

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

Injury No.: 06-061625

Employee: David W. Hicks
Employer: St. John Development Corporation
Insurer: American Family Mutual Insurance Company

The above-captioned workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and considered the whole record and we find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the February 2, 2010, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Findings of Fact

Employee, now 48 years old, has been a painter since he was 16 years old. On July 10, 2006, latex paint got in employee's eyes while he was painting a ceiling in fulfillment of his job duties. He was first treated at St. Anthony's Medical Center on that date. The emergency room physician's diagnosis was bilateral chemical corneal abrasion.

On July 12, 2006 and July 19, 2006, employee was seen at the St. Louis Eye Clinic. The treating physician diagnosed bilateral chemical corneal abrasion and chemical conjunctivitis. Dr. Pernoud treated claimant for several years. She diagnosed chemical conjunctivitis causing goblet cell loss and severely dry eyes.

On August 13, 2008, Dr. Pernoud opined that employee was at maximum medical improvement. After examination, Dr. Pernoud reported that employee's visual acuity is 20/20 in each eye with his eyeglass prescription. She concluded that employee does not have an ocular impairment under the Missouri regulations after completing the Division of Workers' Compensation Physician's Report on Eye Injuries (Form 9-A). Curiously, at the same time, Dr. Pernoud opined employee needed future medical care in the form of Buminatate for the rest of his life, as well as, an annual eye exam by an ophthalmologist. Subsequently, Dr. Pernoud recommended that employee use Restasis ophthalmic solution in addition to the Buminatate.

Dr. Musich examined employee for the purpose of providing his opinions regarding employee's disability and medical needs. Dr. Musich opined that employee suffered bilateral trauma on July 10, 2006 and that the trauma is the prevailing factor in employee's development of acute bilateral ocular symptomatology. Dr. Musich offered his opinion that the work accident of July 10, 2006, has resulted in a permanent partial disability of 25% of the body as a whole.

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Employee testified that his eyes hurt constantly resulting in headaches. Employee compared the pain to rubbing the eye with sandpaper or opening your eyes underwater in a swimming pool. Employee is unable to sleep for more than four hours without being awaked by discomfort so that he must put in eye drops. In the winter, the dry air from the furnace exacerbates employee's dry eyes. Employee believes he is unable to work as a painter.

The administrative law judge recited that the employer/insurer agreed to "leave medical open" as it regards employee's medical condition. We interpret this phrase to mean employer/insurer agrees to provide future medical to cure and relieve employee of the effects of his injury as required by § 287.140 RSMo.

Discussion

The only issue stipulated for trial was the nature and extent of employee's permanent disability as a result of the June 10, 2006, work accident.

Section 287.190.1 RSMo sets forth a schedule of losses covering specified injuries. The only reference to eyes sets forth 140 weeks as the scheduled loss for the complete loss of the sight of one eye.

Section 287.190.3 addresses injuries not included on the schedule of losses. "For permanent injuries other than those specified in the schedule of losses, the compensation shall be paid for such periods as are proportionate to the relation which the other injury bears to the injuries above specified, but no period shall exceed four hundred weeks, at the rates fixed in subsection 1."

Division of Workers' Compensation Rule 8 CSR 50-5.020(1)-(8) sets forth the procedures for evaluating visual disabilities. Subsection (9), however, addresses non-visual ocular disturbances.

Certain types of ocular disturbance are not included in the foregoing computations and these may result in disabilities, the value of which cannot be accurately measured by any scientific method available. Among them are disturbance of accommodation, of color vision, of adaptation to light and dark, metamorphopsia, entropion, ectropion, lagophthalmos, epiphora and muscle disturbances not included under diplopia. For such disabilities, additional compensation shall be allowed, but in no case shall such additional compensation make the total for loss in industrial visual efficiency greater than that provided by law for the total loss of the sight of one (1) eye when only one (1) eye is involved and that for permanent partial disability of the body as a whole when both eyes are involved.

...

(E) Although no scientific deductions can as yet be made as a basis for determining disabilities arising from those secondary ocular defect not included in the foregoing computations in the three (3) primary and coordinate factors of vision, experience and sound judgment, as

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expressed in the following table, give a yardstick for estimating losses due to so-called secondary ocular disabilities.

A table follows the text of the rule and identifies the following non-visual ocular disabilities: traumatic cataract; dislocation of lens; ptosis; scotoma; paralysis of accommodation; loss of eye brow; loss of eye lash; symblepharon; ectropion or entropion; lagophthalmus; and epiphora. A footnote to the table states:

In the event of bilateral disabilities due to paralysis of accommodation, loss of eye brows, loss of eye lashes, symblepharon, ectropion, entropion (sic), lagophthalmus, or epiphora, the percentage of unilateral loss in the poorer eye shall be taken of 140 weeks and to that shall be added the percentage of unilateral loss in the better eye taken of 260 weeks.

The administrative law judge found that employee's dry eye condition should be categorized as symblepharon, a listed non-visual ocular disability. The administrative law judge then used the 140/260 calculation described above to calculate the disability attributable to employee's work-related eye condition.

As correctly pointed out by the administrative law judge, the term symblepharon appears in none of the medical records, reports, or opinions. Significantly, Dr. Pernoud did not check the box next to "symblepharon" on the Form 9-A. As an ophthalmologist, she is in a better position to categorize the employee's condition than the administrative law judge. There is no evidence in the record to support a conclusion that employee's condition is symblepharon. The administrative law judge erred in so concluding.

Based upon his erroneous determination the employee's condition is symblepharon, the administrative law judge seemed constrained to determine employee's disability using the table in the Rule. There is no requirement that we use the table in the Rule for non-visual ocular disturbances. As expressly stated in the Rule, the table is provided to "give a yardstick for estimating losses due to so-called secondary ocular disabilities."

Because employee's condition is not expressly stated in the Rule, and because we have the opinion of a credible medical expert on the disability resultant from employee's eye condition, we will accept the expert's opinion as to disability. We accept Dr. Musich's opinion that employee sustained a disability of 25% of the body as a whole, referable to his non-visual ocular disturbances.

Dr. Pernoud's opinion that employee does not have an ocular impairment under the Missouri regulations does not undercut Dr. Musich's opinion regarding disability. The regulations contain no mention or discussion of employee's eye condition so the quantification of employee's disability is not "under the Missouri regulations." Employee's disability is determined under § 287.190 RSMo.

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Award

We modify the administrative law judge's award of permanent partial disability. We award from employer/insurer to employee permanent partial disability benefits of \$35,468.00 (100 weeks X \$354.68).

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

The records of the Division of Workers' Compensation reflect that the compensation awarded herein is subject to a lien in favor of the Director of the Family Support Division, Missouri Department of Social Services pursuant to the provisions of §§ 454.517 and 287.160 RSMo.

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

The award and decision of Administrative Law Judge Joseph E. Denigan, issued February 2, 2010, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 21st day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary