

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

Injury No.: 04-123259

Employee: Thomas Greco
Employer: Grey Eagle Distributing (settled)
Insurer: Duly Qualified Self-Insured (settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 30, 2011. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued June 30, 2011, is attached and incorporated by this reference.

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.

Given at Jefferson City, State of Missouri, this 7th day of November 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Thomas Greco	Injury No.:	04-123259
Dependents:	N/A		
Employer:	Grey eagle Distributing (Settled)		Before the Division of Workers' Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Duly Qualified Self-Insured (Settled)		
Hearing Date:	March 29, 2011	Checked by:	KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: November 26, 2004
5. State location where accident occurred or occupational disease was contracted: City of St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was unloading a pallet jack when he fell.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Cervical spine.
14. Nature and extent of any permanent disability: 30% PPD re: cervical; PTD due to a combination.
15. Compensation paid to-date for temporary disability: \$14,766.85 for a period of 21 6/7 weeks, from the date of injury to May 5, 2005.
16. Value necessary medical aid paid to date by employer/insurer? \$51,277.16

Issued by DIVISION OF WORKERS' COMPENSATION

17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: Not determined
19. Weekly compensation rate: \$675.90/\$354.05
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: Employer previously settled.
22. Permanent total disability benefits from Second Injury Fund:
weekly differential (\$321.85) payable by SIF for 120 weeks
beginning May 5, 2005 and, thereafter, the weekly
benefit of \$675.90 for Claimant's lifetime:

TOTAL:

INDETERMINATE

23. Future requirements awarded: N/A

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: ALAN S. MANDEL OF MANDEL AND MANDEL, LLP.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Thomas Greco	Injury No.: 04-123259
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Grey Eagle Distributing (Settled)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Duly Qualified Self-Insured (Settled)	Checked by: KOB

PRELIMINARIES

The matter of Thomas Greco (“Claimant”) proceeded to hearing to determine the liability of the Second Injury Fund. Attorney Alan Mandel represented Claimant, and Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund.

The parties stipulated to the following:

1. On or about November 26, 2004, Claimant, while in the employment of Grey Eagle Distributing (“Employer”), sustained an injury by accident arising out of and in the course of employment in St. Louis, Missouri.
2. Employer and Claimant were operating under the provisions of the Missouri Workers’ Compensation Law.
3. Employer had proper notice of the injury, and Claimant filed a claim for compensation within the time prescribed by law.
4. Claimant earned an average weekly wage sufficient to qualify for maximum rates of compensation for temporary total disability (“TTD”), permanent total disability (“PTD”) and permanent partial disability (“PPD”), which are \$675.90, \$675.90 and \$354.05, respectively.
5. Employer paid TTD of \$14,766.85 for a period of 21 6/7 weeks, from the date of injury to May 5, 2005.
6. Employer also paid medical benefits of \$51,277.16.

The issue to be resolved is the liability of the Second Injury Fund. Claimant alleges he qualifies for PTD benefits beginning May 5, 2005.

FINDINGS OF FACT

Claimant is 61 years old. He and his wife of over 44 years have two grown children who do not live in the home. Claimant dropped out of school after finishing the 10th grade. He does not have a high school diploma or G.E.D, and he received no specific vocational training, other than on the job training. Prior to joining Employer in 1970, Claimant worked selling newspapers, in grocery stores and at a service station. Claimant retired after nearly 35 years of service to Employer. He has drawn Social Security Disability since 2009. Claimant does not type or use a computer.

Claimant worked multiple jobs for Employer, including driver, warehouse, helper and delivery. As a driver, Claimant used a two-wheeler to deliver kegs and cases of beer, the overall volume of which would vary by route.

Over the years, Claimant sustained a number of injuries at work. In 1998, and again in 2001, Claimant sustained injury to his low back. Since that time, he experienced pain and numbness, but was able to work through it. He changed the way he worked, so tasks like loading pallets took more time. He settled his 1998 and 2001 low back claims for 7 ½% each. In 1999, a left ankle injury, which he settled for 5%, slowed him down further. A 2000 hernia, compromised for 10%, caused more pain and had a greater impact on his function, as did the 5% aggravation of the low back and groin in early 2004. Finally, a left rotator cuff tear occurred in 2002 when the handle of a case of beer broke, and Claimant underwent an open repair. As a result, Claimant took even longer to do his job, experienced pain with overhead work, and lost the ability to be ambidextrous. The 2002 case settled for 26% of the shoulder.

In addition to these orthopedic injuries, Claimant was evaluated and treated for sleep apnea and related disorders beginning in 1998. He used a CPAP machine since the early 2000's. Because of this condition, Claimant slept poorly, getting only 2 to 3 hours of sleep. He felt groggy from lack of sleep, and had a hard time with focus and concentration on the job.

Claimant felt these orthopedic injuries and his sleep apnea slowed him down on the job. He described specific, time-consuming changes he made to his loading methods to keep from having to lift high. His coworkers made comments, calling him an 'Old Man' and encouraging him to pick up the pace of his work. Claimant made changes in his work schedule so he could bid on easier jobs, and switched from the truck back to the warehouse.

On November 26, 2004, Claimant sustained the neck injury that is the basis of the primary claim. At hearing, Claimant testified he was delivering beer to a dock on a sloped drive when he pulled on the jack, lost his footing, and fell. A more detailed history of injury is contained in Dr. Cohen's medical report as follows:

[On November 26, 2004, Claimant] injured his neck, left shoulder, left arm, and left hand.... He was pulling a pallet of beer. The truck was pointed down hill. He was pulling the pallet uphill. He was doing a significant amount of straining to pull it uphill. He was using a hand jack. He states that his feet slipped and he fell down onto his left arm. He immediately had pain in the above noted areas. He had a jerking-like motion of his neck.

Employer directed medical care consisting of x-rays and physical therapy through Concentra, a cervical MRI with neck and shoulder injections through Dr. Chabot, and ultimately, on December 22, 2004, a cervical fusion with post-surgery therapy and injections. Dr. Chabot's operative report notes a post-operative diagnosis of cervical herniated nucleus pulposis cervical radiculopathy, cervical spinal stenosis and degenerative disc disease. Dr. Chabot released Claimant from care on May 5, 2005 at maximum medical improvement ("MMI"), with restrictions of no lifting of more than 40 pounds frequently, no lifting more than 50 pounds overhead, and no lifting more than 70 pounds maximum.¹

¹ Dr. Chabot's restrictions were listed in Mr. Dolan's report.

Claimant has complaints regarding his primary neck injury. Claimant says it hurts all the time such that it “drives [him] crazy.” The range of motion is reduced, and he has tingling into the hands. According to Dr. Cohen’s report, Claimant has headaches. He has difficulty reaching, turning his head, driving, fishing, swimming and throwing a ball. He has constant neck and left shoulder pain. He wakes up two or three times every night.

Claimant testified that he has to lay down in a recliner to relieve pain, which started after his shoulder injury. Sometimes he sleeps in the recliner. Although he had serious injuries before 2004, he was able to find accommodations because he had significant seniority and was able to bid on appropriate jobs. Of all his injuries, the neck is causing the worst problems.

Opinion Evidence

Dr. Cohen examined Claimant on August 3, 2005. He diagnosed status-post cervical surgery for a disc herniation at C6-7 with radiculopathy, and found Claimant had PPD of 45% of the body due to the cervical spine², of which all but one or two percent of the disability is attributable to the November 26, 2004 work. The restrictions from the primary injury are no work activity in which Claimant would have to repetitively bend or twist his neck or keep his head and neck in any sustained or awkward position. He should not lift more than 10-15 pounds at any one time.

Dr. Cohen found pre-existing conditions with PPD ratings as follows:

1. Chronic lumbosaral myofascial pain disorder (20% at the level of the low back);
2. Status post bilateral hernia repairs (15% of the body as a whole);
3. Status post left shoulder surgery for rotator cuff repair (30% of the left shoulder);
4. Obstructive sleep apnea (15% body as a whole); and
5. Left ankle injury³ (15% of the left ankle).

Dr. Cohen testified that it was his medical opinion that Claimant’s pre-existing conditions or disabilities were a hindrance or obstacle to his employment or re-employment.

Dr. Cohen was of the opinion that Claimant’s pre-existing disabilities combined with the primary work related injury to create a greater overall disability than the simple sum, and that due to the combination of disabilities, Claimant was permanently and totally disabled, and incapable of gainful employment. Dr. Cohen specifically testified that the November 26, 2004 injury alone was not enough to render Claimant permanently and totally disabled.

Mr. J. Stephen Dolan, a vocational expert, testified for Claimant. He felt Claimant is no longer able to maintain employment in the open labor market, based on his age, education, academic achievement levels, work experience, Dr. Cohen’s description of Claimant’s

² While the Cohen report indicates the disability is at the “level of the lumbar spine” it is clear from the context of the report and other sources that the primary disability is at the level of the cervical spine.

³ Dr. Cohen did not list the ankle injury under “Pre-existing Conditions or Disabilities,” but did recount the injury in the history, and did provide a rating. The absence of the ankle in the aforementioned section of the report appears to be an oversight.

limitations, and Claimant's description of his own limitations. Important factors in Claimant's description of limitations included the inability to be on his feet or sit for extended periods of time, as well as the need to lie down periodically to relieve pain.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I make the following rulings:

Claimant seeks to recover permanent total disability benefits from the Second Injury Fund. Under the Missouri Workers' Compensation Act, "total disability" is defined as the "inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." § 287.020.7. However, the test for permanent total disability is whether he is able to completely compete in the open labor market given his condition and situation. *Reiner v. Treasurer of State of Missouri*, 837 S.W.2d 363, 367 (Mo. App. E.D. 1992). Specifically, the pivotal question is whether an employer can reasonably be expected to hire this employee, given his present physical condition, and reasonably expect him to successfully perform the work. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo. App. S.D. 1995). Thus, the inquiry into permanent total disability is a factual one: whether Claimant is employable. *See Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274, 275 (Mo. App. 1994). The fact finder does not have to make her decision only upon testimony from physicians, but can make her findings from the entire evidence. *Id.*

The credible evidence establishes Claimant is permanently and totally disabled, and unable to compete in the open labor market. He testified credibly regarding his pain and limitations. The testimony of experts Dr. Cohen and Mr. Dolan support the proposition Claimant is totally disabled. I find no employer can reasonably be expected to hire Claimant, given his present physical condition, and reasonably expect him to successfully perform the work. Claimant is permanently and totally disabled.

In analyzing an alleged total disability case, "the first determination is the degree of disability from the last injury considered alone." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.Banc. 2003). If the employee's last injury in and of itself rendered him permanently and totally disabled, the Second Injury Fund has no liability; the employer is responsible for the entire amount of compensation. *Id.*; *Birdsong v. Waste Management*, 147 S.W.3d 132, 138 (Mo.App. S.D. 2004).

The last injury alone is not totally disabling in and of itself. Dr. Cohen testified specifically to this issue, and established the last injury was not enough to render Claimant permanently and totally disabled. Mr. Dolan relied upon Dr. Cohen's restrictions in formulating his PTD opinion. Dr. Cohen is the only physician to take into account all Claimant's conditions (Dr. Chabot only provided restrictions for the neck), and thus I find all conclusions based on Dr. Cohen's opinions to be valid. Based on all the evidence of record, including Claimant's testimony, the records, the expert opinion, and the compromise settlement amount, I find the primary injury resulted in permanent partial disability of 30% of the body as a whole, and nothing more. Claimant reached MMI from his primary neck injury on May 5, 2005.

To recover benefits from the Second Injury Fund under Mo. Rev. Stat. § 287.220 (2000), Claimant must prove a pre-existing permanent partial disability, that existed at the time of the primary injury, and which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment should employee become unemployed. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo. App. E.D. 1999). Claimant met his burden to establish qualifying preexisting disabilities. There is ample credible evidence to find Claimant's prior disabilities, including his back, left shoulder and groin, were serious enough to have hindered his ability to work over the years leading up to the final injury.

Then to have a valid permanent total disability claim against the Second Injury Fund, that pre-existing permanent partial disability must combine with the primary disability to create permanent total disability. *See Boeing v. Treasurer of Mo., Custodian of the Second Injury Fund*, 947 S.W.2d 483, 489-90 (Mo. App. E.D. 1997). Based on the credible evidence of record, including the testimony of Claimant, and the expert opinions, I find the combination of the primary neck injury with the preexisting disabilities renders Claimant totally disabled. The preexisting disabilities to the back, left shoulder, and groin caused Claimant to alter the way in which he worked, and were a hindrance and obstacle to employment. The new limitations from the neck injury effectively foreclose any reasonable employment for which Claimant might otherwise be qualified.

CONCLUSION

Claimant is permanently and totally disabled from the combination of preexisting injuries and disabilities with the last injury on November 26, 2004. The Second Injury Fund is, therefore, liable for permanent total disability benefits. Claimant is entitled to have and to receive from the Second Injury Fund rate differential benefits of \$321.85 per week for a period of 120 weeks beginning May 5, 2005 and, thereafter, the weekly sum of \$675.90 per week for life.

This award is subject to a lien of 25% in favor of Attorney Alan Mandel for legal services.

Made by: _____
KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

This award is dated the _____ day of June 2011.