

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

Injury No.: 00-100526

Employee: Charles Hogue
Employer: Chouteau Auto Mart (Settled)
Insurer: Auto Owners Insurance Company (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 September 9, 2010. The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued September 9, 2010, 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 6th day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

NOT SITTING
Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

As to the Second Injury Fund Only

Employee: Charles Hogue Injury No. 00-100526
Dependents: N/A
Employer: Chouteau Auto Mart
Insurer: Auto Owners Insurance Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: August 11, 2010 Checked by: PAM/pd

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: July 13, 2000
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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? Yes.
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: Hogue developed plantar fasciitis of the left foot as a result of repetitive twisting and turning in the Course and scope of his employment as a car detailer.

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: Left foot
14. Nature and extent of any permanent disability: Previously settled with Employer
15. Compensation paid to-date for temporary disability? None
16. Value necessary medical aid paid to date by employer/insurer? None
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$266.67
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A
22. Second Injury Fund liability: Yes.
Permanent partial disability benefits of \$6,220.07
23. Future requirements awarded: N/A

Said payments to begin upon receipt of Award 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 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Frank Eppright

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles Hogue Injury No. 00-100526
Dependents: N/A
Employer: Chouteau Auto Mart
Insurer: Auto Owners Insurance Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: August 11, 2010 Checked by: PAM/pd

On August 11, 2010, the parties appeared for hearing. The Employee and Employer settled the claim for permanent partial disability prior to hearing. The Division had jurisdiction to hear this claim pursuant to Section 287.110. The Employee, Charles Hogue, appeared in person and with counsel Frank Eppright. The Second Injury Fund appeared by Assistant Attorney General Richard Wiles.

STIPULATIONS

The parties stipulated to the following:

- 1) that Employer and Employee were operating under and subject to the provisions of the Missouri Workers' Compensation law;
- 2) that Employer had notice of the claim and a timely claim for compensation was filed;
- 3) that the Employee's compensation rate is \$266.67; and
- 4) that no past temporary total disability or medical expenses were paid by Employer/Insurer.

ISSUES

The issues to be determined are:

- 1) whether Charles Hogue sustained an accident or occupational disease in the course and scope of his employment;
- 2) whether the conditions complained of are related to Hogue's primary claim; and
- 3) whether the Second Injury Fund has liability for permanent partial or permanent total disability benefits.

FINDINGS OF FACT AND RULINGS OF LAW

Charles "Mike" Hogue worked at Chouteau Auto Mart and Silver Eagle Auto Mart, car dealerships owned by the same person, as a car detailer for approximately 30 years.

Hogue cleaned both the interior and exterior of vehicles. He was required to climb in and out of cars frequently. Hogue testified that getting in and out of cars required him to twist his foot in awkward positions. Hogue had persistent left foot symptoms in 2000 but had onset of symptoms as early as 1995.

Hogue was diagnosed with plantar fasciitis. Hogue was treated with cortisone shots and orthotic shoe inserts.

Hogue continued to work for Chouteau Auto Mart and Silver Eagle Auto Mart until he was terminated in July 2000.

Hogue has significant complaints of pain and burning in his left foot. Hogue has trouble walking long distances, standing and lifting due to his left foot symptoms.

Hogue has a psoriasis skin condition which predates his foot injury. Hogue testified his skin becomes irritated, unsightly and flaky.

In the 1970's, Hogue sustained a left hand injury with tendon and nerve involvement. The hand injury produces weakness, tingling and reduced grip strength in his left hand and forearm.

Hogue also suffers from diabetes, liver disease (cirrhosis) and Hepatitis C, which were diagnosed after his employment with Chouteau/Silver Eagle was terminated. Hogue also suffers from depression. Hogue suffered a tumultuous childhood with physical/mental abuse by his father. Hogue did poorly in school, dropping out in the ninth grade. Hogue does read but describes himself as slow and "retarded."

Hogue also testified to a history of alcohol and drug abuse; although, he is no longer using those substances. Hogue's sister, Vickie Vaughan, corroborated his abusive childhood and learning difficulties.

Following his termination at Chouteau/Silver Eagle, Hogue worked for approximately one year at Hide Away Lakes, his place of residence, as a security guard. Hogue quit the sit-down guard shack job due to fatigue and pain.

Hogue has had numerous medical evaluations. Dr. Prostic initially evaluated Hogue for foot injuries in 2001. Dr. Prostic assigned 8 percent permanent partial disability. Dr. Horton, specialist, evaluated Hogue for plantar fasciitis but determined it was not work-related. Dr. Hendler also testified that Hogue's plantar fasciitis was not work-related.

Dr. Koprivica evaluated Hogue on June 16, 2005. At that time, Dr. Koprivica did feel Hogue's work activities aggravated Hogue's underlying pes planus deformity and attributed 25

percent permanent partial disability to his left foot problems. Dr. Koprivica assigned 25 percent permanent partial disability to Hogue's left forearm referable to his complex laceration/repair. He further assigns 12.5 percent permanent partial disability for Hogue's psoriasis condition. Finally, Dr. Koprivica assesses 20 percent permanent partial disability to Hogue's chronic liver disease, cirrhosis, and Hepatitis C as predating the July 13, 2000 work injury, this despite the fact that the diseases were not diagnosed until after July 13, 2000. Dr. Koprivica deferred his opinion on any prior psychiatric injury to mental health professionals. In June 2005, Dr. Koprivica specifically felt that Hogue was not permanently and totally disabled until the subsequent complications of Hogue's liver disease were considered.

Dr. Koprivica did author several addendums to the original report, ultimately concluding that Hogue was permanently and totally disabled from the primary injury and prior disabilities.

Hogue was evaluated by mental health professionals as well. Dr. Schmidt, psychologist, evaluated Hogue on November 22, 2006. Schmidt assesses 45 percent permanent partial disability to psychological disability, 30 percent to pre-July 13, 2000 and 15 percent to depression associated with Hogue's left foot injury. Dr. Hughes, psychiatrist, does not attribute any disability to the primary claim nor makes an assessment of preexisting disability.

Michael Dreiling testified Hogue is unemployable in the open labor market. Dreiling acknowledges Hogue's emotional and psychological issues includes, among other things, significant drug and alcohol abuse as well as legal problems (felony conviction). Dreiling also testified that fatigue attributable to Hogue's liver disease impacts his employability.

Hogue claims he is permanently and totally disabled due to the primary claim and preexisting disability.

To determine whether an employee is deemed totally disabled under the Missouri Workers' Compensation Law, it must be found that the Claimant unable to return to any employment. Section 287.020(7) RSMo (1986) defines total disability as "an inability to return to any employment and not merely...inability to return to the employment which the employee was engaged at the time of the accident." The terms "any employment" mean any reasonable or normal employment or occupation. Reese v. Gary & Roger Link, Inc. 5 S.W.3d 522 (Mo. App. 1999); Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1996); Kowalski v. M-G Metal and Sales, Inc., 631 S.W.2d 919, 921 (Mo. App. 1982); Groce v. Pyle, 315 S.W.2d 482, 490 (Mo. App. 1958).

In applying the above to the current case, I find Hogue was not permanently and totally disabled as a result of the July 13, 2000 work injury.

The evidence clearly supports that Hogue is unable to work due to fatigue and depression associated with chronic liver disease and Hepatitis C. Dr. Koprivica's testimony that the liver disease and Hepatitis C were disabling prior to July 13, 2000 is simply not supported by the medical records and is not credible.

To qualify as a pre-existing condition, it need not be shown that the claimant or the employer knew of the pre-existing disability prior to the work injury. Messex, 989 S.W.2d at

214. However, the claimant must establish that an actual or measurable disability existed at this time. *Id.* The disability must be “of such seriousness as to constitute a hindrance or obstacle to [her] employment.” Loven v. Greene County, 63 S.W.3d 278, 283 (Mo. App. 2001). Pre-existing conditions are not denominated “disabilities” as of the date of the second injury simply because, at some point in the future, they combine with that injury to render the claimant permanently and totally disabled. See Wilhite v. Hurd, 411 S.W.2d 72, 77-78 (Mo. 1967) (pre-existing cataract as not sufficiently disabling at the time of workplace accident even though its natural progression thereafter cause a loss of vision.)

Of particular note is Dr. Prostic’s January 26, 2001 report in which Hogue reports to be in good health six months after the last date of work for Chouteau Auto Mart. Hogue secured and maintained employment for over a year subsequent to July 13, 2000. There is insufficient evidence to support that Hogue’s liver disease/Hepatitis C manifested itself as an actual or measurable disability at the time of the primary claim. Dr. Koprivica’s assessment of permanent total disability includes the chronic liver disease/Hepatitis C. Accordingly, there is insufficient evidence to support Hogue’s claim for permanent total disability benefits.

There is competent evidence in the record to trigger Second Injury Fund liability for the enhanced cumulative disabilities sustained by Hogue.

I do find Hogue developed plantar fasciitis in the course and scope of his employment with Chouteau Auto Mart.

In order for Hogue to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he must prove that the last injury, combined with pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund, 183 S.W.3d 714, 717-718 (Mo. Banc 2004). Hogue has met the burden imposed by law.

Based on the medical records and reports, Dr. Koprivica’s, Dr. Schmidt’s and other expert testimony and Hogue’s testimony, I find the following:

Hogue sustained 15 percent permanent partial disability at the 155-week level of the left lower extremity as a result of his July 13, 200 injury.

Hogue sustained pre-existing disabilities which meet statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment as follows:

- 20 percent at the 200-week level – left upper extremity;
- 12.5 percent body as a whole referable to the psoriasis;
- 30 percent body as a whole referable to psychological disability.

The total weeks for pre-existing disabilities are 210.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, cause 10 percent greater overall disability than the independent

sum of the disabilities. The Second Injury Fund liability represents 23.25 weeks for the last injury and 210 weeks for pre-existing injury for a total of 233.25 weeks, 10 percent of which is 23.325 weeks of overall greater disability.

The award of compensation from the Second Injury Fund is 23.325 x \$266.67 or \$6,220.07.

An attorney's fee of 25 percent is allowed to Frank Eppright for necessary legal services rendered to Claimant.

Date: _____

Made by: _____

Paula McKeon
Chief Administrative Law Judge
Division of Workers' Compensation

This award is dated attested to and transmitted to the parties this ____ day of _____, 2010 by:

Naomi Pearson
Division of Workers' Compensation