

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 06-071401

Employee: Jerome Ives
Employer: Triple Crown Services (Settled)
Insurer: Lumberman's Underwriting Alliance (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. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge with this separate opinion.

Preliminaries

The parties stipulated the following issues for determination by the administrative law judge: (1) accident; and (2) Second Injury Fund liability.

The administrative law judge failed to resolve the issue of accident, made a number of factual findings that are not supported by the record, disregarded uncontested expert testimony on the issue of permanent total disability, and concluded employee is not entitled to benefits from the Second Injury Fund because employee enjoys an active lifestyle in Costa Rica.

Employee submitted a timely Application for Review with the Commission.

For the reasons set forth below, we affirm the award of the administrative law judge with this separate opinion.

Findings of Fact

Preexisting conditions

Prior to April 19, 2006, the date on which employee sustained the primary injury, employee suffered shoulder, back, rib, and left leg pain referable to a 2001 motor vehicle accident. Employee's symptoms prompted him to stop running for exercise. Employee, who was a self-employed construction worker at the time, also turned down some jobs after the 2001 accident, and visited a doctor for back pain when he overexerted himself.

Primary injury

On April 19, 2006, employee suffered injury while working as a truck driver for employer. Employee was trying to adjust the wheels on his trailer. This task involved removing a pin, which was stuck. As employee was jostling the pin, it came loose suddenly, causing employee to twist around and fall backward. Employee experienced immediate pain in his back and numbness and tingling shooting down into his right leg. Treating doctors

Employee: Jerome Ives

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diagnosed a herniated disc at L4-5, took employee off work, and prescribed muscle relaxers and physical therapy. Employee ultimately underwent a fusion surgery at L4-5. Employee reached maximum medical improvement on April 20, 2007. Dr. Amundson, the treating physician, assigned permanent restrictions of no lifting greater than 20 lbs, and no sitting, walking or standing for extended periods.

Employee described his limitations following the work injury. Employee testified he can sit 15 to 30 minutes. Employee can walk for about a half hour. Every day, employee lies down half an hour during the day. All of these limitations are attributable to symptoms stemming from the 2006 work injury and subsequent fusion surgery. We credit the foregoing testimony from employee. We find that employee can only sit 15 to 30 minutes, walk for about a half hour, and has to lie down every day owing to the effects of the work injury.

Employee presents Dr. Poppa, who opined that employee is permanently and totally disabled. Dr. Poppa rated the following permanent partially disabling conditions resulting from the work injury: 5% of the body as a whole referable to the thoracic spine and 35% of the body as a whole referable to the lumbar spine. Dr. Poppa opined that employee is not able to continue working in construction or as a driver, and identified a number of lifting restrictions and opined that employee should alternate positions at least every two hours, or as needed for comfort, when standing, sitting, or walking.

Dr. Poppa opined a need to lie down during the day would eliminate employee from most employment. We credit this testimony from Dr. Poppa. We find that employee's need to lie down every day as a result of the work injury eliminates most employment prospects for him.

Dr. Poppa ultimately offered the opinion that employee is permanently and totally disabled owing to a combination of the work injury and his preexisting conditions referable to the 2001 motor vehicle accident. We note that, in explaining his opinion, Dr. Poppa started with the preexisting conditions and then added the restrictions referable to the work injury. In other words, Dr. Poppa did not isolate and consider the effects of the work injury alone upon employee in rendering his opinion as to the source of employee's permanent total disability. We also note Dr. Poppa's testimony that employee did not tell him about his need to lie down daily following the work injury. Especially given Dr. Poppa's testimony that a need to lie down daily will eliminate most employment prospects for employee, it appears Dr. Poppa lacked the relevant information to form his "combination" opinion. Given these considerations, we find unpersuasive Dr. Poppa's opinion that employee is permanently and totally disabled owing to a combination of the work injury and his preexisting conditions.

Employee also presents the vocational expert Michael Dreiling, who agreed that a need to lie down during the day precludes performing work. Like Dr. Poppa, Mr. Dreiling offered the ultimate opinion that employee is permanently and totally disabled owing to a combination of the work injury and preexisting disabilities. But this opinion from Mr. Dreiling strikes us as conclusory, and it appears that he never considered the effects of the work injury in isolation. We find his "combination" opinion unpersuasive,

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because it lacks a credible explanation and does not provide us with the relevant considerations to perform our analysis. We credit, on the other hand, Mr. Dreiling's testimony (and so find) that a need to lie down daily renders employee permanently and totally disabled.

Conclusions of Law

Accident

The version of Chapter 287 applicable to this claim provides the following definition of an "accident" for purposes of the Missouri Workers' Compensation Law:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

Employee's evidence has satisfied the foregoing statutory definition. Employee established that on April 19, 2006, he was working for employer trying to adjust the wheels on his trailer, when a pin came loose suddenly, causing him to spin around and experience immediate sensations of pain in his back and loss of sensation in his right leg. In other words, employee proved that he suffered an unexpected traumatic event identifiable by time and place and producing at the time objective symptoms of an injury caused by a specific event during a work shift. We conclude employee sustained an accident.

Second Injury Fund liability

For the Second Injury Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have credited employee's testimony that he needs to lie down daily owing to the effects of the primary injury. We have also credited the testimony from both of employee's experts that a need to lie down daily renders employee permanently and totally disabled. Although they ultimately rendered opinions indicating employee is permanently and totally disabled owing to a combination of his problems, we have found their ultimate opinions conclusory, contradictory as to their testimony regarding a need to lie down daily, and lacking credibility as a result.

We conclude employee is permanently and totally disabled as a result of the primary injury considered alone and in isolation.

Employee: Jerome Ives

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Employee has failed to meet his burden of proving Second Injury Fund liability for permanent total disability benefits.

Conclusion

Based on the foregoing, the Commission concludes employee is permanently and totally disabled as a result of the primary injury considered alone and in isolation. Accordingly, employee's claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued June 7, 2012, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 28th day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD
Denying Compensation

Employee: Jerome Ives Injury No. 06-071401
Employer: Triple Crown Services (settled)
Additional Party: Treasurer of the State of Missouri as Custodian of the Second Injury Fund
Hearing Date: April 20, 2012 Checked by: MSS/cy

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: April 19, 2006
5. State location where accident occurred or occupational disease was contracted: Lawrence, Kansas
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:
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: Back, whole body
14. Nature and extent of any permanent disability: 19% whole body
15. Compensation paid to-date for temporary disability: Unknown
16. Value necessary medical aid paid to date by employer/insurer? Unknown

- 17. Value necessary medical aid not furnished by employer/insurer? Unknown
- 18. Employee's average weekly wages: \$696.97
- 19. Weekly compensation rate: \$436.55/\$365.08
- 20. Method wages computation: Agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: N/A
- 23. Future requirements awarded: None

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Jerome Ives Injury No. 06-071401
Employer: Triple Crown Services (settled)
Additional Party: Treasurer of the State of Missouri as Custodian of the Second Injury Fund
Hearing Date: April 20, 2012 Checked by: MSS/cy

This case comes on before Administrative Law Judge Siedlik in Kansas City, Missouri on April 19, 2012. The Claimant was present with his counsel, Mr. Russell Purvis. The Second Injury Fund was represented by their counsel, Ms. Kimberly Fournier. This case involves injuries on or about the 19th of April 2006 and while Claimant was in the employ of Triple Crown Services and sustained injuries by accident arising out of and in the course and scope of employment in Lawrence, Kansas. At the time of the injuries the parties were subject to the Missouri workers' compensation law and the employer's liability insured by Lumberman's Underwriting. The employer had notice of the injury and claims were timely filed. I show the Claimant's average weekly wage agreed to be \$696.97 and the compensation rates agreed to be \$436.55 over \$365.08.

ISSUES

The issues to be resolved by this proceeding are whether there was an accident on or about April 19, 2006 and the liability of the Second Injury Fund. The evidence at trial consisted of the testimony of Claimant in person, together with Claimant's Exhibits A through I comprising of medical reports, records, and the deposition testimony of Dr. Michael Poppa and vocational expert, Michael Dreiling. The Second Injury Fund offered Claimant's discovery deposition as Second Injury Fund Exhibit Number 1.

Jerome Ives is a 69 year old man who lives in Costa Rica with his wife. He has 2 years of college education in construction management and additional certifications in EMT, firefighting, and forestry service. Mr. Ives has a computer, and while not trained on a computer at work, is able to use his computer at home. Mr. Ives was self employed in the construction industry for most of his career. He performed most every type of job duty associated with construction, ranging from concrete, roofing, and drywall to excavation.

Mr. Ives Condition prior to 2006

Despite working in the heavy demand construction industry, Mr. Ives was physically able to perform his jobs. He did have an auto accident in 2001 that injured his left arm, ribs, left knee and back. He went to see his family doctor approximately 3 times for treatment due to this collision. He sought no additional care for that injury, nor do any records reflect that he was having any type of difficulty from this accident between January 2002 and April of 2006. (Poppa dep page 34-35) Mr. Ives had no permanent restrictions placed on him by his treating doctors for this 2001 injury. (Dreiling dep page 25, Poppa dep page 34-35) Mr. Ives stated he had no limitation to his ability to sit, stand or walk prior to 2006, and Mr. Ives experts both confirmed that there was no limitation to Mr. Ives ability to sit, stand or walk prior to that time either. (Dreiling transcript page 23, Poppa dep page 41) Mike Dreiling had no knowledge of whether Mr. Ives was on any kind of chronic pain medication prior to 2006. (Dreiling dep

pages 29-31) Mr. Ives had been able to pass a DOT physical which required him to demonstrate to the examiner that he could bend, twist and turn. (Poppa transcript p. 32)

Even though the records do not suggest that the 2001 injury seemed to have ongoing effects, Mr. Ives testified at hearing that he was having difficulty between 2001 and 2006 performing his construction jobs due to the residuals of the 2001 collision. He did continue to participate in lifting heavy objects regularly after 2001, including even a back hoe scoop that weighed in excess of 250 pounds. (Ives Dep page 19) Dr. Poppa had not been made aware of this. (Poppa dep p 44-45) Mr. Dreiling pointed out that the construction industry that Mr. Ives worked in between 2001 and 2005 was medium to heavy demand work. (Dreiling dep page 33) He went on to state that the work Mr. Ives was doing required him to climb, constant use of the upper and lower extremities, turning and twisting, and exposure to vibration. (Dreiling dep page 34) Mr. Ives performed the work in the construction/excavation industry between 2001 and 2005 on a full time basis. (Dreiling dep page 35) Mr. Ives only missed work approx 6 times per year before 2006. (Ives dep page 31) Mr. Dreiling opined that this degree of absence would not be a factor that would cause an individual to lose his job. (Dreiling dep page 42)

Mr. Ives indicated that due to the 2001 injury, he had to occasionally turn down work, but interestingly admitted that he did not suffer any decrease in his pay between 2001 and 2006. Even so, it was not until 2005 that Mr. Ives chose to leave the construction industry, purchase a truck and begin working in the trucking industry. He alleges he left the construction industry because his back caused him difficulties, however, he also admitted that the construction industry was not as profitable after 2001 because he had to often hire helpers. No doctor advised Mr. Ives to stop working in the construction industry at that time. (Poppa dep page 37)

In 2005 he initially went to work for Horizon Trucking, then went to Mason Dixon, and lastly drove for Triple Crown Services. He began the employment for Triple Crown in February of 2006. His job duties with Triple Crown Services included picking up and delivering loads of food products over the road in his own tractor. He was not responsible for loading and unloading freight. Mr. Ives stated that due to back and left leg complaints, which were not substantiated by the medical records, he was unable to do "long hauls" before 2006, but was working his driving job on a full time basis-approximately 11 hours per day. He stated that he would get out of the truck and take rest breaks, however, due to the premium on efficiency he was always able to get his load delivered in a timely fashion. He received no poor work evaluations for late loads.

Mr. Ives helped his wife out around the house prior to 2006. He was also able to continue bicycling for recreation before 2006 and was able to cut his own grass before 2006. (Ives depo page 63) Mr. Ives vocational expert, Mike Dreiling, agreed that based on Mr. Ives age, and because Mr. Ives presented with appropriate intellectual functioning, he did not administer any academic tests. (Dreiling dep page 33)

Despite pain in his back, Mr. Ives showed up for work, and satisfactorily performed the functions of his job both in the construction industry, and the trucking industry prior to 2006. He was even able to pass a physical examination prior to beginning work at Triple Crown Trucking. (Ives dep pages 50, 68)

Mr. Ives' 2006 Injury

On April 19, 2006, Mr. Ives was working in Lawrence Kansas at the Del Monte plant. He was adjusting the wheels on his tractor by pulling a pin and jostling his trailer. Suddenly the chain came loose, and he spun around causing injury to his back. Mr. Ives had immediate pain in his back and down into his right leg. He had a loss of feeling that went all the way down his leg all the way into his foot.

Mr. Ives drove the truck back to work, immediately went to his supervisor to advise him of the incident, and was sent out for treatment the same day. Mr. Ives was initially prescribed muscle relaxers and physical therapy.

Ultimately, Mr. Ives went to see Dr. Amundson who treated him with three epidural injections, physical therapy and took him off work. Mr. Ives was diagnosed with a disc herniation at the L4-5 level, and ultimately underwent a fusion at that level. He then had additional therapy and muscle relaxers. Mr. Ives was released on April 20, 2007 with permanent restrictions of: no lifting greater than 20 pounds, no sitting, walking or standing for extended periods of times, and ultimately Mr. Ives was placed in a light duty demand category. Mr. Ives vocational expert, Mike Dreiling, agreed that if the Court found these restrictions to be more credible and reflective of Mr. Ives physical abilities that Mr. Ives could be employable on the open labor market. (Dreiling dep page 32)

Mr. Ives contends that his surgery was not successful. He has continued pain in his back, has pain into his right and left legs and is required to do exercises before even getting out of bed in the mornings. Mr. Ives settled his case with the employer for 19% ppd to the body as a whole.

Mr. Ives' post 2006 Condition

Mr. Ives sold his truck following the 2006 back fusion. He looked for work in the construction industry as an inspector, or as a project manager but received no job offers. He also stated that he went to Missouri Vocational Rehabilitation to request training for a new industry, however was turned down based on his age alone.

After the 2006 injury, Mr. Ives and his wife operated a photography business. They traveled across the Kansas City Metropolitan area to find interesting places and things to photograph. (Ives dep page 43-44, 45) He would assist his wife with the driving and some of the photograph taking. She would then take the photos and create artwork with the photos. They performed the functions of this business 1-2 times per month, and sometimes more often. They operated this business for approximately 6 years. The purported income of that photography business of \$26,000 per year would be considered a viable income for an individual to be considered employment in the open labor market. (Dreiling dep page 43)

Currently, Mr. Ives has difficulty sitting or standing for long periods of time (Poppa dep page 41), however, he can walk for at least 30 minutes without stopping. He also says that he has a difficult time twisting, bending kneeling, and stooping. (Ives dep page 20) Despite those limitations, Mr. Ives was walking at least one mile per day for exercise, and swim at the YMCA in 2008. (Ives dep page 21) Mr. Dreiling was also aware that Mr. Ives was physically active with walking and swimming after the 2006 accident, but Dr. Poppa was not. (Dreiling dep page 40, Poppa p. 44) Mr. Ives indicated that he does not have any problems climbing stairs. (Ives dep p 20) Mr. Ives did not advised his expert witnesses that he needs to lie down during the day (Dreiling dep p. 45; Poppa dep. P. 41) however stated during his deposition that he does lie down during the day to help relieve the pressure in his back. (Ives dep page 63). Mike Dreiling indicated that lying down during the day is not an acceptable work practice. (Dreiling dep p 45-6) Dr. Poppa agreed that lying down during the day is not typically allowed by employers. (Poppa dep p 42) Mr. Ives postural limitations began after his 2006 injury. (Dreiling dep page 36)

Mr. Ives had to give up his hobbies of running and playing tennis after his 2006 accident. (Ives dep page 58) He no longer participates in household maintenance and is no longer able to work on his own cars. (Ives dep page 64)

Mr. Ives worked in 2007 for a few weeks in a marketing position, but purportedly stopped due to back pain. (Dreiling dep page 14) Mr. Ives also had an accident in 2008, and following that accident had to be on Hydrocodone for the pain. (Ives dep Tr. 53)

Despite the ongoing pain that Mr. Ives purports to have, he and his wife re-located to Costa Rica in 2009. There they are on a government provided medical plan, however he does not go to the doctor for any issues with his back. Moreover, he does not take prescription pain medication for back/leg pain either. He is currently able to swim, walk, and snorkel for recreation. He and his wife are very social, and get out regularly for dinner, church, and visits with friends. They also continue to be avid photographers, although no longer for money. He believes that exercise actually benefits him rather than causes him greater problems physically.

Although Mr. Ives would like to work, he does not feel like he can work any longer.

Mr. Dreiling agreed during his deposition if Dr. Amundson's restrictions are to be accepted then Mr. Ives would continue to be employable on the open labor market after 2006. (Dreiling dep. 47-48) He went on to say that Dr. Poppa placed restrictions on Mr. Ives, but did not distinguish which restrictions were to have been placed on Mr. Ives prior to 2006 versus after the 2006 injury. (Dreiling dep page 48)

Mr. Ives' is not retrainable to return to the open labor market because of his age considered alone. (Dreiling dep page 49) Mr. Ives was turned down for State Vocational Rehabilitation because of his age considered alone. (Dreiling dep page 20-21)

Essentially, Dreiling found that because of this man's age, and sit/stand restrictions provided by Dr. Poppa that Mr. Ives was unemployable on the open labor market. (Dreiling dep p 20) He went on to agree that there were no postural limitations on Mr. Ives prior to 2006. (Dreiling dep page 49)

FINDINGS

I find based on the credible evidence and the testimony presented, the Claimant has not met his burden of proof to establish Second Injury Fund liability. I make this finding to the extent that I find the Claimant is not permanently and totally disabled, nor that there were preexisting conditions which rise to the level of Second Injury Fund liability.

The Claimant has alleged that he is permanently and totally disabled from the combination of his last accident and his preexisting conditions. Total disability is defined as the inability to return to any employment and not merely to return to the employment in which the employee was engaged at the time of the accident. The term, "any employment" means "any reasonable or normal employment or occupation." Fletcher v. Second Injury Fund, 1992 S.W. 2d 402 (Mo.App. 1996.) It is not necessary that the individual be completely inert or inactive in order to meet the statutory definition of permanent total disability. It is necessary, however, that the employee be unable to compete in the open labor market. Searcy v. McDonald Douglas Aircraft, 894 S.W. 2d 1173 (Mo.App. 1995.)

Missouri courts have held that the test for determining permanent total disability is whether the individual was able to compete in the open labor market and whether an employer in the usual course of business would reasonably be expected to employ the employee in their present physical condition. Sullivan v. Masters Jackson Paving Company, 35 S.W. 3d 879 (Mo.App. S.D. 2001.)

In the case presented, I find Mr. Ives has not met his burden of proof there is permanent and total disability liability against the Second Injury Fund. Mr. Ives had a preexisting motor vehicle accident for

which minimal treatment was provided in 2001 and thereafter worked heavy labor for a period of years until his last accident. Mr. Ives testified to certain conditions of ill, which as highlighted previously, Mr. Ives did not make his examining experts aware, thereby calling into question the veracity of their opinions regarding disability. Further, Mr. Ives, after his 2006 accident, presented himself to vocational rehabilitation division for the State of Missouri and was turned down for retraining based on his advanced age alone, the degree of his physical disabilities never addressed. Mr. Dreiling, in his examination, took into account the Claimant's representation of his need to lie down on a daily basis, which is in no place a physical restriction by a physician but a lifestyle choice by the Claimant and opined that if the Claimant would need to lie down every day, it would not be consistent with open labor market employment.

The Claimant testified post-accident behavior after his 2006 injuries, represented activities of gainful employment, in conjunction with he and his wife's business of photography for a period of time until their relocation to Costa Rica. The Claimant testified he continues to enjoy an active lifestyle, both physically and socially, and that he and his wife continue with their photography pursuits, although currently not for income. Claimant testified after he and his wife relocated to Costa Rica in 2009, he does not go to the doctor for any issues regarding his back. Mr. Ives further testified he does not take prescription medication for pain and is currently able to swim, walk over a mile per day and snorkel for recreation. Claimant testified he and his wife were very social and are out and about regularly with friends and acquaintances. Mr. Ives' case is not one where the work he had been performing with his wife post-accident was highly accommodated but was rather representative of the employment on the open labor market.

I find, therefore, that based on the Claimant's testimony and that of the combined experts, that Mr. Ives is not permanently and totally disabled and the proof being of his continued employment six years post 2006 injury is sufficient and competent evidence to determine that Mr. Ives is neither permanently and totally disabled, nor is he unemployable on the open labor market.

For the reasons set forth above, I find the Claimant is entitled to no Second Injury Fund benefits.

Made by: _____
Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation