

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

Injury No.: 01-014020

Employee: William Kempker
Employer: ABB T & D
Insurer: Self-Insured
c/o Gallagher Bassett
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: February 24, 2001
Place and County of Accident: Jefferson City, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 21, 2006. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued February 21, 2006, 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 23rd day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: William Kempker

Injury No. 01-014020

Dependents:

Employer: ABB T & D

Additional Party: Second Injury Fund

Insurer: Self-insured c/o Gallagher Bassett

Hearing Date: January 4, 2006

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

Checked by: HDF/cs

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?
4. Date of accident or onset of occupational disease: February 24, 2001.
5. State location where accident occurred or occupational disease was contracted: Jefferson City, MO.
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:
(see award).
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, body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability awarded.
15. Compensation paid to-date for temporary disability: \$41,997.20.
16. Value necessary medical aid paid to date by employer/insurer? \$75,476.75.
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate: \$599.96 ttd and tpd/\$314.26 ppd.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

Permanent total disability benefits from Employer beginning September 21, 2002, for Claimant's lifetime (through 2/16/06 = 177.71 weeks x \$599.96 = \$106,618.89

22. Second Injury Fund liability: No.

TOTAL: \$106,618.89

23. Future requirements awarded: Permanent total disability benefits from 9-21-02, ongoing.

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:

Evan Beatty

FINDINGS OF FACT and RULINGS OF LAW:

Employee: William Kempker

Injury No: 01-014020

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: ABB T & D

Additional Party Second Injury Fund

Insurer: Self-insured c/o Gallagher Bassett

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on January 4, 2006. Memoranda were submitted by February 15, 2006.

The parties stipulated that on or about the 24th day of February, 2001, the claimant was in the employment of ABB Power T & D; the claimant sustained an injury by accident; the accident arose out

of and in the course of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was self-insured by Gallagher Bassett; the employer had notice of the injury. A claim for compensation was filed within the time prescribed by law; the rate of compensation on the date of accident was \$599.96 per week for temporary total and permanent total disability benefits, \$314.26 per week for permanent partial disability benefits; temporary total disability benefits have been provided to the claimant to date in the amount of \$41,997.20, those payments representing 70 weeks of benefits, through September 20, 2002; medical aid has been provided in the amount of \$75,476.75.

The issues to be resolved by hearing include 1) the nature and extent of permanent disability (permanent total disability is alleged as of September 21, 2002), 2) the liability of the Second Injury Fund, and 3) the liability of the employer/insurer for future medical expenses.

FINDINGS OF FACT

The claimant, William Kempker, was 49 years old as of the date of hearing. Mr. Kempker graduated from high school in 1974 and began working for ABB Power Tool and Die (ABB) in 1977 or 1978.

On February 24, 2001, Mr. Kempker was running a high-voltage machine for a coil winding job and as he was pulling on a copper strap he felt a sharp pain in his back and a loss of control in his legs.

The next morning, Mr. Kempker sought medical treatment for his back pain with Dr. Cooper.

In October of 2001, Mr. Kempker had a decompression laminectomy and a fusion at L4-5 performed by Dr. Abernathie. Mr. Kempker improved after surgery until he had an increase in back pain during physical therapy. Dr. Abernathie operated on Mr. Kempker again on April 10, 2002, fusing at the L5-6 and L5-S1 levels. Thereafter, Mr. Kempker's pain increased.

Currently, Mr. Kempker takes a variety of medications including hydrocodone, Gabapentin, Skelaxin, Tizanidine, Prevacid, Maalox, a diuretic, Flomax and Ambien. These medications have been prescribed by Dr. Dudenhoeffer.

Prior injuries and medical procedures sustained by Mr. Kempker include a 1978 right knee injury, a right carpal tunnel surgery and right ganglion cyst surgery and hernia surgery. The right knee injury has not affected Mr. Kempker's ability to bend or stoop, the right hand injuries have caused Mr. Kempker's right hand to cramp occasionally and to fatigue more readily and the hernia surgery has left Mr. Kempker with a pulling sensation at the incision site.

Mr. Kempker admitted to seeking medical treatment in 1994, 1995, 1996 and 1997 for back strains.

Currently, Mr. Kempker complains of burning, stabbing pain in his back, sometimes extending into the left leg. Mr. Kempker can sit or stand alternately for about 20 minutes at a time. Mr. Kempker uses a power chair or a cane or a walker to assist him in mobility. Mr. Kempker no longer hunts or cuts wood, activities in which he used to engage prior to his 2001 injury.

Dr. Dennis Abernathie of the Columbia Orthopaedic Group, LLC, opined in a November 20, 2002 letter that Mr. Kempker has a 20-percent permanent partial disability. Dr. Abernathie recommended that, due to Mr. Kempker's physical condition, "he not lift over five pounds and that he sit, stand, and walk intermittently."

Delores E. Gonzalez, vocational rehabilitation counselor, testified by deposition that she evaluated Mr. Kempker at the request of his counsel. Ms. Gonzalez opined that Mr. Kempker's residual functional capacity is "less than sedentary which does not exist on the open labor market." Ms. Gonzalez found Mr. Kempker to be "unable to compete in a regular job market" based "on the fact that he is unable to do any prolonged sitting, standing or walking . . . It's necessary for him to rest by sitting at least 15 to 20 minutes every hour in a recliner with his feet up . . . to take the pressure off his low back." Ms. Gonzalez stated that Mr. Kempker's unemployable status is the result of "a combination of all of his problems, all of his disabilities." Ms. Gonzalez referred specifically to injuries to the "right upper extremity, including the elbow," the injuries to the back, a knuckle injury and a knee injury as injuries resulting in Mr. Kempker's "residual functional capacity." Ms. Gonzalez opined that Mr. Kempker's restrictions as the result of his carpal tunnel symptoms would be a hindrance in obtaining employment because of his inability to do repetitive hand-finger actions required in most

unskilled jobs.

However, Ms. Gonzalez later stated that it is Mr. Kempker's need to sit in his recliner every hour that causes him to be unemployable.

Dr. David Volarich, osteopathic physician, testified by deposition that he evaluated Mr. Kempker on August 27, 2003. Dr. Volarich found Mr. Kempker to have a 35-percent permanent partial disability of the right wrist attributable to carpal tunnel syndrome and ganglion cyst excision and 15-percent permanent partial disability of the right elbow attributable to mild cubital tunnel syndrome, as the result of a February 19, 1999 injury. With regard to a March 9, 2000 injury sustained by Mr. Kempker, Dr. Volarich rated disability as 10 percent of the body attributable to the hernia and an additional 20 percent of the body attributable to the lumbar spine for, among other things, aggravation of degenerative disk disease. Dr. Volarich opined that Mr. Kempker's February 24, 2001 accident resulted in a permanent disability of 65 percent of the body referable to the lumbar spine, specifically the lowest two levels of the lumbar spine.

With regard to injuries prior to February 19, 1999, Dr. Volarich opined to 20 percent of the right knee for a patellar fracture and five percent of the right hand due to a laceration of the right long finger. Dr. Volarich found Mr. Kempker's back to be asymptomatic prior February 19, 1999, and assigned no permanent disability to Mr. Kempker's back prior to 1999.

Dr. Volarich found Mr. Kempker to be permanently and totally disabled as the result of all of his injuries through February 24, 2001.

Dr. Volarich's restrictions pertaining to Mr. Kempker's low back as described in his report are:

- 1) He is advised to limit repetitive bending, twisting, lifting, pushing, pulling carrying, climbing and other similar tasks to an as needed basis.
- 2) He should not handle any weight greater than 10 pounds, and limit his task to an occasional basis assuming proper lifting techniques.
- 3) He should not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain.
- 4) He is advised to avoid remaining in a fixed position for any more than about 15-20 minutes at a time including both sitting and standing.
- 5) He should change positions frequently to maximize comfort and rest when needed.
- 6) He is advised to pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking, or swimming to tolerance daily.

APPLICABLE LAW

Questions of the nature, extent, and permanency of disabilities following physical injury must be decided based on expert medical evidence. Knapp v. Missouri Local Government Employee's Retirement System, 738 S.W.2d 903, 914 (Mo. Ct. App. 1987). Expert medical evidence is necessary in order to prove the extent of disability. Plaster v. Dayco Corp., 760 S.W.2d 911, 913 (Mo. Ct. App. 1988); Griggs v. A.B. Chance Co., 503 S.W.2d 697, 704-705 (Mo. Ct. App. 1973).

The Second Injury Fund is a creature of statute, and benefits from the Second Injury Fund are awarded only if employee proves that under Section 287.220.1 RSMo., he is entitled to such benefits. Employee has the burden of proving all essential elements of his workers' compensation claim. Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 793 (Mo. App. S.D. 1992). Second Injury Fund liability exists only if employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sums of disabilities. Section 287.220.1 RSMo. 2000; Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576 (Mo. App. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. Brown vs. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990).

In order to find permanent total disability against the Second Injury Fund, it is necessary that employee suffer from a permanent partial disability as the result of the last compensable injury, and that

disability has combined with a prior permanent partial disability to result in total disability. Section 287.220.1 RSMo. 1994, Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990), Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576 (Mo. App. 1985).

Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work-related injury.

Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992) (emphasis added). In determining the extent of disability attributable to the employer and the Second Injury Fund, an administrative law judge must determine the extent of the compensable injury first. Roller v. Treasurer of the State of Mo., 935 S.W.2d 739, 742-43 (Mo. App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

Section 287.140.1, RSMo., provides, in part, "In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Evidence must demonstrate that future medical care required flows from the accident in order to hold an employer liable for benefits. Mickey v. CityWide Maintenance, 996 S.W.2d 144, 149 (Mo. App. 1999). An employer is not responsible for compensation for future medical care unless the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury, even if the treatment will also provide a benefit to a non-compensable condition. Bowers v. Hiland Dairy Co., 2006 Mo. App. LEXIS 113 (Mo. Ct. App. 2006), citing Landers v. Chrysler Corp., 963 S.W.2d 275, 283 (Mo. App. 1997); Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 888-89 (Mo. App. 2001). While it is irrelevant that medical treatment may have benefited pre-existing conditions, the need must flow from the work injury which is the initial basis for the claim. Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 269 (Mo. App. 2004). Otherwise, the employer is held responsible for a causation other than the injury in his workplace. Bowers v. Hiland Dairy Co., 2006 Mo. App. LEXIS 113 (Mo. Ct. App. 2006).

AWARD

The claimant, William Kempker, has sustained his burden of proof that he is permanently and totally disabled. Mr. Kempker's testimony is supported by the medical records as well as the testimonies of Dr. Volarich and Ms. Gonzalez. I find that it is Mr. Kempker's injury to his back as the result of his accident of February 24, 2001, which has caused Mr. Kempker's permanent and total disability. While Mr. Kempker has sustained injuries prior to February 24, 2001, which resulted in permanent disability, it is the sequelae of his February 24, 2001 back injury which have caused him to be unemployable in the open labor market.

The claimant, William Kempker, has failed to sustain his burden of proof that the Second Injury Fund is liable for benefits. As noted in the preceding paragraph, the evidence supports a finding that Mr. Kempker is permanently and totally disabled as the result of his back injury of February 24, 2001.

Finally, Mr. Kempker has failed to sustain his burden of proof that he is entitled to future medical expenses. While Mr. Kempker listed numerous medications which he takes currently, it was not clear why he was taking each medication. Furthermore, no physician described or explained the medications which Mr. Kempker should be taking to cure or relieve the effects of the February 24, 2001 injury.

Date: February 21, 2006

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret

Patricia "Pat" Secret, *Director*
Division of Workers' Compensation