

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No.: 01-120380

Employee: Henry I. Hilderbrand
Employer: Fry-Wagner Industrial Moving, Inc. (Settled)
Insurer: Vanliner 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 (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, 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 and decision of the administrative law judge with this supplemental opinion.

Discussion

Employee's additional evidence

We note that employee has attached approximately 650 pages of documents to his Application for Review. Employee requests that we consider these documents as evidence in support of his claim against the Second Injury Fund. Employee alleges that he delivered copies of these documents to counsel for the Second Injury Fund and to the Division of Workers' Compensation (Division) on April 30, 2013. But employee did not offer these documents into evidence during the hearing before the administrative law judge on February 20, 2014.

Commission Rule 8 CSR 20-3.030(2) governs the submission of additional evidence to the Commission, and provides, in relevant part, as follows:

(A) After an application for review has been filed with the commission, any interested party may file a motion to submit additional evidence to the commission. The hearing of additional evidence by the commission shall not be granted except upon the ground of newly discovered evidence which with reasonable diligence could not have been produced at the hearing before the administrative law judge.

By their very purported nature, the documents employee now requests that we consider would have been in existence at the time of the February 20, 2014, hearing before the administrative law judge, and thus cannot be said to be "newly discovered" for purposes of the foregoing rule. It appears that employee may have believed that his attempt to furnish copies of these documents to the Division and to opposing counsel in April 2013 relieved him of his obligation to offer these documents as evidence during the hearing before the administrative law judge. While we are sensitive to the fact that employee is proceeding

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without the assistance of legal counsel in this matter, we must apply the foregoing rule and deny employee's request to submit additional evidence to the Commission. For this reason, we cannot consider any of the approximately 650 pages of documents employee has attached to his Application for Review, and instead must confine our review to the record created during the hearing before the administrative law judge.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.*

Here, employee is claiming that he is permanently and totally disabled owing to a combination of his last work injury and his preexisting injuries and disabilities. The administrative law judge, in denying the claim, discussed the thresholds applicable to claims for permanent *partial* disability under § 287.220.1. We note that, under the plain language of the statute, those thresholds are not applicable to claims for permanent *total* disability: "[i]f the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply." *Id.*

We must, however, deny the claim for benefits from the Second Injury Fund. This is because employee did not provide evidence sufficient to prove that he suffered from any preexisting permanent partially disabling condition of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment. Rather, employee's testimony at the hearing suggests (and we so find) that although he had some prior injuries, none of these rose to the level of affecting his ability to perform strenuous job duties without restriction or limitation before October 23, 2001, the date of the last work injury.

Employee may very well be permanently and totally disabled, but as noted above, evidence of at least one preexisting permanent partially disabling condition is a prerequisite to recovering permanent total disability benefits from the Second Injury Fund. Because we are convinced that employee did not prove this essential element of his case, we must deny the claim.

Clerical error

We note that employee and counsel for the Second Injury Fund stipulated, at the outset of the hearing before the administrative law judge, that employee "sustained accident and injury arising out of and in the course of employment on or about October 23, 2001." *Transcript*, page 1. Employee points out, however, that the administrative law judge stated, in the eighth numbered paragraph on page 1 of his Award, that employee did not sustain an accident arising out of and in the course of the employment. In light of the parties' stipulation, and the administrative law judge's own finding, on page 3 of his award, that employee "testified to the requisite facts underlying a compensable injury," we

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deem the contrary indication on page 1 to be an obvious clerical or typographical error, which we hereby correct.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 22, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5th day of September 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Henry I. Hildebrand, <i>pro se</i>	Injury No.: 01-120380
Dependents:	N/A	Before the
Employer:	Fry-Wagner Industrial Moving, Inc. (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Vanliner Insurance Co.	Department of Labor and Industrial
Hearing Date:	February 20, 2014	Relations of Missouri
		Jefferson City, Missouri
		Checked by: JED

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? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: October 23, 2001
5. State location where accident occurred or occupational disease contracted: St. Louis County (alleged)
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 happened or occupational disease contracted:
Claimant was moving a large heavy cabinet that he attempted to stabilize from tipping and was pushed back and fell to the floor.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: multiple body parts (Exhibit E).
14. Nature and extent of any permanent disability: 10% PPD of the body referable to "back, head, chest, left elbow, vision, legs" as per stipulated settlement (Exhibit E).
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$373.43
- 19. Weekly compensation rate: \$330.86/\$329.42
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
40 weeks PPD from Employer (settled)
- 22. Second Injury Fund liability: none

TOTAL: -0-

- 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Henry I. Hildebrand, <i>pro se</i>	Injury No.: 01-120380
Dependents:	N/A	Before the
Employer:	Fry-Wagner Industrial Moving, Inc. (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
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This case involves a disputed injury resulting to Claimant with the alleged accident date of October 23, 2001. Employer/Insurer previously settled its risk of liability. The Second Injury Fund ("SIF") remains a party to this claim. Claimant proceeds *pro se* and the SIF is represented by counsel. The single issue for trial is the liability of the SIF.

FINDINGS OF FACT

1. Claimant testified to the requisite facts underlying a compensable injury which the Employer/Insurer settled as per Exhibit E.
2. Claimant testified to a number of pre-existing injuries, mostly from childhood. The injuries were not supported by medical evidence. He mentioned his scars (disfigurement) were permanent.
3. In 1977, Claimant fractured his right thumb and underwent surgery. Claimant exhibited a one and one-half-inch linear scar on his right thumb. No medical records regarding this are in evidence.
4. In 1984, Claimant fractured his left wrist and underwent surgery. Claimant exhibited a five-inch scar on the dorsal aspect of his left wrist. No medical records regarding this injury are in evidence.
5. In 1990 and 1991, Claimant experienced two low back injuries neither of which required surgery. No medical records regarding these injuries are in evidence.
6. Claimant's testified about generalized low back pain without mention of dates of onset or the course of his symptoms.
7. Claimant stated he was diagnosed with clinical depression and attempted to offer Exhibits A and B in support thereof but which Exhibits were excluded pursuant to well-taken hearsay and authentication objections. In any event, Claimant admitted he was diagnosed *after* his reported accident herein.

10. Claimant did not explain any permanent symptoms or limitations resulting from any of these injuries.

11. On cross-examination, Claimant admitted he had no problem performing his duties at work after any of these accidents. He identified no permanent work restrictions that might suggest otherwise.

RULINGS OF LAW

Liability of the SIF

SIF liability is premised on synergistic combination between the primary and pre-existing disabilities. Synergy is the concept in which the current PPD and the pre-existing PPD are found, in combination, to create a "substantially greater" disability, or an increased overall disability, and for which the employer should not be held liable. Rather, the SIF is responsible for any significant combination. The significance of any pre-existing disability is predicated by the statutory minimum thresholds for injuries to the extremities and injuries to the body as a whole. The permanent partial disability threshold for disabilities to the body-as-a-whole is set at twelve and one-half percent and that for major extremity disability is set at fifteen percent. Section 287.220.1 RSMo (2000).

Here, Claimant presented no evidence of injury to the body or a major extremity that resulted in permanent partial disability that meets these thresholds. No medical evidence was offered in evidence that provided a basis from which greater permanent partial disability might be demonstrated. Claimant was able to continue working successfully without restrictions after each of the injuries he described. He received good reviews and promotions.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain any permanent disability giving rise to SIF liability. Claim denied.

Date: _____

Made by: _____


Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation