

**FINAL AWARD DENYING COMPENSATION**  
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 07-027372

Employee: Robert E. Gentry  
Employer: Kraft Foods, Inc. (Settled)  
Insurer: Indemnity Insurance Company of North America c/o ESIS (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 for review as provided by § 287.480 RSMo<sup>1</sup>. We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge dated February 9, 2011. The award and decision of Administrative Law Judge David L. Zerrer is attached hereto solely for reference.

**Findings of Fact**

Employee is 67 years old. He has a high school education. He worked for employer, Kraft Foods, Inc., for 22½ years. He retired from employer on July 30, 2008.

Employee offered no expert medical opinion regarding his alleged left eye vision problems. Employee testified that he has always had vision problems in his left eye. According to employee, he has suffered from an eye condition known as amblyopia in his left eye since he was a child. He had surgery on his left eye when he was 5 or 6 years of age, but employee testified the surgery did not improve his vision. Employee testified that he cannot see out of his left eye but he can distinguish light and dark, shapes, and colors. In addition, he can see movement in his peripheral vision. Employee believes if he lost his right eye, he would be totally blind and unable to read or drive.

Employee testified that every eye doctor that has examined his left eye said there is nothing that can be medically done to improve employee's vision in the left eye. Employee reads with his right eye. Employee said his prescription glasses do not even have a corrective lens for the left eye, because correction of the vision in that eye is not possible.

On March 29, 2007, employee injured his right arm in a work-related accident. He settled his claim against his employer for the arm injury. He proceeded to trial seeking permanent partial disability from the Second Injury Fund alleging that the disability from his arm injury combines with his preexisting vision disability to result in greater disability than the simple sum of the disabilities.

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2006, unless otherwise indicated.

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The administrative law judge ruled, in part:

I find that Claimant has sustained his burden of proof that his pre-existing diminished sight in the left eye is a substantial condition that meets the requirements of Section 287.220.1. I further find that there was substantial and competent evidence adduced at the hearing that Claimant's diminished left eye sight is an obstacle or hindrance to Claimant's employment at the time of the primary claim, which has caused him to suffer a 40% permanent disability to the left eye.

I further find that Claimant's primary claim settled for 20% of the right arm at the 210-week level, and that claimant has sustained his burden of proof that the primary injury is a substantial injury that meets the requirements of Section 287.220.1. I further find that the Claimant has a permanent disability greater than the simple sum of the Claimant's pre-existing condition and the primary injury and that this is a 20% disability greater than the simple sum of the pre-existing disability and the disability resulting from the primary injury.

### **Conclusions of Law**

To recover on a claim of enhanced permanent partial disability against the Second Injury Fund, employee must first show that he sustained a compensable injury that meets one of the minimum thresholds set forth in § 287.220.1 RSMo. If employee clears that hurdle, he must then show that he suffers from one or more pre-existing disabilities constituting a hindrance or obstacle to his employment or reemployment, which pre-existing disabilities also meet the thresholds set out in § 287.220.1. Then, the employee must show that the effects of all of the disabilities under consideration combine in such a way that the overall resulting disability exceeds the simple sum of the disabilities.

In this case, the Second Injury Fund does not challenge that employee's disability from the March 29, 2007, injury meets the thresholds set out in § 287.220.1, so we may direct our attention to employee's alleged pre-existing vision disability.

We must first determine whether employee has proven that, as of March 29, 2007, employee suffered from the preexisting condition of amblyopia. We find that he did not so prove. Based solely on his testimony and without the benefit of any medical evidence, employee asks us to find:

- employee suffers from a condition known as amblyopia;
- the amblyopia resulted in an almost complete loss of vision in his left eye;
- the amblyopia and resultant vision loss is permanent;
- the amblyopia and resultant vision loss is a hindrance or obstacle to his employment or reemployment;
- the amblyopia and resultant vision loss produce a disability that exceeds 50 weeks of compensation; and,

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- the disability caused by the vision loss combines with the disability from his work-related arm injury to result in a greater disability than the simple sum of the disabilities.

The Commission is composed of laypersons, not physicians. We have not been trained to identify the characteristics of amblyopia in order that we can determine whether the symptoms employee described are those expected of the condition amblyopia. We do not know if amblyopia is a permanent condition.

Employee bears the burden of proving the elements of his claim. Since we are not physicians and employee is not a physician, it would have been helpful if employee had presented the expert opinion of an ophthalmologist or other medical professional specializing in medical conditions of the eyes to prove the existence of amblyopia, the symptoms of amblyopia, the permanency of amblyopia, and the disability caused by amblyopia. Employee failed to do so. Consequently, he failed to persuade us that he suffered from the preexisting, permanent condition of amblyopia or any resultant disability as of the date of the primary injury.

Because employee failed to prove that he suffered from a preexisting, permanent disability as of the date of the primary injury, his claim against the Second Injury Fund must fail.

**Award**

We reverse the award of the administrative law judge and deny compensation in this matter. All other issues are moot.

Given at Jefferson City, State of Missouri, this 11<sup>th</sup> day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

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Secretary

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### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the award and decision of the administrative law judge should be affirmed.

Years of case law make clear that a medical opinion is not always necessary to support the Commission's disability determination.

"The determination of the specific amount or percentage of disability is a finding of fact within the special province of the Commission." "When the Commission makes the determination of disability it is not strictly limited to the percentages of disability testified to by the medical experts." *Id.* Moreover, this court has held that "[t]he Commission is authorized to base its findings and award solely on the testimony of a claimant. His testimony alone, if believed, constitutes substantial evidence . . . of the nature, cause, and extent of his disability."

*Bock v. City of Columbia*, 274 S.W.3d 555, 560 (Mo. App. 2008) (internal citations omitted).

Employee described what he cannot see and his testimony is credible. It does not matter *why* employee cannot see. Although I am a layperson, I have personal experience with vision. I can comprehend and understand the extent of employee's vision loss by his descriptions of the things he cannot see and those few visual characteristics he can distinguish. Based upon employee's description of the few things he can distinguish, I have no difficulty finding that he has a complete loss of vision in his left eye.

Employee credibly testified that he has had the left eye condition since childhood and that it has never improved, even after surgery. Employee has established that his left eye condition is permanent.

The Second Injury Fund suggests that employee has not shown that his left eye condition was a hindrance or obstacle to employment or reemployment. This suggestion is ridiculous. The Second Injury Fund is well-aware that the determination of whether a preexisting disability is a hindrance or obstacle to employment takes into consideration far more than the extent to which the disability has caused vocational problems in the past.

When determining SIF liability, the 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." (emphasis in original). *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo.App.E.D. 1995).

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

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Considering the most obvious potential combination, if employee were to lose the vision in his right eye in a work-related accident, he would be completely blind. Certainly, being completely blind is a greater disability than being blind in the right eye. Employee's left eye condition was a hindrance or obstacle to employment on March 29, 2007.

According to § 287.190.1(29) RSMo, employee's complete loss of vision in his left eye means he suffers a preexisting permanent disability equal to 140 weeks. Employee has shown that his vision condition meets the threshold set forth in § 287.220.1 RSMo.

The administrative law judge believes that employee's right arm disability combines with the disability caused by his left eye condition to result in an overall disability that is 20% greater than the simple sum of the disabilities. I would affirm the administrative law judge's award.

For the foregoing reasons, I respectfully dissent from the award of the Commission majority.

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Curtis E. Chick, Jr., Member