

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 05-144118

Employee: Ysidro Garcia
Employer: Fasco Industries, Inc. (Settled)
Insurer: Travelers Commercial Casualty (Settled)
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. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies and supplements the award and decision of the administrative law judge. This Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

Discussion

The administrative law judge determined that employee is permanently and totally disabled owing to the combined effects of his preexisting conditions of ill and primary low back and psychiatric injuries sustained by occupational disease on August 18, 2005, and found the Second Injury Fund liable to employee for permanent total disability benefits. The Second Injury Fund appeals.

We agree that employee is permanently and totally disabled owing to a combination of his primary injuries and preexisting conditions of ill, and that the Second Injury Fund is liable for permanent total disability benefits as a result. However, in order to address some clerical errors and apply the law regarding the timing of permanent total disability benefits from the Second Injury Fund, we write this decision and modify the administrative law judge's award accordingly.

Clerical error

We note that the administrative law judge appears to have confused the Injury Numbers associated with the three cases that were tried together on June 16, 2011. Those three cases, and the alleged injuries involved in each, are as follows:

Injury No. 05-144118: On August 18, 2005, employee sustained left shoulder and psychiatric injuries by occupational disease.

Injury No. 05-144136: On August 18, 2005, employee sustained low back and psychiatric injuries by occupational disease.

Injury No. 05-045999: On May 10, 2005, employee sustained right shoulder and psychiatric injuries by accident.

The administrative law judge, in issuing her three awards, transposed the facts and circumstances at issue in Injury No. 05-144118 with those involved in Injury No. 05-144136. In other words, we now have an award in Injury No. 05-144118 that talks about employee's

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low back injury, rather than a left shoulder injury, and vice versa with respect to the award in Injury No. 05-144136.

This confusion does not appear to have affected the administrative law judge's substantive analysis in any way, and the parties have apparently acceded to this circumstance, as it was not mentioned in either brief, and the Second Injury Fund filed its Application for Review in this case treating the award in Injury No. 05-144118 as if it were properly the award resolving employee's claim alleging low back and psychiatric injuries by occupational disease. Meanwhile, no Application for Review was filed in Injury No. 05-144136, with the effect that that award is now final.

Because the parties have not asked us to take any action with respect to what we believe is merely a clerical error, we will not disturb the caption or designation of this award as Injury No. 05-144118, notwithstanding that this injury number actually corresponds to employee's claim for a left shoulder injury. We have, nevertheless, provided the foregoing discussion in order to make clear that we believe that we properly understand the issues involved in this appeal to pertain to primary low back and psychiatric injuries, sustained by occupational disease on August 18, 2005.

Maximum medical improvement

We agree with the administrative law judge that the Second Injury Fund is liable for permanent total disability benefits. But the administrative law judge found employee to be permanently and totally disabled as of August 19, 2005 (the day after the date of injury) and also ordered that the payment of permanent total disability benefits by the Second Injury Fund commence on August 18, 2005. Absent a showing that employee reached maximum medical improvement on August 19, 2005, any finding as to the nature and extent of employee's permanent disability as of that date is premature.

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. ...

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,

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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).

The parties, in their briefs, have provided no suggestions as to the date employee reached maximum medical improvement for the effects of the primary low back injury, nor have they directed us to where we might find such information in the medical treatment record. Employee did not receive treatment for the primary low back injury with employer's authorized workers' compensation doctors, but rather pursued conservative treatment with the Veteran's Affairs Hospital. Employee testified his back is not worse but is not significantly better than it was as of the August 18, 2005, date of injury. Dr. Koprivica found employee to be at maximum medical improvement for the low back as of June 6, 2007, the day he examined employee and conducted an independent medical evaluation.

Given these considerations, we find Dr. Koprivica's opinion the best evidence on the issue. We find that employee reached maximum medical improvement from the effects of the primary injury on June 6, 2007.

Because he had not reached maximum medical improvement as of August 19, 2005, the administrative law judge's determination that employee was permanently and totally disabled as of that date is erroneous. We find, instead, that employee was permanently and totally disabled as of June 6, 2007, the date that he reached maximum medical improvement from the effects of the work injury.

Commencement of payments from the Second Injury Fund

Section 287.220.1 RSMo governs the timing and commencement of weekly payments from the Second Injury Fund in cases where it is found to be liable for benefits, and provides in relevant part, as follows:

[I]f the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

We find appropriate and affirm the administrative law judge's finding that the work injury resulted in 15% permanent partial disability of the body as a whole referable to the back and 3% permanent partial disability of the body as a whole referable to psychiatric injury. The employer's liability for the primary injury is equal to 72 weeks of permanent partial disability benefits. Employer's liability for permanent partial disability begins on June 6, 2007, the date employee reached maximum medical improvement.

The rates for permanent partial and permanent total disability benefits in this matter are equal at \$313.86. Because the rates are equal, the Second Injury Fund is not liable to

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pay benefits under the above-quoted portion of § 287.220.1 until 72 weeks after employee's date of maximum medical improvement. In other words, permanent total disability benefits are due from the Second Injury Fund beginning on October 22, 2008.

We conclude the Second Injury Fund is liable for weekly payments of permanent total disability benefits beginning on October 22, 2008.

Award

We supplement the award of the administrative law judge to make clear that we understand the facts and issues involved herein to pertain to employee's primary low back and psychiatric injuries, notwithstanding the administrative law judge's transposing the original injury number assigned to this case (Injury No. 05-144136) with that in a case that was heard at the same time (Injury No. 05-144118). We have not disturbed that action because it was not appealed and because it has no bearing on our substantive analysis as to the merits of this matter.

We modify and supplement the award of the administrative law judge as to the timing and commencement of payment of permanent total disability benefits from the Second Injury Fund. We find employee reached maximum medical improvement on June 6, 2007.

The Second Injury Fund is ordered to pay permanent total disability benefits beginning October 22, 2008, at the rate of \$313.86 per week for employee's lifetime.

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.

The award and decision of Administrative Law Judge Vicky Ruth, issued September 16, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 29th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary