death? No Date of death?
13. Part(s) of body injured by accident or occupational disease: Back
 - Nature and extent of any permanent disability: 32% Body as whole
 - Compensation paid to-date for temporary disability: \$35,050.24
 - Value necessary medical aid paid to date by employer/insurer? \$117,335.00

Employee: Phillip Fulkerson

Injury No.: 05-012276

17. Value necessary medical aid not furnished by employer/insurer? -0-

- Employee's average weekly wages: \$1180.20

19. Weekly compensation rate: \$675.90/\$354.05

20. Method wages computation: Agreed

COMPENSATION PAYABLE

21. Amount of compensation payable:

28 weeks of permanent partial disability from Employer (Already paid)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: *
weekly differential (\$321.85) payable by SIF for weeks 128 beginning
December 22, 2006, and, thereafter \$675.90, for Claimant's lifetime
(*denotes a lifetime contingent benefit)

Total: *

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 of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ann Dalton

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Phillip Fulkerson

Injury No.: 05-012276

Dependents: N/A

Employer: Union Electric Company (Settled)

Additional Party: Second Injury Fund

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

ISSUES PRESENTED

The issues presented for resolution by way of this hearing were the nature and extent of any Second Injury Fund liability.

FINDINGS OF FACT

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- Claimant is 54 years old on the date of the hearing, born January 16, 1954. He has been married to his wife Patricia for 33 years and they have a daughter Karla who is 24 years old and in college. Claimant is currently on long-term disability through Local 148, having last worked at Union Electric Company August 3, 2006.
- At the time Claimant last worked for Union Electric he was pushing a broom and was unable to perform the duties of his job.
- Claimant has two years of junior college, received an Associate's Degree in Automotive Technology from Kaskaskia Junior College in 1974. He was in the Army for five years and in the National Guard for 26 years. He retired when he was unable to pass his physical training test in September of 2006.
- Prior to going to work with Ameren, Claimant worked at odd jobs. He started at Ameren in 1978 as an auto mechanic's helper where he would change and check oil, change and check tires, lubricate vehicles and report problems to the mechanic for repair.

- Claimant bid out of the power plant after a few years to become a laborer. He worked in general cleanup for three years and bid out to operations where he would work the graveyard shift or the a.m./p.m. shift and generally worked up towards a higher pay grade.

- Claimant next bid out into operations for seven years working in the water cleanup operation, maintaining and working on boilers, then in the pump room keeping pumps working and maintained, and then on the boiler floor washing and maintaining the boilers.

- The downtown plant where Claimant worked closed and he had to start over at the Labadie plant as a laborer. After three years working there, he bid out as a repair apprentice. He became a repairman in 1992 and a certified repairman after that. Claimant got more money if he became a certified repairman. This would require meeting welding certifications every six months. As a certified repairman, he would work in the winters pulling boilers apart for 8 to 10 weeks, x-raying them, welding them and replacing tubes and valves.

- Claimant never worked as a supervisor and was never allowed to sit down on the job.
- Claimant was injured on September 2, 1993, when he was installing an air line header unit in the No. 4 middle boiler with his partner. His partner was on a step ladder with a pipe and Claimant was maneuvering the air line into a beam when there was a backup of black coal dust with a volatile mixture of fire, which caused an explosion into Claimant's face. He burned his face, hands, wrists, mouth and throat, and was lucky that he was not breathing or he would have also burned his lungs.
- Following this explosion, Claimant was diagnosed with a variety of problems, one of which was carpal tunnel syndrome and involved the release of the right carpal tunnel ligament in September of 1994. The problem got

worse after the surgery and following more diagnostic tests a herniated disk was discovered at C6-C7 and discectomy was performed by Dr. Kennedy. That surgery provided good relief for three months, but then the pain came back again worse than it was before and a second surgery was performed in October of 1996 at C4-5, C5-6. Claimant was off three to six months for the first surgery and four to five months following the second surgery.

- Claimant returned to work with restrictions of no welding, no use of vibratory tools, no lifting over 40 pounds and staying off of ladders. Claimant was about to lose his welding certification but made an arrangement with his boss that he could keep his certification if he obtained a light hood and his supervisor would arrange for him to perform light shop welding only, thereby keeping his certification and his high pay level.
- Claimant was able to work okay. His foreman knew his physical condition and he was shifted around the plant and carried by coworkers, with his partner doing the high work and Claimant doing the low work following that original coal fire explosion.

- The pain in Claimant's right hand continued up until 2005, the date of the second accident. The neck was not too problematic. He was able to get off prescription medications and take Motrin for pain and was capable of finishing a full day within his restrictions. He took no overtime following that injury.

- Claimant also owned a little garden tractor, which he utilized to keep his 3 acres in order, but was unable to mow due to pain in his neck from bouncing and therefore obtained a bigger tractor. Following this accident he was unable to engage in volleyball and softball, but was able to continue rifle hunting although he could not draw a bow and hold it.

- Claimant was also able to continue in the military from 1993 until 2005 passing his physical tolerance tests, performing as many as 60 push-ups, 60 sit-ups and a 2-mile age based run. Following the accident, he had to practice the entire year to pass the physical training tests. Before 1993 it would take him one month and now took him one year to prepare for that test.
- Claimant settled that claim as a workers' compensation case for 40% of the neck, 15% of the hand and 10% of the back.
- Claimant had a minor back injury as they were installing a long lance in a boiler in November of 1993 after returning to work. It was 3 inches in diameter and 20 feet long and a team was maneuvering the lance when Claimant got left holding the end of it and strained his back. Following that he wore a back brace or a work belt under his jacket. No extended treatment was required.
- On February 7, 2005, Claimant was working and cleaning up at the end of the day and stepped out of a shower onto a rubber mat to dry off. As Claimant walked to his locker, he stepped on something sharp, reached down to pull it out of his foot and fell onto the hard, concrete floor. Claimant got up and was able to get himself on the bench. He sat there for a while, got dressed and reported the injury immediately to his foreman. As Claimant fell, he hit his back and right side, but did not hit his head. Claimant went home and had a headache. The pain started traveling down his arm and felt all over like the pain he experienced following the 2003 explosion accident and surgeries.
- Claimant immediately went to work the next day and reported that he was having serious problems like he had previously and was sent to urgent care. Claimant was having difficulty with his right arm and shoulder and Dr. Kennedy performed an MRI. Dr. Kennedy provided the previous surgical care relating to Claimant's neck. Dr. Kennedy determined that Claimant had broken the fusion at C4-5 and C5-6 and immediately scheduled surgery. Claimant started blanking out at work and Dr. Kennedy pushed the surgical date up and on April 22, he fused the areas from C4-7 with a metal plate and six screws and an autologous bone plug graft.
- Claimant was fine at first, but after two to three months the neck began hurting again. Dr. Kennedy performed further diagnostic tests and determined that there was a nonfusion of C5-6. This time, Dr. Kennedy proposed a posterior fusion with struts and screws and set screws that he guaranteed would solve the problems. Claimant

lost time from April of 2005 to April of 2006 following this surgery. He returned to work in 2006 with limitations of no overtime, no lifting greater than 10 pounds and no overhead work at all.

- Claimant returned to the Sioux power plant and was given light work by his supervisors pushing brooms because it was about the only thing that he could do within his restrictions. Claimant was given extensive breaks in the locker room where he could rest and stretch and lay down, the only requirement being that he not fall asleep.
- Claimant found it extremely difficult to drive home at the end of his shift, having to go through four construction sites, 90 miles one way. Eventually, Claimant was sent back to the Labadie plant. He was not certified because he had not performed a certified weld for two years. His breaks began getting longer and longer and Claimant found it more difficult to perform the simple duties pushing a broom.
- Finally, Claimant called to work and said that he was unable to come in for several days. A meeting was scheduled between human resources, Claimant and the union. Essentially, the Employer had no job for Claimant. If he could not do all the elements of his job, then Ameren could not provide him with any work.
- Claimant settled his claim against the Employer for this injury for 32% of the body as a whole.
- Now Claimant cannot do any deer hunting. He cannot do any mowing. He performs quite a bit of stretching and walking during the day. He does not like to drive and takes prescription medications twice a day consisting of hydrocodone, diazepam and Motrin 800.
- As a result of these injuries, Claimant has lost benefits to his pension and overtime. He has long-term disability, but has taken a pay cut. He has applied for and is waiting for Social Security. Claimant is unable to go to the movies or read, work on the computer or watch TV because it hurts his neck because he is unable to look up or to the sides or down.
- Dr. Volarich and Mr. England believe Claimant is permanently and totally disabled as a result of all his injuries, Dr. Robson believes that Claimant was disabled as a result of the last injury alone.

RULINGS OF LAW

- Claimant has proven by substantial and competent evidence that he is permanently and totally disabled following his healing from injuries as a result of an injury that he experienced while working at Union Electric on February 7, 2005. After the rendition of medical care and a healing period, Claimant sustained a 32% permanent partial disability measured at the level of the body as a whole.
- Following the healing period and the rendition of the aforementioned medical treatment, Claimant thereafter became permanently and totally disabled and said permanent total disability was not a result of the last injury alone; therefore, the Second Injury Fund is liable for permanent and total disability benefits beginning 128 weeks after he reached maximum medical improvement on December 22, 2006. Claimant is entitled to the differential between the permanent total disability compensation rate and the permanent partial disability compensation rate in the amount of \$321.85 for 128 weeks from the Second Injury Fund. Thereafter, Claimant is entitled to the maximum compensation rate of \$675.90 for life.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeff Buker
Director
Division of Workers' Compensation