

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

Injury No. 12-093343

Employee: Carl Horton
Employer: Fulton State Hospital (Settled)
Insurer: C A R O (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, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing 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

Controlling case law and the 2005 amendments

We agree with the administrative law judge's (implied) rejection of the Second Injury Fund's argument in this matter that employee's preexisting hearing loss cannot be considered a disability affecting the "body as a whole" for purposes of § 287.220.1 RSMo. As employee correctly notes in his brief, this is consistent with controlling judicial precedent on the topic. Specifically, in *Pierson v. Treasurer of Mo. as Custodian of the Second Injury Fund*, 126 S.W.3d 386 (Mo. 2004), the Supreme Court of Missouri rejected a nearly identical argument from the Second Injury Fund that vision loss could not be considered a disability affecting the body as a whole because vision loss is listed as a "member" in the "schedule of losses" set forth under § 287.190 RSMo.

The Second Injury Fund acknowledges the *Pierson* decision, but asks us to assume that the holding was abrogated by the 2005 amendments to the Missouri Workers' Compensation Law, because the *Pierson* court cited the pre-2005 mandate that Chapter 287 was to be liberally construed. We are not persuaded. First, the *Pierson* court expressly relied on the fact the Second Injury Fund "offer[ed] no logical reason why the legislature would choose not to allow fund compensation for [preexisting vision or hearing deficits], but would for all others." 126 S.W.3d at 389. It appears to us that the *Pierson* court's decision was motivated as much (if not more so) by logic as opposed to a liberal construction of Chapter 287. Here, the Second Injury Fund fails once again to provide us with any logical reason why the legislature would intend to deny Missouri employees and their employers the benefit of protections for enhanced disability resulting from preexisting hearing loss, but would for all other preexisting disabilities. The fact that occupational hearing loss enjoys its own statutory and regulatory provisions does nothing to

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demonstrate any legislative intent to preclude Second Injury Fund liability in cases involving preexisting hearing loss, or to justify such a patently “illogical” result.

Second, we note that the legislature expressly abrogated a number of judicial decisions and judicial interpretations of key terms in 2005. See, e.g., § 287.020.10 RSMo. We note also that the legislature left the material provisions of §§ 287.190 and 287.220.1 undisturbed. Accordingly, to accept the Second Injury Fund’s argument in this matter, we would need to assume that, rather than list the *Pierson* decision as among those abrogated in 2005, the legislature intended to silently abrogate *Pierson* and introduce a new, unstated definition of “body as a whole” by means of replacing the liberal construction mandate of § 287.800 RSMo for the new requirement thereunder that the language of Chapter 287 be strictly construed. In asking us to make these assumptions, the Second Injury Fund argument distorts the meaning of strict construction:

[A] strict construction of a statute presumes nothing that is not expressed. The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. The clear, plain, obvious, or natural import of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions.

Allcorn v. Tap Enters., 277 S.W.3d 823, 828 (Mo. App. 2009)(citations omitted).

To assume the legislature’s 2005 amendments to Chapter 287 silently abrogated *Pierson* in favor of the “illogical” exclusion of Second Injury Fund liability in cases of preexisting hearing loss would, in our view, run directly contrary to the mandate of strict construction, because it would require us to presume something that is not expressed by those amendments. It would also require us to presume a definition of “body as a whole” that is not affirmatively pointed out by the terms of either §§ 287.190 or 287.220.1. Applying the clear, plain, obvious, or natural import of the phrase “body as whole,” as well as the controlling precedent from *Pierson*, we conclude that this employee’s preexisting hearing loss amounted to a preexisting disability affecting his body as a whole. For these reasons, we affirm the award of compensation.

Conclusion

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

The award and decision of Administrative Law Judge David L. Zerrer, issued May 14, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm the administrative law judge’s allowance of attorney’s fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 6th day of November 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Carl Horton

Injury No. 12-093343

Dependents:

Employer: Fulton State Hospital

Additional Party: Second Injury Fund

Insurer: N/A

Hearing Date: March 16, 2015/March 27, 2015

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: DLZ

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: December 3, 2012
5. State location where accident occurred or occupational disease was contracted: Fulton, Callaway 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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was struck from behind and hit head on door.
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: head; body as a whole
14. Nature and extent of any permanent disability: 12.5% referable to the head and 5% referable to the neck, all of the body as a whole.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$485.10
- 19. Weekly compensation rate: \$323.40
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Employer previously settled all primary injury claims.

- 22. Second Injury Fund liability: Yes No Open

13.2 weeks of permanent partial disability from Second Injury Fund-\$4,268.88

TOTAL: \$4,268.88

- 23. Future requirements awarded: None

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Van Camp Law Firm

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FINDINGS OF FACT and RULINGS OF LAW:

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Injury No: 12-093343

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Fulton State Hospital

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: N/A

Checked by: DLZ

On the 16th day of March, 2015, the parties appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and with his attorney, Christine Kiefer. The Employer in the primary claim did not appear, having previously settled all issues in the primary injury claim. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is a party to this claim, and appeared by Assistant Attorney General Maggie Ahrens. The record was ordered to be left open until 5:00 p.m., March 27, 2015.

The parties have entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit: On or about the 3rd day of December, 2012, Fulton State Hospital was an employer operating subject to the Missouri Workers' Compensation Law; on the alleged injury date of December 3, 2012, Carl Horton was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the parties agree that on or about December 3, 2012, Claimant sustained an accident, which arose out of the course of and scope of employment; the employment occurred in Callaway County, Missouri, and the parties agree that Cole County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$485.10, sufficient to allow a compensation rate of \$323.40 for temporary total

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disability, permanent partial disability, and permanent total disability; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

ISSUE

The liability of the Second Injury Fund for enhanced permanent partial disability?

DISCUSSION

A legal file was established for this hearing, which consisted of the following documents, to wit: Report of Injury; Claim for Compensation, filed with the Division December 13, 2012; Amended Claim for Compensation, filed with the Division April 10, 2014; Second Injury Fund Answer to Claim for Compensation, filed with the Division December 21, 2012; Second Injury Fund Answer to Amended Claim for Compensation, filed with the Division April 25, 2014; Stipulation for Compromise Settlement, approved by the Division September 2, 2014; Request for Final Hearing, filed with the Division January 9, 2015.

Exhibits

- Exhibit 1. Copy of Stipulation for Compromise Settlement for Injury 12-093343;
- Exhibit 2. Independent Medical Evaluation of Dr. Raymond F. Cohen, dated June 17, 2013;
- Exhibit 3. Independent Medical Evaluation of Dr. David Mason, Ph.D., Hearing Instrument Specialist;
- Exhibit 4. Supplemental report of Dr. David Mason, Ph.D., dated October 3, 2014;
- Exhibit 5. Medical records of Callaway Community Hospital;
- Exhibit 6. Medical records of Runde Occupational & Environmental Physicians;
- Exhibit 7. Medical records of Runde Occupational & Environmental Physicians;

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Exhibit 8. Medical records from Select Physical Therapy;

Exhibit 9. Medical records of University Hospital and Clinics;

Exhibit 10. Records from Jones Beltone Hearing Center;

Exhibit 11. Records from Jones Beltone Hearing Center;

Exhibit 12. Records of expenses advanced by Van Camp Law Firm

Carl Horton, Claimant herein, testified in his own behalf. Claimant was 58 at the time of the hearing and was not employed. He worked for Fulton State Hospital, employer herein, for approximately 27 years, with his last day of employment being January 15, 2015. The Claimant testified that he was terminated because he was having difficulty comprehending the rules and requirements of the job, along with his inability to successfully complete required reviews and tests to maintain his employment. At the time of the hearing, the Claimant was drawing unemployment and retirement benefits. He has not worked since he left Fulton State Hospital.

The Claimant testified that approximately 10 years ago he began suffering from hearing loss. He stated that he was not able to hear birds outside or low voices when people were talking to him. Claimant stated that he had a difficult time at work as he was distracted by background noise and was unable to understand people speaking to him. Claimant testified that at any given time there could be 20 patients on the ward where he worked. Often times these patients were yelling or screaming, kicking doors, or doing other loud activities. He indicated that this loud environment made it difficult for him to hear conversations or people coming up behind him.

The Claimant testified that at the time of the hearing he had been wearing hearing aids for approximately six or seven years, but that he still found it difficult to hear. Claimant stated that when lots of people would be talking, particularly at work, it would be confusing for him as the background noise would drown out the individual speaking to him. He had a hard time

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separating conversation noise from background noise. Over the years, Claimant replaced the hearing aids to get better models as the technology improved. However, at times the hearing aids were so powerful that he could hear water running in the pipes, both at home and at work, which was very distracting and also made it difficult for him to understand people talking to him. Claimant testified that he would adjust the volume of the hearing aids when at work to try to drown out background noise, but this was not always successful. He also testified that his hearing has gotten worse over the years.

Claimant testified that on December 3, 2012, Claimant was at work when a patient came up behind him and struck him in the head, Claimant's head hit a door and he was knocked unconscious. The patient then repeatedly kicked the Claimant throughout his body. The Claimant testified that he knew this particular patient was dangerous as the patient had been running up and down the hallways. He knew that this patient also commonly attacked people from behind. However, the Claimant testified that he did not hear the patient coming up behind him due to his hearing loss.

The Claimant treated at Callaway Hospital. Medical records admitted into evidence indicate that the Claimant was kicked in the head and face multiple times and that he lost consciousness. X-rays and CT scans were taken and stitches were put in his head. (Exhibit 5) Claimant then treated with Dr. Runde on December 5, 2012, where he complained of a headache and sensitivity on the left eye, as well as symptoms in the head/scalp, forehead. He was diagnosed with a concussion with post-concussive headache as well as laceration of the scalp, and multiple abrasions and contusions of the head and scalp. (Exhibit 6). The Claimant attended physical therapy where he was treated for headache, cervicalgia, and joint pain in the shoulder and hand. (Exhibit 8) Claimant also was seen at University Hospital for

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photosensitivity. He was diagnosed with photophobia from abrasion. (Exhibit 9). Dr. Runde released the Claimant on March 22, 2013, though the Claimant still complained of photophobia, headaches, and neck stiffness. (Exhibit 7)

Following his release from treatment, the Claimant continued to suffer from a feeling of being off balance and unsteady. He also felt that his comprehension had been reduced and that he had difficulty following a coherent train of thought. The Claimant's testimony was somewhat convoluted, which seemed to suggest he did suffer from confusion and difficulty understanding questions. He also testified that he suffers from headaches two to three times a week which occur as soon as he wakes up in the morning and are all over his head. These headaches will last about 30 minutes to an hour, and he will take over-the-counter pain relief medication to help with the pain. He testified that he continued to have these headaches when he returned to work following the head injury. The Claimant also had pain in the back of his neck and in between the shoulder blades. Claimant further testified that during the remaining tenure at Fulton State Hospital following the injury, he did more one-to-one work and sitting at the counter instead of being out in the ward or the day room. He felt it was easier to be in one place due to his hearing problems along with his difficulties with comprehension, dizziness, and feeling imbalanced. He testified that his co-workers knew he had these difficulties and would accommodate him by allowing him to sit in one space rather than walking around the ward among patients. He testified that there was less need for communication with multiple parties when he was sitting at the counter. Due to the combination of his hearing loss and his head injury, Claimant had a more difficult time completing the normal requirements of the job than prior to the injury of December 3, 2012.

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The Claimant was evaluated by Dr. Cohen on June 17, 2013, for an independent medical evaluation. Dr. Cohen took a history, reviewed medical records, and performed a physical examination of the Claimant. He indicated that Claimant reported having headaches approximately two to four times a week which Claimant stated would last 30 minutes and increase with activities or loud noise. Claimant indicated that lying down or taking a nap seemed to help with the pain and that he is sensitive to light.

Dr. Cohen stated that Claimant reported that he continued to have pain in the neck and shoulders throughout the posterior neck and upper muscles of the posterior shoulders. Claimant described a deep, tight, aching feeling, and that he tried to do stretching exercises to ease the pain.

Dr. Cohen noted that the Claimant had memory problems after the injury of December 3, 2012, and that he would lose items throughout the house or need to write things down to remember. He had difficulty with people's names and was irritable. He also had difficulties with balance and a sensation as if he is being pulled to the left or the right when walking. Dr. Cohen provided a rating of 25% of the head and 12.5% of the neck. (Exhibit 2)

The Claimant settled his underlying case with the employer for 12.5% of the head and 5% of the neck. (Exhibit 1)

Dr. Cohen opined that the Claimant's "hearing was diminished bilaterally for the ability to hear a finger rub or whispered sounds." He also noted that the Claimant had worn hearing aids and that he could not hear without them. He noted that the Claimant had a difficult time hearing at work due to loud noises from the TV and people talking. Dr. Cohen provided a rating of 70% of the left ear and 70% of the right ear. (Exhibit 2)

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Records from Jones Beltone Hearing Center are largely illegible, but do show audiograms from 2004, 2006, 2007, 2012, and 2013 and indicate replacement in his hearing aids or the batteries. (Exhibit 10, 11)

Exhibits 3 and 4 set out hearing evaluations administered by Dr. David Mason, Ph.D., regarding Claimant's hearing loss. He indicated that the Claimant had bilateral hearing loss for at least eight years prior to his testing procedures. Dr. Mason administered three separate hearing tests and concluded that the Claimant had a hearing impairment of 43.5% of the right ear and 33% of the left ear, without any adjustment for age relatedness.

FINDINGS OF FACT AND RULINGS OF LAW

The liability of the Second Injury Fund for enhanced permanent partial disability?

The purpose of the Second Injury Fund is to encourage the employment of individuals who are disabled in some respect from a pre-existing injury or medical condition and to protect an employer from liability in the workplace for any pre-existing disabilities.

Section 287.220 states: "If any employee who has a pre-existing permanent partial disability, whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a

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major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree of or percentage of disability which would have resulted from the last injury had there been no preexisting disability.”

Claimant testified concerning the use of his hearing aids and the amount of difficulty he experienced at his job tasks when the hearing aids were not used or if used, not adjusted properly. Dr. Cohen provided a rating of 70% of each ear based on his observation of finger rub and whisper sounds and further, by the fact that Claimant had to use hearing aids in both ears. Dr. Mason opined that Claimant had a 43.5% hearing impairment in the right ear and 33% hearing impairment in the left ear. The average for binaural hearing impairment was 34.75%. For purposes of assessing impairment for hearing loss, the hearing impairment is based on 180 weeks for bilateral hearing loss. The total hearing loss impairment for both of Claimant’s ears, based on Dr. Mason’s report, without any adjustment for age since this is a pre-existing condition, would be 62.55 weeks of impairment.

After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find there is substantial and competent evidence adduced at the hearing for Claimant to sustain his burden of proof that he has suffered a pre-existing injury or condition which constituted a hindrance or an obstacle to Claimant’s employment or reemployment. I further find that Claimant’s pre-existing condition, when combined with the primary injury disability, exceeds the combination of each individual condition when considered separately and that the combined injuries and/or disabilities combined to establish a disability

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greater than the sum of each condition and/or injury. I find that Claimant has suffered a pre-existing permanent partial disability of 15.5% of the body as a whole, as a result of his bilateral hearing loss.

I further find that Claimant has suffered a permanent partial disability of 17.5% of the body as a whole as a result of the primary injury of December 3, 2012.

Based on the findings set out above, I find that Claimant has suffered an additional permanent disability as a result of the combination of the above disabilities being greater than the simple sum of each disability added separately. I further find that Claimant has a combined disability which is 10% higher than the simple sum of the pre-existing condition and the primary injury permanent partial disability.

Therefore, the Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, is hereby ordered to pay to Claimant the sum of \$4,268.88, as and for enhanced permanent partial disability [(15.5% x 400 weeks = 62 weeks) + (17.5% x 400 weeks = 70 weeks) = 132 weeks x 10% = 13.2 weeks x \$323.40 = \$4,268.88].

Claimant's attorney requested approval of an attorney fee of 25% of the amount of any award. Claimant's attorney's fee request is hereby approved. Claimant's attorney is hereby awarded an attorney fee of 25% of the amount of this award. Claimant's attorney is granted a lien on the proceeds of this award unless and until the attorney fee shall have been paid in full.

Made by: _____

David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation