AWARD AFTER MANDATE

Injury No. 07-072826

Employee: Edward Gleason, Sr.

Employer: Ceva Logistics (Settled)

Insurer: New Hampshire Insurance Co. (Settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

Preliminaries

On March 3, 2015, the Missouri Court of Appeals for the Western District issued an opinion reversing our May 15, 2014, award and decision. *Gleason v. Treasurer of the State*, (Mo. App. 2015)(No. WD77607). In particular, the Court reversed our conclusion that employee's injury did not arise out of and in the course of his employment. By mandate dated March 25, 2015, the Court remanded this matter to us for further proceedings in accordance with the opinion of the Court.

Pursuant to the Court's mandate, we issue this award. Having reviewed the evidence and considered the whole record in light of the opinion of the Court, we reverse the November 19, 2013, award of the administrative law judge and award benefits.

At the trial of this matter, employee sought permanent total disability from the Second Injury Fund. By his application for review, employee abandoned his claim for permanent total disability benefits conceding that "a diagnosis of PPD appears to be more appropriate." The sole issue remaining before us is whether the Second Injury Fund is liable to employee for permanent partial disability benefits relative to his August 5, 2007, accident that arose out of and in the course of his employment.

On April 30, 2009, an administrative law judge approved a Stipulation for Compromise Settlement in which employer/insurer and employee agreed to resolve employee's claim against employer/insurer by the payment from employer/insurer to employee of $34,000.00 based upon approximate permanent partial disabilities of 15% of the upper right extremity at the 232-week level and 13% of the body as a whole referable to employee's cervical and thoracic spine.[1]

Findings of Fact

In June 2007, employee suffered a mild stroke due to a cerebral vascular condition. As a result of the stroke, employee suffered a permanent reduction in his peripheral vision, in particular a right-sided field cut. Before the work injury, employee also suffered from coronary artery disease with ischemic cardiomyopathy and peripheral arterial disease. An angiography performed in June 2007, revealed employee had an occluded left internal carotid artery.

[1] The administrative law judge erroneously found the employer/insurer and employee settled the claim "for 15% ppd to the body as a whole for cervical and thoracic injuries."

On August 5, 2007, employee was atop a railcar performing an inspection as part of his duties for employer. Employee fell 20 – 25 feet from the top of the railcar and landed on the ground. Employee does not remember the circumstances leading up to the fall, the fall itself, or the three days after the fall, during which time employee was hospitalized. No individuals testified to having witnessed the fall. As a result of his fall, employee sustained injuries to his head (contusion/closed head injury), neck (musculoligamentous sprain/strain), right shoulder (contusion/strain/tendonitis), anterior chest (right clavicular fracture/closed pneumothorax/rib fractures) and thoracic spine (right transverse process fractures at T9 and T10/right scapular fracture).

Dr. Samuelson treated employee for his work injuries. Because employee's cardiac condition rendered employee a poor candidate for surgery, Dr. Samuelson treated employee's orthopedic injuries conservatively. Eventually, employee's fractures healed.

On September 6, 2007, approximately one month after his work injury, employee underwent coronary artery bypass surgery.

Employee participated in three weeks of physical therapy for his shoulder beginning in late October 2007. Employee also returned to work with restrictions in October 2007. Employee worked until December 10, 2007, at which time employer suspended him. Employer eventually discharged employee. Despite submitting hundreds of job applications, employee has not worked since December 2007.

In November 2007, employee complained to Dr. Samuelson of continued shoulder pain. After a possible rotator cuff tear was ruled out, Dr. Samuelson recommended employee take anti-inflammatory medications and engage in a home exercise program. Dr. Samuelson continued to monitor employee's progress until March 7, 2008, when Dr. Samuelson released employee at maximum medical improvement. Dr. Samuelson opined that according to the American Medical Association, Guides to Evaluation of Permanent Impairment, employee suffered a permanent partial impairment rating of 2% of employee's right upper extremity.

Employee testified that as a result of his fall at work, he gets headaches daily after he has been up for about three and a half hours. To ameliorate his headaches, employee takes Tylenol and lies down. Employee testified that he experiences discomfort in his neck and shoulder; he says it feels as if they are misaligned. Employee has reduced grip strength in his right hand.

On March 28, 2008, Dr. Poppa evaluated employee for purposes of providing his expert medical opinion in this case. Dr. Poppa believes employee sustained permanent partial disabilities as a result of his August 5, 2007, fall. Dr. Poppa believes employee's accident was the prevailing factor in causing his injuries and resulting disabilities. Dr. Poppa believes that as a result of the August 5, 2007, fall, employee sustained the following permanent partial disabilities:

1) 5% permanent partial disability of the body as a whole referable to his head (closed head injury);
2) 10% of the body as a whole referable to his cervical spine;

3) 20% permanent partial disability of his right upper extremity referable to the shoulder injury and clavicular fracture; and,
4) 10% permanent partial disability of the body as a whole referable to his pneumothorax, scapular fracture, rib fractures, and vertebral body transverse fractures at T9 and T10.

Dr. Poppa believes employee's overall disability as a result of the work fall is 37% permanent partial disability of the body as a whole.

Dr. Poppa offered his opinion that at the time employee sustained his work injury, employee suffered from 20% permanent partial disability related to his cardiac condition and 20% permanent partial disability related to his cerebral vascular disease. Dr. Poppa believed the cardiac and vascular conditions then constituted a hindrance or obstacle to employee's employment or reemployment.

Dr. Poppa testified that from a functional standpoint employee could perform the work duties associated with a job in the sedentary category of physical demand, meaning employee could perform primarily seated duties with occasional walking and standing and occasional lifting of up to 10 pounds. Even so, Dr. Poppa opined that employee's pre-existing heart and vascular conditions combined with the permanent partial disabilities from the work fall in such a manner that employee presents as an individual who is not capable of employment in the open labor market. Specifically, due to the combination of the three conditions, Dr. Poppa believes no employer would reasonably be expected to hire employee.

We find generally credible the medical opinions of Dr. Poppa but, based upon employee's own assessment of his capabilities before the work injury, we believe Dr. Poppa overstated the extent of employee's pre-existing permanent partial disabilities. We find that employee suffered a pre-existing permanent partial disability of 20% of the body as a whole relative to his cardiac and vascular conditions (80 weeks) and that those conditions were a hindrance or obstacle to employment.

We think Dr. Poppa's opinions regarding the extent of the permanent partial disabilities employee sustained as a result of his work fall are slightly overstated. Employee resolved his claim against employer/insurer for approximately 15% permanent partial disability at the level of the right shoulder (34.8 weeks) and 13% of the body as a whole referable to employee's thoracic and cervical regions (52 weeks). We believe the settlement percentages accurately reflect employee's resulting permanent partial disabilities and we adopt them.

We do not question Dr. Poppa's belief that when he examined employee on March 8, 2008, no employer would have reasonably been expected to hire employee as employee then presented. But we do not accept Dr. Poppa's opinion that employee's condition and presentation on March 28, 2008, can be attributed *solely* to the combination of employee's pre-existing conditions and the disabilities from his work injury. We think the worsening of employee's cardiac and vascular problems after the work injury – in particular employee's worsening problem with fatigue – also contributed to employee's overall condition and non-competitive presentation on March 28, 2008.

Consequently, we find employee's permanent partial disabilities from his work injuries synergistically combined with his preexisting disabilities to result in a greater overall permanent partial disability than their simple sum, but the combination did not result in permanent total disability. We believe a loading factor of 20% fairly accounts for this enhanced permanent partial disability.

Law

"Section 287.220 creates the Second Injury Fund and sets forth when and the amount of compensation that shall be paid from the fund in 'all cases of permanent disability where there has been previous disability.'"[2] "In order to be entitled to Fund liability, the claimant must establish 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."[3]

"Liability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'"[4] The preexisting disability must also be of such seriousness as to constitute a hindrance or obstacle to employment.[5] "To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, 'the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition.'"[6] The Second Injury Fund is not liable for permanent partial disability benefits unless some preexisting permanent partial disability equals at least 15% permanent partial disability relative to a major extremity or 50 weeks of compensation measured at the body as a whole.[7]

Conclusions of Law

The opinions of Dr. Poppa have convinced us that at the time he sustained his work injury, employee suffered from actual and measurable preexisting permanent partial disabilities that constituted hindrances or obstacles to his employment or reemployment. We have found that employee's preexisting permanent partial disability equals 20% of the body as a whole, or 80 weeks. Employee's permanent partial disability meets the minimum threshold required to trigger Second Injury Fund liability.

Employee's permanent partial disabilities from his work injuries synergistically combined with his preexisting disabilities to result in a greater overall permanent partial disability than their simple sum and a loading factor of 20% is appropriate. Stated in compensation weeks, the simple sum of employee's preexisting and work disabilities is 166.8 weeks (34.8

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[2] *Hughey v. Chrysler Corp*., 34 S.W.3d 845, 847 (Mo. App. 2000)(citations omitted).
[3] *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004) citing *Karoutzos v. Treasurer of State*, 55 S.W.3d 493, 498 (Mo. App. 2001).
[4] *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (MO. 2003), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999).
[5] Section 287.220.1 RSMo.
[6] *E.W. v. Kansas City School District*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997).
[7] *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455, 465 (Mo. 2013).

shoulder, 52 cervical/thoracic, 80 weeks pre-existing cardiac/vascular). Applying a 20% loading factor, employee's enhanced permanent partial disability is equivalent to 33.36 weeks.

Award

We reverse the award of the administrative law judge. The injuries employee sustained on August 5, 2007 (head, shoulder, neck, and back) arose out of and in the course of his employment. We award from the Second Injury Fund to employee permanent partial disability benefits in the amount of $12,978.37 (33.36 weeks at $389.04).

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

We attach the November 19, 2013, award and decision of Administrative Law Judge Emily S. Fowler solely for reference.

Given at Jefferson City, State of Missouri, this ___11th___ day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

_____
Secretary

FINAL AWARD
AS TO THE SECOND INJURY FUND ONLY

Employee: Edward Gleason Injury No. 07-072826

Dependents: N/A

Employer: Ceva Logistics (Settled)

Insurer: New Hampshire Insurance Co. (Settled)

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: October 4, 2013 Checked by: ESF/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No

2. Was the injury or occupational disease compensable under Chapter 287? No

3. Was there an accident or incident of occupational disease under the Law? No

4. Date of accident or onset of occupational disease: August 5, 2007

5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay 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? No

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: The Employee fell from a train car.

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: Shoulder and back

14. Nature and extent of any permanent disability: 15% at the 232 week level and 13% body as a whole as to the Employer.

15. Compensation paid to date for temporary disability: $4,654.10

16. Value necessary medical aid paid to date by employer/insurer? $85,735.36

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: $634.65

19. Weekly compensation rate: $423.10/$389.04

20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: Previously settled with the employer/insurer for 15% at the 232 week level and 13% body as a whole

22. Second Injury Liability: No.

23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Edward Gleason Injury No. 07-072826

Dependents: N/A

Employer: Ceva Logistics (Settled)

Insurer: New Hampshire Insurance Co. (Settled)

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: October 4, 2013 Checked by: ESF/lh

On October 4, 2013, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110. The Employee, Edward Gleason, appeared in person representing himself. The Second Injury Fund appeared through Assistant Attorney General Kim Fournier. There was no appearance on behalf of the Employer and Insurer as the claim between the Employer and the Employee has previously been settled.

STIPULATIONS

The parties stipulated to the following:

1) that on August 5, 2007 the Employer, CEVA Logistics, was operating subject to Missouri's workers' compensation law and its liability was fully insured through New Hampshire insurance Co;
2) that Edward Gleason was its employee working subject to the law in Kansas City, Clay County, Missouri;
3) that the State of Missouri has jurisdiction to hear this case;
4) that Employee notified the Employer of the injury as required by law and his claim was filed within the time allowed by law;
5) that Employee's average weekly wage was $634.65, resulting in a compensation rate of $423.10 for temporary total disability and $389.04 for permanent partial disability; and
6) that the Employer has paid $4,654.10 for temporary total disability compensation and medical care costing $85,735.36.

ISSUES

The issues to be resolved by this hearing are as follows:

1) whether Claimant sustained an accident arising out of and in the course and scope of his employment;

2) whether Employee suffered any disability either permanent partial or permanent total; and

3) whether the Second Injury Fund is liable to Employee for any disability compensation.

FINDINGS OF FACT AND RULINGS OF LAW

The Employee, Edward Gleason, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

Claimant's Exhibit A – *03/28-08 report from Dr. Poppa*
Claimant's Exhibit C – *Medical records*
Claimant's Exhibit D – *Deposition of Dr. Poppa (submitted after hearing)*
Claimant's Exhibit F – *Summary of Mr. Gleason's reason for entitlement to benefits*

The following exhibit was offered over the objection of the second Injury Fund and was not admitted:

Claimant's Exhibit B *-10/20/2010 Report of Mr. Dreiling*

The following exhibit was to be offered after hearing but was never submitted as Employee stated it could not be found and this Court does not have it in its possession:

Claimant's Exhibit E – *Deposition of Mr. Dreiling*

The Second Injury Fund presented the following exhibits, all of which were admitted into without objection.

Second Injury Fund's Exhibit A- *Medical Records of Dr. Deedy*

Based on the above exhibits and the testimony of the Claimant, this Court makes the following findings:

Edward Gleason is a 58 year old married man with an 11th grade education. Despite his lack of education, Mr. Gleason's job history has been excellent. He had no difficulty in obtaining or maintaining employment prior to 2007. He has worked in maintenance as well as in management. He also has a personal computer at home and does have some computer proficiency. Mr. Gleason's last job was with Ceva Logistics as a train car inspector/transportation coordinator. His job required him to climb up onto train cars that were holding automobiles which were about to be transported and check that they were properly

secured. Mr. Gleason's job was full time, physically demanding and also required that he supervise 5-7 people.

Mr. Gleason's Condition prior to 2007

Mr. Gleason was shot three times in the late 1970's early 1980s. Once healed from those injuries, Mr. Gleason had no ongoing physical problems from the wounds, and was in no way hindered by his old gun-shot wounds.

In June, 2007, Mr. Gleason suffered a stroke and was off work for several weeks. Mr. Gleason returned to work for and with some loss to his peripheral vision. Despite that, he was able to continue working as a supervisor and a rail car inspector. He did feel somewhat unsafe doing his job because of the partial loss of vision. Dr. Poppa was unaware of any ongoing cognitive deficits following this stroke. (Poppa transcript page 23, 24, 26)

Dr. Poppa did provide ratings for Mr. Gleason's coronary condition/stroke before 2007 at 20% ppd to the body as a whole. (Poppa transcript page 20) He did not, however, ask Mr. Gleason how the coronary disease affected his ability to work prior to 2007. (Poppa transcript page 19-20, 22) Mr. Gleason's job for CEVA logistics was a light or possibly higher demand category job which he was performing despite his June 2007 stroke. (Poppa transcript 34-35)

Mr. Gleason was able to do his job, and had no other physical problems, and nothing else was creating any kind of hindrance or obstacle to his ability to work prior to 2007.

Mr. Gleason denied to Dr. Poppa that he had any work injuries before 2007. (Poppa transcript page 10)

Mr. Gleason's 2007 Injury

On August 5, 2007, Mr. Gleason was atop a train car performing an inspection when he fell from the car several feet, injuring his head, neck, right shoulder, clavicle, and ribs. (Poppa transcript pages 4-6). Mr. Gleason testified that he has no idea how his fall occurred. He was unable to state at hearing that the fall was proximately caused by his work. While Dr. Poppa says that the injury was the prevailing factor in his disability, Dr. Poppa made no finding in either his report or his deposition testimony that Mr. Gleason's work was the prevailing factor in causing the fall. (Poppa report page 4)

After the fall, Mr. Gleason went to the hospital immediately and was in-patient for several days. He had no recall of his first 3 days in the hospital. (Poppa transcript page 6)

Mr. Gleason received minimal conservative care for these injuries through March of 2008. (Poppa transcript page 8) Dr. Samuelson treated Mr. Gleason for the 2007 work injury and placed no permanent restrictions on Mr. Gleason as a result of the fall. (Poppa transcript page 8). Mr. Gleason's rating physician, Dr. Poppa, performed no cognitive testing on Mr. Gleason following this injury. (Poppa transcript page 7)

Mr. Gleason's post 2007 Condition

While Mr. Gleason was undergoing his treatment for the August 5, 2007 fall, he suffered a heart attack and underwent coronary double bypass surgery in February of 2008. (Poppa

transcript page 9) He was also diagnosed with a vascular condition in his legs in 2011. These conditions cause him a great deal of discomfort in his legs, swollen ankles, possible memory loss and chronic fatigue. He lies down during the day now due to fatigue. Dr. Poppa agreed that the fatigue and lack of strength are due to his progressive cardiopyopathy. (Poppa transcript page 21-22) Dr. Poppa went on to say that Mr. Gleason's heart condition is impacting his activities of daily living. (Poppa transcript page 22)

After the bypass surgery, Mr. Gleason went back to work for Ceva Logistics. He was there for approximately 2 months under modified duty. His job duties required him to drive cars into the freight yard to be loaded. In December 2007 he was terminated from the employ of Ceva Logistics. He was on unemployment for several months after his termination.

Mr. Gleason advised Dr. Poppa that he has difficulty sleeping, driving and participating in social and recreational activities. (Poppa transcript page 10) Mr. Gleason also indicated that he has ongoing headaches and memory issues as well since the 2007 injury. Interestingly, however, Dr. Poppa indicated that in March of 2008 Mr. Gleason's headaches were not as frequent and at that time he was not having much difficulty with his neck. (Poppa transcript page 14) Moreover, Dr. Poppa was unable to independently verify any cognitive deficits as he did no testing. (Poppa transcript page 11) Dr. Poppa had no records or restrictions from any treating physicians or vocational experts that suggested that Mr. Gleason should not be working back in March of 2008 when Dr. Poppa saw Mr. Gleason. (Poppa transcript page 10-11)

Dr. Poppa indicated that Mr. Gleason did have some ongoing strength problems and pain in his right shoulder, however Dr. Poppa was not aware of any physician imposed restrictions on Mr. Gleason following his 2007 fall. (Poppa transcript page 14, 29) Dr. Poppa opined that he felt Mr. Gleason was capable of employment in the sedentary work category when looking at the primary work injury and its residuals. (Poppa transcript page 30, 31)

Dr. Poppa made no recommendations for ongoing use of narcotic medications for Mr. Gleason, nor was Mr. Gleason on narcotics in 2008 when Dr. Poppa evaluated him. (Poppa transcript page 15, 29)

Dr. Poppa rated Mr. Gleason's permanent partial disability for his 2007 work injury at 37% ppd at the body as a whole. (Poppa transcript page 18) Mr. Gleason settled his claim against his employer for this injury for 15% ppd to the body as a whole for cervical and thoracic injuries. (Poppa transcript page 18)

Even though Dr. Poppa tried to opine that Mr. Gleason is permanently and totally disabled as a result of his 2007 work injury in combination with his prior cardiovascular condition, he admitted that there is nothing about this gentleman's heart or stroke condition existing prior to 2007 that would remove him from performing sedentary work. (Poppa transcript page 40) He admitted that prior to 2007 Mr. Gleason was performing greater than light category work despite his cardiovascular condition. (Poppa transcript page 35)

In December 2010 Mr. Gleason decided to obtain his insurance license. He made it most of the way through the training program and then decided to discontinue as he was not feeling able to perform the job. Additionally, Mr. Gleason has begun walking with a cane subsequent to his 2007 work injury.

Mr. Gleason testified to significant physical complaints subsequent to his 2007 work injury all stemming from his cardiovascular worsening. He has had to discontinue helping his wife with work around the house, and he had to discontinue taking trips to St. Louis to see his family sometime in 2010. He also quit driving in 2009 due to this ongoing worsening.

I. No Second Injury Fund liability exists because there is no evidence that Mr. Gleason's fall at work in 2007 was actually caused by his work.

In a workers' compensation preceding it is the claimant who has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195 (Mo.App. 1990). Mr. Gleason has not met that burden.

The first element of proof in a case against the Second Injury Fund is a compensable primary injury. *See Garcia v. St. Louis County*, 913 S.W.2d 263, 266 (Mo.App. E.D. 1995). Claimant bears the burden of proving an accident occurred and that it resulted in injury. *Goleman V. MCI Transporters*, 844 S.W.2d 463, 465 (Mo.App. 1992). He must not only show causation between the accident and the injury, but also that a disability resulted and the extent of such disability. *Id.* at 465. The claimant must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995). Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Id.* at 655. Mr. Gleason has not met his burden of proving a compensable primary injury.

In this case, Mr. Gleason alleges that he injured his head, lung, right shoulder, and body as a whole when he fell from the top of a train car at Ceva Logistics. Unfortunately, he admitted during his testimony that he had no idea how his fall had occurred. There was no description of tripping, slipping or losing his balance due to carrying a heavy item that one might expect to see in a compensable claim for compensation. Rather there is a possibility that he just blacked out and fell, a circumstance not related to his job. Dr. Poppa's report and testimony indicates there was a fall from the top of the train while at work, however, even his testimony and report do not describe any kind of a compensable situation causing the fall.

In *Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671 (Mo.banc 2009), the employee felt a pop and subsequent pain in his knee while walking on uneven ground towards his work truck where there was no identified obstruction that caused him to fall or otherwise sustain any additional injuries due to the popping, which, later led to surgical repair. *Id*. at 672. The Mo. Supreme Court affirmed that Mr. Miller failed to meet his burden of proving that he suffered a compensable injury as a result of a work-related accident arising out of and in the course of employment *Id.* at 671. While the facts showed that the injury <u>occurred at work, in the course of employment</u>, it did <u>not</u> arise out of employment because it came from a "hazard or risk unrelated to employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life" *Id*. at 673.

In *Michael Hager v. Syberg's Westport*, 2010 WL 623685 (Mo.App. E.D.) *citing, Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671, 673 (Mo. banc 2009), the employee's

injury was not deemed to have arisen "out of and in the course of employment" where Hager slipped and fell on black ice on the parking lot which was not owned or controlled by the employer. *Id.* at 4. The Court reasoned that Employee could have fallen on an ice-covered parking lot anywhere; therefore, "his injury comes from a hazard or risk unrelated to his employment." *Id.*

Mr. Gleason's injuries were a result of his fall at work, however, even per his own testimony the fall appears to be idiopathic and not causally related to his work.
Based upon the evidence herein this Court determines that no work injury occurred in 2007 because there is no medical opinion expressed that Mr. Gleason's work was the prevailing cause of the fall from the train. Rather, the only opinion is that the fall is the prevailing cause of the injuries Mr. Gleason sustained. The requirements of Angus *v. The Second Injury Fund*, 328 S.W.3d 294, (Mo. App. 2010) were not met in this case as Dr. Poppa's opinion fails to indicate that Mr. Gleason's work was the cause of his injuries.

Mr. Gleason failed to prove that somehow the fall from the train was a compensable injury, and therefore no Second Injury Fund exists.

II. No Second Injury Fund liability exists because Mr. Gleason was employable in the open labor market after his 2007 work accident; however his subsequent deterioration of his cardiovascular system is the current cause of his permanent total disability and inability to work.

Even if this Court were to determine that Employee's fall was causally related to his work no Second Injury Fund liability exists because Mr. Gleason was employable in the open labor market after his 2007 work accident. Mr. Gleason's expert contends that he is permanently and totally disabled as a result of the disability he suffered from his 2007 alleged work accident in combination with his pre-existing cardiovascular conditions. Permanent total disability is set forth in the Workers' Compensation Act of Missouri, Chapter 287 RSMo. In so asserting, he carries the burden of proving each element of his claim, including that he is permanently and totally disabled as defined in §287.020.6. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. 1992).

"The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." Section 287.020.6 RSMo. Cumm.Supp. 2009. "The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. [Citation omitted]. The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant to perform the work for which he or she is hired." *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo. App. 1992).

In determining if Mr. Gleason is permanently and totally disabled as defined by Chapter 287, case law holds that the following are to be considered: (1) whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in his present

physical condition, and reasonably expect him to perform the duties of the work for which he was hired; and (2) whether the employee would be able to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

Mr. Gleason was able to compete in the open labor market after his 2007 injury and even after his double bypass surgery for more than 2 months. It was not until December 2007 that he was terminated from his employer for failure to come to work. Mr. Gleason was unable to produce the vocational expert, Mike Dreiling's, deposition, and thus no vocational expert's opinion is in evidence regarding Mr. Gleason's employability. Dr. Poppa's ultimate conclusions that Mr. Gleason is permanently and totally disabled as a result of his primary and pre-existing injuries lack credibility and the Administrative Law Judge is free to so find and disregard those opinions as this is not a question of medical causation. *Angus v. Second Injury Fund*, 328 S.W.3d 294 (Mo. App. W.D. 2010), states "that the Commission may not substitute an administrative law judge's personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert." *Angus* at 300. The Court of Appeals has since clarified *Angus* by stating that, "extent of disability. . . is not so medically technical as to remove it from the expertise that is attributed to the Commission. The question whether a claimant is totally and permanently disabled is not exclusively a medical question." *Carkeek v. Treasurer*, 352 S.W.3d 604, 610 (Mo. App. W.D. 2011), citing *Crum v. Sachs Elec.*, 769 S.W.2d 131, 136 (Mo. App. W.D. 1989).

The written conclusions of Dr. Poppa are not credible and were significantly diminished during cross-examination by the Second Injury Fund in that he admitted that Mr. Gleason is on no narcotics from the 2007 injury and was in no way restricted by his treating physicians for the alleged 2007 injury. Moreover, Mr. Gleason's own testimony was very clear that his current inability to access the open labor market is due to his current cardiac condition. Most importantly Dr. Poppa's conclusions on cross examination support the finding that Mr. Gleason was capable of sedentary work after his 2007 injury and had been working greater than a sedentary job prior to his 2007 injury despite having had a stroke.

The fact finder may reject all or part of an expert's testimony. *Bennett v. Columbia Health Care* 134 S.W.3d 84 (Mo.App W.D. 2004), citing *Kelley v. Banta & Stude Constr. Co.*, 1 S.W. 3d 43, 48 (Mo. App. E.D. 1999). Moreover, the Second Injury Fund has no obligation to present conflicting or contrary evidence on a claim for permanent and total disability evidence, rather a claimant "must prove the nature and extent of any disability by a reasonable degree of certainty." *Michael v. Treasurer of the State of Missouri*, --- S.W.3d ----, 2011 WL 646555 (Mo.App.); citing *Dunn v. Treasurer of Mo.*, 272 SW 3d 267, 275 (Mo. App. 2008); *Elrod v. Treasurer of the State of Missouri*, 138 SW3s 714, 717 (Mo. banc 2004)

Finally it appears from both Employee's own testimony as well as the Dr. Poppa's deposition that Employee's current condition and his alleged permanent total disability is based upon a worsening of his conditions of both his cardiac condition as well as the effects of his stroke, after the last accident. When asked by the Second Injury Fund "Do you have any medical records that you would rely on saying that the heart was bad enough even before the heart attack happened to combine with the fall from the rail train's residual to permanently and totally disable this gentlemen?" Dr. Poppa replied: "I think if you look – if you are just speaking of the heart

and not of the other conditions, probably not." He was asked the same question regarding the stroke and he answered the same. It appears that there are no medical records that document any effects of Employee's heart condition prior to the last accident that caused a hindrance or obstacle to employment. Neither were there any records of ongoing problems prior to his last accident but even after his stroke that would be considered a hindrance or obstacle to employment. If he became permanently and totally disabled after the last accident due to a worsening of his underlying heart condition and/or the effects of his stroke the Second Injury Fund is not liable for said disability. The Second Injury Fund is not liable for benefits if the disability is due to a worsening of conditions which occur after the last accident.

Based upon the above and foregoing, this Court therefore finds find that Mr. Gleason was employable on the open labor market following his alleged 2007 work injury and therefore no Second Injury Fund liability exists. Further, if Employee is permanently and totally disabled it is due to the worsening of his cardiac condition along with the effects of his stroke, since the date of his primary injury in 2007.

For the above reasons, Mr. Gleason is entitled to no Second Injury Fund benefits.

_____

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation

FINAL AWARD DENYING COMPENSATION

Injury No.: 07-072826

Employee: Edward Gleason

Employer: Ceva Logistics (Settled)

Insurer: New Hampshire Insurance Co. (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.[1] We have reviewed the evidence and considered the whole record. We find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award of the administrative law judge by this separate award and decision.

Findings

On August 5, 2007, employee was atop a railcar performing an inspection as part of his duties for employer. Employee fell 20 – 25 feet from the top of the railcar and landed on the ground. Employee does not remember the circumstances leading up to the fall, the fall itself, or the three days after the fall, during which time employee was hospitalized. No individuals testified to having witnessed the fall. As a result of his fall, employee sustained injuries to his head, neck, right shoulder, clavicle, and ribs.

Dr. Poppa evaluated employee for purposes of providing his expert medical opinion in this case. Dr. Poppa believes employee sustained permanent partial disabilities as a result of his August 5, 2007, fall. Dr. Poppa believes employee's accident was the prevailing factor in causing his injuries and resulting disabilities. In rendering his opinions, Dr. Poppa assumed employee was walking on top of a railcar when he stepped backwards off the railcar and fell approximately 20 - 25 feet to the ground. One assumed fact upon which Dr. Poppa relied in forming his opinions –the premise that employee stepped backward and fell from the train – was not proven to be true.[2] There is simply no evidence in the record to establish why employee fell. We find employee's fall from the train is unexplained.

Employee settled his claim for compensation against his employer. Employee now seeks permanent disability benefits from the Second Injury Fund.

Conclusions of Law

The first issue we must consider is whether employee's injuries arose out of and in the course of his employment. To that end, employee bore the burden of proving that "[i]t is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury;" and, that "[the injury] does not come from a

[1] Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

[2] Had the evidence established that employee stepped backward off the railcar, we would know the risk giving rise to his injuries – mis-stepping while working at a great height – and we could easily conclude that employee was exposed to a greater risk of injury from mis-stepping while working at a great height than workers in their nonemployment lives and that employee's injury arose out of and in the course of his employment.

hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life."[3]

Substantial and competent evidence in the form of employee's testimony, the medical records, and Dr. Poppa's testimony establishes that employee's accident was the prevailing factor in causing employee's injuries and resulting disabilities so we will focus on the second prong of the arising out of and in the course of employment test.

The Supreme Court has framed the proper inquiry under this prong generally as "whether the cause of [employee']s injury had a causal connection to [employee]'s work activity other than the fact that it occurred at work."[4] If this were the only judicial guidance regarding how to apply § 287.020.3(2)(b), we would be inclined to agree with the rationale of the dissenting opinion and find that employee has shown § 287.020.3(2)(b) is satisfied in this case because employee has shown a causal connection between the height at which he was required to perform his duties and his injury. But the Supreme Court's general guidance is not the only judicial guidance on the issue. The Missouri Court of Appeals for the Southern District has twice considered how to apply § 287.020.3(2) specifically in the context of an unexplained fall such as we consider here.[5] In both cases, the court concluded that § 287.020.3(2) was not satisfied because the injured worker could not explain why she fell.

In the instant case, employee cannot explain why he fell. Employee's inability to tell us why he fell is fatal to this claim. Since we do not know what hazards or risks gave rise to employee's fall, we cannot determine if those hazards or risks are related or unrelated to employment and we cannot determine if workers are equally exposed to those hazards or risks outside of and unrelated to employment in their normal nonemployment lives.

We conclude that employee failed to establish that his injury did not come from a hazard or risk unrelated to his employment to which workers would be equally exposed outside of and unrelated to employment in their normal nonemployment lives. Consequently, employee failed to show that his injury arose out of and in the course of employment. On the record before us, employee's claim against employer/insurer is not compensable.[6]

To prevail on a claim against the Second Injury Fund, employee must establish a "subsequent compensable injury" combines with preexisting permanent disabilities to result in greater disability than their simple sum.[7] Because employee failed to prove the August 5, 2007, injury was compensable, the injury does not constitute a "subsequent compensable injury" and the Second Injury Fund claim fails. For this reason, we affirm the administrative law judge's decision to deny employee's claim against the Second Injury Fund, but for the reasons stated herein.

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[3] Section 287.020.3(2) RSMo.
[4] *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012).
[5] See *Bivens v. St. John's Regional Heath Center*, 272 S.W.3d 446 (Mo. App. 2008); *Porter V. RPCS*, 402 S.W.3d 161 (Mo. App. 2013).
[6] Section 287.120.1 RSMo. "Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment."
[7] Section 287.220.1 RSMo.

We attach the November 19, 2013, award and decision of Administrative Law Judge Emily S. Fowler solely for reference.

Given at Jefferson City, State of Missouri, this 15th day of May 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

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 decision of the administrative law judge should be reversed.

Before I explain my reasoning, I want to express how disappointing it is that I have to. Consider just these uncontested facts from this case: Employer's work put employee 20 – 25 feet in the air. Employee fell to the ground from that height. Employee sustained serious injuries as a result of the fall, including a closed head injury. Can there seriously be any question that there is a sufficient causal link between employee's work atop the railcar and his physical injuries such that his injuries may fairly be said to have arisen out of and in the course of his employment?

The facts of this case are nothing like the facts of the *Bennett*,[8] *Kasl*,[9] and *Drewes*[10] cases – the cases specifically abrogated by the legislature and the cases cited repeatedly as illustrative of the types of injuries for which the legislature sought to restrict compensation. In those cases, nothing about the workers' employments contributed to the cause of their injuries. The injuries occurred while Ms. Bennett, Ms. Kasl, and Ms. Drewes were at work, but not because Ms. Bennett, Ms. Kasl, and Ms. Drewes were at work.[11] The same can be said for the injuries considered in the Missouri Supreme Court's decisions in *Miller*[12] and *Johme*,[13] where the facts also showed that nothing about the employments contributed to causing the injured workers' injuries.

This case is clearly distinguishable. Employee's injuries occurred because he was at work. Employee's injuries were not the result of falling; they were the result of falling from 20-plus feet in the air. Regardless what precipitated the fall; it was the fall *distance* that caused employee's injuries.

The original purpose of the workers' compensation law was to place upon industry one of the costs of industry – the cost associated with restoring to good physical and/or fiscal health those workers injured because they were furthering their employer's business interests. Employee was injured because he was working at a moderate height to further employer's business interests. Industry, specifically employer, put employee 20-plus feet in the air to perform his duties. The purpose of the workers' compensation law is fulfilled by requiring employers, through the Second Injury Fund, to bear the cost of restoring employee to good health.

Here, the injured employee cannot tell us why he fell from the railcar precisely because the fall from the railcar resulted in employee losing his memory of the events. A careful reading of the 2005 amendments does not reveal a legislative intent to deny compensation to brain-

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[8] *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo. App. 2002).
[9] *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. banc 1999).
[10] *Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512 (Mo. banc 1999).
[11] *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315 (Mo. App. 2012).
[12] *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671 (Mo. 2009).
[13] *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012).

injured workers solely because they cannot recall the events leading up to their injuries due to a result of their injuries; to wit, memory loss. I believe a rule automatically denying compensation in such cases is bad public policy. In any event, the words of the workers' compensation law do not require this disastrous outcome.

Arising out of and in the course of employment
Section 287.120.1 RSMo sets forth the heart of the Missouri Workers' Compensation Law and provides, in relevant part:

> Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment.

Section 287.020.3 RSMo provides:

> (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
>
> (2) An injury shall be deemed to arise out of and in the course of the employment only if:
>
> > (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
> >
> > (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.
>
> (3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

Did employee prove his accident was the prevailing factor in causing his injury?
Section 287.020.2 RSMo defines accident, thusly:

> The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Employee's fall from the railcar is the "accident" for our consideration in this case. Employee's fall from the railcar was an unexpected traumatic event, the end of which (i.e., the part where employee's body hit the ground) produced employee's objective symptoms of injury.

It seems quite clear to me that employee's fall from the railcar (read, "accident") was the primary factor in relation to any other factor in causing employee's injury. We do not know what precipitated employee's fall from the railcar. But the only factor shown to have contributed to employee's injuries was the height from which he fell. Physics and common sense assure us that the force with which employee hit the ground after falling from the top of the railcar was much greater than the force with which he would have hit the ground had he fallen while he was standing on the ground.

Did employee prove that his injury did not come from a hazard or risk unrelated to employment to which workers would be equally exposed outside of and unrelated to employment?

Employee had to work atop the railcar to perform his job duties. The hazard giving rise to employee's injuries was the height at which employee was required to perform his duties. There is no evidence to establish that workers generally are equally exposed in their non-employment lives to the risks associated with performing activities at an elevated height.

Employee satisfied both prongs of § 287.020.3(2), so I conclude employee's injury arose out of and in the course of employment.

Did the Second Injury Fund prove any provision of the Workers' Compensation Law defeats the compensability of employee's claim?

The general compensability rule is that an employer shall pay workers' compensation benefits if an employee shows that he sustained an injury by accident arising out of and in the course of employment.[14] Under certain circumstances set forth in § 287.220 RSMo, an employer is relieved of a portion of the benefits due for a compensable injury and the obligation to pay such benefits is shifted from employer to the Second Injury Fund.[15] I believe those circumstances exist in this case. Because the majority denies compensation and to minimize the length of this dissent, I will not discuss each element of the Second Injury Fund liability analysis. I will, however, address the suggestion throughout the record that employee may have succumbed to an idiopathic condition which contributed to his fall.

The Missouri Workers' Compensation Law contains some exceptions to the general compensability rule, which exceptions can defeat all or a portion of the compensation ordinarily due for a personal injury by accident arising out of and in the course of employment. One such exception is found in § 287.020.3(3), which states: "An injury resulting directly or indirectly from idiopathic causes is not compensable."

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[14] Effective January 1, 2014, the legislature amended § 287.120.1 RSMo to extend its coverage to personal injury or death of the employee by occupational disease arising out of and in the course of employment.
[15] See § 287.220 RSMo.

Before we can conclude that an injury results directly or indirectly from an idiopathic cause, some party must put forth evidence to prove an idiopathic cause contributed to the injury. That party is the party asking us to find § 287.020.3(3) applies to defeat compensability.[16] In the instant case, that party is the Second Injury Fund. The holding in *Taylor v. Contract Freighters, Inc*., [17] supports my position. Mr. Taylor was injured in a motor vehicle accident while driving a tractor trailer for his employer. Immediately after a coughing spell, Mr. Taylor lost control of his truck resulting in the motor vehicle accident. Mr. Taylor admitted to having coughing spells in the past. The majority of the Commission concluded that an idiopathic condition – chronic coughing spells – caused Mr. Taylor to cough and, thus, denied compensation under § 287.020.3(3). The *Taylor* court reversed the Commission's conclusion: "To reach the Commission's conclusion that [Mr. Taylor's] idiopathic condition caused the cough on the day of the accident, there must have been some evidence that *this particular cough* was caused by some coughing condition unique to [Mr. Taylor]. There is no evidence in the record to support that conclusion."[18]

Like the employer in *Taylor*, the Second Injury Fund failed to present evidence in this case to support a finding that it is more likely than not that employee's fall was caused by an idiopathic condition. Consequently, § 287.020.3(3) does not operate to deny compensation on the record before us.

Conclusion

I would reverse the administrative law judge's award. I would find that employee's injury arose out of and in the course of employment. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

_____
Curtis E. Chick, Jr., Member

[16] See § 287.808, which provides in relevant part: "In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."
[17] 315 S.W.3d 379 (Mo. App. 2010).
[18] *Id.*, at 382 (emphasis added).

FINAL AWARD
AS TO THE SECOND INJURY FUND ONLY

Employee: Edward Gleason Injury No. 07-072826

Dependents: N/A

Employer: Ceva Logistics (Settled)

Insurer: New Hampshire Insurance Co. (Settled)

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: October 4, 2013 Checked by: ESF/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No

2. Was the injury or occupational disease compensable under Chapter 287? No

3. Was there an accident or incident of occupational disease under the Law? No

4. Date of accident or onset of occupational disease: August 5, 2007

5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay 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? No

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: The Employee fell from a train car.

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: Shoulder and back

14. Nature and extent of any permanent disability: 15% at the 232 week level and 13% body as a whole as to the Employer.

15. Compensation paid to date for temporary disability: $4,654.10

16. Value necessary medical aid paid to date by employer/insurer? $85,735.36

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: $634.65

19. Weekly compensation rate: $423.10/$389.04

20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: Previously settled with the employer/insurer for 15% at the 232 week level and 13% body as a whole

22. Second Injury Liability: No.

23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Edward Gleason Injury No. 07-072826

Dependents: N/A

Employer: Ceva Logistics (Settled)

Insurer: New Hampshire Insurance Co. (Settled)

Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund

Hearing Date: October 4, 2013 Checked by: ESF/lh

On October 4, 2013, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110. The Employee, Edward Gleason, appeared in person representing himself. The Second Injury Fund appeared through Assistant Attorney General Kim Fournier. There was no appearance on behalf of the Employer and Insurer as the claim between the Employer and the Employee has previously been settled.

STIPULATIONS

The parties stipulated to the following:

1) that on August 5, 2007 the Employer, CEVA Logistics, was operating subject to Missouri's workers' compensation law and its liability was fully insured through New Hampshire insurance Co;
2) that Edward Gleason was its employee working subject to the law in Kansas City, Clay County, Missouri;
3) that the State of Missouri has jurisdiction to hear this case;
4) that Employee notified the Employer of the injury as required by law and his claim was filed within the time allowed by law;
5) that Employee's average weekly wage was $634.65, resulting in a compensation rate of $423.10 for temporary total disability and $389.04 for permanent partial disability; and
6) that the Employer has paid $4,654.10 for temporary total disability compensation and medical care costing $85,735.36.

ISSUES

The issues to be resolved by this hearing are as follows:

1) whether Claimant sustained an accident arising out of and in the course and scope of his employment;

2) whether Employee suffered any disability either permanent partial or permanent total; and

3) whether the Second Injury Fund is liable to Employee for any disability compensation.

FINDINGS OF FACT AND RULINGS OF LAW

The Employee, Edward Gleason, testified in person and offered the following exhibits, all of which were admitted into evidence without objection:

Claimant's Exhibit A – *03/28-08 report from Dr. Poppa*
Claimant's Exhibit C – *Medical records*
Claimant's Exhibit D – *Deposition of Dr. Poppa (submitted after hearing)*
Claimant's Exhibit F – *Summary of Mr. Gleason's reason for entitlement to benefits*

The following exhibit was offered over the objection of the second Injury Fund and was not admitted:

Claimant's Exhibit B *-10/20/2010 Report of Mr. Dreiling*

The following exhibit was to be offered after hearing but was never submitted as Employee stated it could not be found and this Court does not have it in its possession:

Claimant's Exhibit E – *Deposition of Mr. Dreiling*

The Second Injury Fund presented the following exhibits, all of which were admitted into without objection.

Second Injury Fund's Exhibit A- *Medical Records of Dr. Deedy*

Based on the above exhibits and the testimony of the Claimant, this Court makes the following findings:

Edward Gleason is a 58 year old married man with an 11th grade education. Despite his lack of education, Mr. Gleason's job history has been excellent. He had no difficulty in obtaining or maintaining employment prior to 2007. He has worked in maintenance as well as in management. He also has a personal computer at home and does have some computer proficiency. Mr. Gleason's last job was with Ceva Logistics as a train car inspector/transportation coordinator. His job required him to climb up onto train cars that were holding automobiles which were about to be transported and check that they were properly

secured. Mr. Gleason's job was full time, physically demanding and also required that he supervise 5-7 people.

Mr. Gleason's Condition prior to 2007

Mr. Gleason was shot three times in the late 1970's early 1980s. Once healed from those injuries, Mr. Gleason had no ongoing physical problems from the wounds, and was in no way hindered by his old gun-shot wounds.

In June, 2007, Mr. Gleason suffered a stroke and was off work for several weeks. Mr. Gleason returned to work for and with some loss to his peripheral vision. Despite that, he was able to continue working as a supervisor and a rail car inspector. He did feel somewhat unsafe doing his job because of the partial loss of vision. Dr. Poppa was unaware of any ongoing cognitive deficits following this stroke. (Poppa transcript page 23, 24, 26)

Dr. Poppa did provide ratings for Mr. Gleason's coronary condition/stroke before 2007 at 20% ppd to the body as a whole. (Poppa transcript page 20) He did not, however, ask Mr. Gleason how the coronary disease affected his ability to work prior to 2007. (Poppa transcript page 19-20, 22) Mr. Gleason's job for CEVA logistics was a light or possibly higher demand category job which he was performing despite his June 2007 stroke. (Poppa transcript 34-35)

Mr. Gleason was able to do his job, and had no other physical problems, and nothing else was creating any kind of hindrance or obstacle to his ability to work prior to 2007.

Mr. Gleason denied to Dr. Poppa that he had any work injuries before 2007. (Poppa transcript page 10)

Mr. Gleason's 2007 Injury

On August 5, 2007, Mr. Gleason was atop a train car performing an inspection when he fell from the car several feet, injuring his head, neck, right shoulder, clavicle, and ribs. (Poppa transcript pages 4-6). Mr. Gleason testified that he has no idea how his fall occurred. He was unable to state at hearing that the fall was proximately caused by his work. While Dr. Poppa says that the injury was the prevailing factor in his disability, Dr. Poppa made no finding in either his report or his deposition testimony that Mr. Gleason's work was the prevailing factor in causing the fall. (Poppa report page 4)

After the fall, Mr. Gleason went to the hospital immediately and was in-patient for several days. He had no recall of his first 3 days in the hospital. (Poppa transcript page 6)

Mr. Gleason received minimal conservative care for these injuries through March of 2008. (Poppa transcript page 8) Dr. Samuelson treated Mr. Gleason for the 2007 work injury and placed no permanent restrictions on Mr. Gleason as a result of the fall. (Poppa transcript page 8). Mr. Gleason's rating physician, Dr. Poppa, performed no cognitive testing on Mr. Gleason following this injury. (Poppa transcript page 7)

Mr. Gleason's post 2007 Condition

While Mr. Gleason was undergoing his treatment for the August 5, 2007 fall, he suffered a heart attack and underwent coronary double bypass surgery in February of 2008. (Poppa

transcript page 9) He was also diagnosed with a vascular condition in his legs in 2011. These conditions cause him a great deal of discomfort in his legs, swollen ankles, possible memory loss and chronic fatigue. He lies down during the day now due to fatigue. Dr. Poppa agreed that the fatigue and lack of strength are due to his progressive cardiopyopathy. (Poppa transcript page 21-22) Dr. Poppa went on to say that Mr. Gleason's heart condition is impacting his activities of daily living. (Poppa transcript page 22)

After the bypass surgery, Mr. Gleason went back to work for Ceva Logistics. He was there for approximately 2 months under modified duty. His job duties required him to drive cars into the freight yard to be loaded. In December 2007 he was terminated from the employ of Ceva Logistics. He was on unemployment for several months after his termination.

Mr. Gleason advised Dr. Poppa that he has difficulty sleeping, driving and participating in social and recreational activities. (Poppa transcript page 10) Mr. Gleason also indicated that he has ongoing headaches and memory issues as well since the 2007 injury. Interestingly, however, Dr. Poppa indicated that in March of 2008 Mr. Gleason's headaches were not as frequent and at that time he was not having much difficulty with his neck. (Poppa transcript page 14) Moreover, Dr. Poppa was unable to independently verify any cognitive deficits as he did no testing. (Poppa transcript page 11) Dr. Poppa had no records or restrictions from any treating physicians or vocational experts that suggested that Mr. Gleason should not be working back in March of 2008 when Dr. Poppa saw Mr. Gleason. (Poppa transcript page 10-11)

Dr. Poppa indicated that Mr. Gleason did have some ongoing strength problems and pain in his right shoulder, however Dr. Poppa was not aware of any physician imposed restrictions on Mr. Gleason following his 2007 fall. (Poppa transcript page 14, 29) Dr. Poppa opined that he felt Mr. Gleason was capable of employment in the sedentary work category when looking at the primary work injury and its residuals. (Poppa transcript page 30, 31)

Dr. Poppa made no recommendations for ongoing use of narcotic medications for Mr. Gleason, nor was Mr. Gleason on narcotics in 2008 when Dr. Poppa evaluated him. (Poppa transcript page 15, 29)

Dr. Poppa rated Mr. Gleason's permanent partial disability for his 2007 work injury at 37% ppd at the body as a whole. (Poppa transcript page 18) Mr. Gleason settled his claim against his employer for this injury for 15% ppd to the body as a whole for cervical and thoracic injuries. (Poppa transcript page 18)

Even though Dr. Poppa tried to opine that Mr. Gleason is permanently and totally disabled as a result of his 2007 work injury in combination with his prior cardiovascular condition, he admitted that there is nothing about this gentleman's heart or stroke condition existing prior to 2007 that would remove him from performing sedentary work. (Poppa transcript page 40) He admitted that prior to 2007 Mr. Gleason was performing greater than light category work despite his cardiovascular condition. (Poppa transcript page 35)

In December 2010 Mr. Gleason decided to obtain his insurance license. He made it most of the way through the training program and then decided to discontinue as he was not feeling able to perform the job. Additionally, Mr. Gleason has begun walking with a cane subsequent to his 2007 work injury.

Mr. Gleason testified to significant physical complaints subsequent to his 2007 work injury all stemming from his cardiovascular worsening. He has had to discontinue helping his wife with work around the house, and he had to discontinue taking trips to St. Louis to see his family sometime in 2010. He also quit driving in 2009 due to this ongoing worsening.

I. No Second Injury Fund liability exists because there is no evidence that Mr. Gleason's fall at work in 2007 was actually caused by his work.

In a workers' compensation preceding it is the claimant who has the burden to prove by a preponderance of credible evidence all material elements of his claim, including Second Injury Fund liability. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195 (Mo.App. 1990). Mr. Gleason has not met that burden.

The first element of proof in a case against the Second Injury Fund is a compensable primary injury. *See Garcia v. St. Louis County*, 913 S.W.2d 263, 266 (Mo.App. E.D. 1995). Claimant bears the burden of proving an accident occurred and that it resulted in injury. *Goleman V. MCI Transporters*, 844 S.W.2d 463, 465 (Mo.App. 1992). He must not only show causation between the accident and the injury, but also that a disability resulted and the extent of such disability. *Id.* at 465. The claimant must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995). Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Id.* at 655. Mr. Gleason has not met his burden of proving a compensable primary injury.

In this case, Mr. Gleason alleges that he injured his head, lung, right shoulder, and body as a whole when he fell from the top of a train car at Ceva Logistics. Unfortunately, he admitted during his testimony that he had no idea how his fall had occurred. There was no description of tripping, slipping or losing his balance due to carrying a heavy item that one might expect to see in a compensable claim for compensation. Rather there is a possibility that he just blacked out and fell, a circumstance not related to his job. Dr. Poppa's report and testimony indicates there was a fall from the top of the train while at work, however, even his testimony and report do not describe any kind of a compensable situation causing the fall.

In *Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671 (Mo.banc 2009), the employee felt a pop and subsequent pain in his knee while walking on uneven ground towards his work truck where there was no identified obstruction that caused him to fall or otherwise sustain any additional injuries due to the popping, which, later led to surgical repair. *Id*. at 672. The Mo. Supreme Court affirmed that Mr. Miller failed to meet his burden of proving that he suffered a compensable injury as a result of a work-related accident arising out of and in the course of employment *Id.* at 671. While the facts showed that the injury <u>occurred at work, in the course of employment</u>, it did <u>not</u> arise out of employment because it came from a "hazard or risk unrelated to employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life" *Id*. at 673.

In *Michael Hager v. Syberg's Westport*, 2010 WL 623685 (Mo.App. E.D.) *citing, Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671, 673 (Mo. banc 2009), the employee's

injury was not deemed to have arisen "out of and in the course of employment" where Hager slipped and fell on black ice on the parking lot which was not owned or controlled by the employer. *Id.* at 4. The Court reasoned that Employee could have fallen on an ice-covered parking lot anywhere; therefore, "his injury comes from a hazard or risk unrelated to his employment." *Id.*

Mr. Gleason's injuries were a result of his fall at work, however, even per his own testimony the fall appears to be idiopathic and not causally related to his work.
Based upon the evidence herein this Court determines that no work injury occurred in 2007 because there is no medical opinion expressed that Mr. Gleason's work was the prevailing cause of the fall from the train. Rather, the only opinion is that the fall is the prevailing cause of the injuries Mr. Gleason sustained. The requirements of Angus *v. The Second Injury Fund*, 328 S.W.3d 294, (Mo. App. 2010) were not met in this case as Dr. Poppa's opinion fails to indicate that Mr. Gleason's work was the cause of his injuries.

Mr. Gleason failed to prove that somehow the fall from the train was a compensable injury, and therefore no Second Injury Fund exists.

II. No Second Injury Fund liability exists because Mr. Gleason was employable in the open labor market after his 2007 work accident; however his subsequent deterioration of his cardiovascular system is the current cause of his permanent total disability and inability to work.

Even if this Court were to determine that Employee's fall was causally related to his work no Second Injury Fund liability exists because Mr. Gleason was employable in the open labor market after his 2007 work accident. Mr. Gleason's expert contends that he is permanently and totally disabled as a result of the disability he suffered from his 2007 alleged work accident in combination with his pre-existing cardiovascular conditions. Permanent total disability is set forth in the Workers' Compensation Act of Missouri, Chapter 287 RSMo. In so asserting, he carries the burden of proving each element of his claim, including that he is permanently and totally disabled as defined in §287.020.6. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. 1992).

"The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." Section 287.020.6 RSMo. Cumm.Supp. 2009. "The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. [Citation omitted]. The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant to perform the work for which he or she is hired." *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo. App. 1992).

In determining if Mr. Gleason is permanently and totally disabled as defined by Chapter 287, case law holds that the following are to be considered: (1) whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in his present

physical condition, and reasonably expect him to perform the duties of the work for which he was hired; and (2) whether the employee would be able to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

Mr. Gleason was able to compete in the open labor market after his 2007 injury and even after his double bypass surgery for more than 2 months. It was not until December 2007 that he was terminated from his employer for failure to come to work. Mr. Gleason was unable to produce the vocational expert, Mike Dreiling's, deposition, and thus no vocational expert's opinion is in evidence regarding Mr. Gleason's employability. Dr. Poppa's ultimate conclusions that Mr. Gleason is permanently and totally disabled as a result of his primary and pre-existing injuries lack credibility and the Administrative Law Judge is free to so find and disregard those opinions as this is not a question of medical causation. *Angus v. Second Injury Fund*, 328 S.W.3d 294 (Mo. App. W.D. 2010), states "that the Commission may not substitute an administrative law judge's personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert." *Angus* at 300. The Court of Appeals has since clarified *Angus* by stating that, "extent of disability. . . is not so medically technical as to remove it from the expertise that is attributed to the Commission. The question whether a claimant is totally and permanently disabled is not exclusively a medical question." *Carkeek v. Treasurer*, 352 S.W.3d 604, 610 (Mo. App. W.D. 2011), citing *Crum v. Sachs Elec.*, 769 S.W.2d 131, 136 (Mo. App. W.D. 1989).

The written conclusions of Dr. Poppa are not credible and were significantly diminished during cross-examination by the Second Injury Fund in that he admitted that Mr. Gleason is on no narcotics from the 2007 injury and was in no way restricted by his treating physicians for the alleged 2007 injury. Moreover, Mr. Gleason's own testimony was very clear that his current inability to access the open labor market is due to his current cardiac condition. Most importantly Dr. Poppa's conclusions on cross examination support the finding that Mr. Gleason was capable of sedentary work after his 2007 injury and had been working greater than a sedentary job prior to his 2007 injury despite having had a stroke.

The fact finder may reject all or part of an expert's testimony. *Bennett v. Columbia Health Care* 134 S.W.3d 84 (Mo.App W.D. 2004), citing *Kelley v. Banta & Stude Constr. Co.*, 1 S.W. 3d 43, 48 (Mo. App. E.D. 1999). Moreover, the Second Injury Fund has no obligation to present conflicting or contrary evidence on a claim for permanent and total disability evidence, rather a claimant "must prove the nature and extent of any disability by a reasonable degree of certainty." *Michael v. Treasurer of the State of Missouri*, --- S.W.3d ----, 2011 WL 646555 (Mo.App.); citing *Dunn v. Treasurer of Mo.*, 272 SW 3d 267, 275 (Mo. App. 2008); *Elrod v. Treasurer of the State of Missouri*, 138 SW3s 714, 717 (Mo. banc 2004)

Finally it appears from both Employee's own testimony as well as the Dr. Poppa's deposition that Employee's current condition and his alleged permanent total disability is based upon a worsening of his conditions of both his cardiac condition as well as the effects of his stroke, after the last accident. When asked by the Second Injury Fund "Do you have any medical records that you would rely on saying that the heart was bad enough even before the heart attack happened to combine with the fall from the rail train's residual to permanently and totally disable this gentlemen?" Dr. Poppa replied: "I think if you look – if you are just speaking of the heart

and not of the other conditions, probably not." He was asked the same question regarding the stroke and he answered the same. It appears that there are no medical records that document any effects of Employee's heart condition prior to the last accident that caused a hindrance or obstacle to employment. Neither were there any records of ongoing problems prior to his last accident but even after his stroke that would be considered a hindrance or obstacle to employment. If he became permanently and totally disabled after the last accident due to a worsening of his underlying heart condition and/or the effects of his stroke the Second Injury Fund is not liable for said disability. The Second Injury Fund is not liable for benefits if the disability is due to a worsening of conditions which occur after the last accident.

Based upon the above and foregoing, this Court therefore finds find that Mr. Gleason was employable on the open labor market following his alleged 2007 work injury and therefore no Second Injury Fund liability exists. Further, if Employee is permanently and totally disabled it is due to the worsening of his cardiac condition along with the effects of his stroke, since the date of his primary injury in 2007.

For the above reasons, Mr. Gleason is entitled to no Second Injury Fund benefits.

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Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation