

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

Injury No.: 08-112331

Employee: Richard Hussmann
Employer: St. Louis Hearing & Speech Center (Settled)
Insurer: Missouri Employers Mutual Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge (ALJ) dated June 22, 2011.

Preliminaries

In December 2008, employee injured his knee, back, and neck in a work fall. Employee settled his permanent partial disability claim against employer. Employee proceeded to final hearing of his claim against the Second Injury Fund.

The ALJ awarded enhanced permanent partial disability against the Second Injury Fund. Employee appealed to the Commission alleging that the ALJ erred in denying his claim for permanent total disability (PTD) benefits from the Second Injury Fund.

Findings of Fact

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are incorporated and adopted by the Commission herein.²

Employee credibly testified that prior to the December 18, 2008, injury he experienced numerous difficulties due to his preexisting disabilities. Employee had problems with his right shoulder and neck, so employee would use the left arm and shoulder to perform the cranking activities necessary to set up his trailer. Further, because employee had trouble lifting with his right side, he used his left side for lifting. Finally, employee had such difficulty pushing, pulling, and kneeling on his right side that he had to lie down to perform some work activities.

Dr. Volarich was the only medical expert to offer an opinion regarding the nature and extent of employee's disabilities. Based upon a physical examination, a review of employee's medical records, and his discussions with employee, Dr. Volarich imposed various physical restrictions on employee's activities as a result of his left knee condition. In addition, Dr. Volarich reiterated

¹ Statutory references are to the Revised Statutes of Missouri 2008 unless otherwise indicated.

² For the benefit of the reader, we point out that the last sentence of the ALJ's analysis under the heading *Liability of the SIF* incorrectly refers to a 2007 Second Injury Fund claim. The reference should have been to a 2002 Second Injury Fund claim. Because we do not adopt that portion of the ALJ's award, there is no need to correct the error.

Employee: Richard Hussmann

- 2 -

the physical restrictions he recommended after evaluating employee with regard to previous injuries. Dr. Volarich opined that “[employee] is unable to engage in any substantial gainful activity nor can he be expected to perform in an ongoing working capacity in the future....” Dr. Volarich concluded that employee “is permanently and totally disabled as a direct result of the work related injury of 12/18/08, in combination with all of his preexisting medical conditions.”

Although employee performed work beyond the restrictions imposed by Dr. Volarich during the four years leading up to the primary injury, as we found above, he performed them with great difficulty. We find that Dr. Volarich’s restrictions were reasonable and we find credible his opinion that employee is unable to engage in substantial gainful activity.

Mr. England, the only vocational expert to render an opinion regarding employee’s ability to compete in the open labor market, opined that “[i]t appears obvious that [employee] would not be able to go back to do any of his past jobs because of the tremendous difficulty he has just getting up out of a chair and trying to walk....” After considering the physical restrictions imposed by Dr. Volarich and employee’s advanced age, Mr. England concluded that “[employee] is likely to remain permanently and totally disabled from a vocational standpoint.” Contrary to the administrative law judge, we find Dr. Volarich’s opinions credible (including his restrictions). Naturally, then, we find no error in Mr. England’s reliance on Dr. Volarich’s restrictions. We find credible the opinions of Mr. England.

Employee settled his claim against employer/insurer. The settlement was based upon approximate permanent partial disabilities of 30% of the left knee, 5% of the body as a whole referable to the neck, and 5% of the body as a whole referable to the lumbar spine. We find that these approximations are supported by the opinions of Dr. Volarich.

The Second Injury Fund did not offer any witnesses, expert evidence, or medical records to rebut employee’s evidence.

We find that as a result of the work injury, employee sustained permanent partial disabilities of 30% of the left knee, 5% of the body as a whole referable to the neck, and 5% of the body as a whole referable to the lumbar spine. We find employee reached maximum medical improvement on August 27, 2009, the date Dr. McAllister released employee from his care.

Conclusions of Law

We do not adopt the ALJ’s conclusions as they appear under the heading *Liability of the SIF*.

Employee contends that the ALJ erred in denying him PTD benefits against the Second Injury Fund. Section 287.020.6 RSMo defines “total disability” as the “inability to return to any employment....”

The test for permanent total disability is whether, given the employee’s situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person’s present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

Employee: Richard Hussmann

Based upon the medical records, employee's testimony, and the uncontradicted opinions of Dr. Volarich and Mr. England, we believe that no employer would reasonably be expected to hire employee in his present condition. We have previously found employee's permanent disability from the work injury is only partial. We conclude employee is permanently and totally disabled due to the combination of the disability from his December 2008 injury with his many preexisting disabilities. The Second Injury Fund is liable to employee for permanent total disability benefits.

Award

We modify the award of the ALJ. Employee is permanently and totally disabled due to the combination of the disability from his December 2008 work injury with his many preexisting disabilities.

Beginning August 27, 2009, and continuing for 88 weeks³, the Second Injury Fund shall pay to employee \$155.40, the difference between employee's PTD rate and his PPD rate.⁴ Thereafter, the Second Injury Fund shall pay to employee \$560.06 for the remainder of employee's life, or until modified by law.

The award and decision of Administrative Law Judge Joseph E. Denigan issued June 22, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ's allowance of attorney's fee as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 25th day of January 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

³ The work injury resulted in permanent partial disabilities of 48 weeks (knee), 20 weeks (neck), and 20 weeks (lumbar spine). Therefore the total PPD attributable to the work injury is 88 weeks.

⁴ \$560.06 - \$404.66