

FINAL AWARD DENYING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 09-065400

Employee: Danny L. Mackey
Employer: Superior Cartage, Inc. (Settled)
Insurer: Great West Casualty Co. (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 reverses the award and decision of the administrative law judge.

Introduction

The issues stipulated in dispute at the hearing were: (1) whether jurisdiction is proper in Missouri; and (2) Second Injury Fund liability for permanent total disability.

The administrative law judge determined that employee is permanently and totally disabled owing to a combination of his preexisting disabling conditions and employee's disability resulting from the last injury.

The Second Injury Fund filed an Application for Review alleging the administrative law judge erred because the overwhelming weight of the evidence supports a finding that employee is permanently and totally disabled based on the residuals of his primary work injury considered alone and in isolation.

We reverse the award of the administrative law judge for the reasons set forth herein.

Findings of Fact

On August 10, 2009, while lifting a mattress in the course of his work for employer, employee suffered a low back injury that resulted in a disk herniation at L4-5. Employee underwent laminectomy at L2, L3, L4, and L5, a right-sided L4-5 diskectomy, and a follow-up surgery to remove a blood clot. Employee settled his claim with employer for 23.5% permanent partial disability of the body as a whole referable to the lumbar spine.

The evidence reveals that employee suffers considerable disability as a result of the primary August 2009 low back injury. Employee testified (and we so find) that the primary injury resulted in the following residuals: employee suffers from unrelenting severe low back pain which he manages with Vicodin every 5 hours and by reclining on a daily basis, is unable to maintain a normal sleep pattern, ambulates with a cane and cannot walk more than five or ten minutes without needing to sit down or rest, and can no longer engage in his past hobbies such as fishing, golf, swimming, or riding motorcycles.

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At the time of the primary injury, employee suffered from a significant preexisting left shoulder injury that resulted in chronic pain, loss of strength, and reduced range of motion. Employee filed a workers' compensation claim in connection with that injury, which he settled for 56% permanent partial disability of the left shoulder.

In support of his claim against the Second Injury Fund, employee provided the expert medical testimony of Dr. James Stuckmeyer and the expert vocational testimony of Mary Titterington; both offered the ultimate opinion that employee is permanently and totally disabled due to a combination of the primary injury and preexisting left shoulder condition. But on cross-examination by the Second Injury Fund, Dr. Stuckmeyer agreed that the bulk of the considerable physical restrictions he assigned to employee correspond to the primary low back injury. Those restrictions include no prolonged standing, no prolonged walking, no repetitive stair climbing, no repetitive bending at the waist, and no lifting greater than five to ten pounds from the waist to the shoulder. (We note that Dr. Stuckmeyer urged the caveat that the lifting restriction should also be considered as partially owing to employee's preexisting left shoulder condition). Also on cross-examination, Dr. Stuckmeyer agreed that the restrictions he assigned for the back would relegate employee to extremely sedentary work, and that he would not be surprised if employee had to lie down frequently as a result of his back condition following the primary injury.

We believe Ms. Titterington's ultimate opinion was also significantly diminished on cross-examination by the Second Injury Fund. Specifically, Ms. Titterington agreed that employee's postural limitations and need to lie down (problems related to employee's primary low back injury) render him "unemployable." See *Transcript*, page 696.

After careful review and consideration, it appears to us that the ultimate opinions from both Dr. Stuckmeyer and Ms. Titterington are not in keeping with the considerable concessions obtained by the Second Injury Fund on cross-examination. We do find Dr. Stuckmeyer and Ms. Titterington credible to the extent that we are convinced by their testimony that employee is permanently and totally disabled. But especially in light of employee's own testimony, which emphasized the effects of the primary low back injury as the source of his most significant limitations, such as the need to lie down multiple times per day, ambulate with a cane and only for very short distances, and use narcotic medications every few hours to manage his pain, we do not find credible the testimony from either expert that employee's permanent total disability is owing to a combination of the primary injury and his preexisting conditions of ill.

Conclusions of Law

The only issue before the Commission is the liability of the Second Injury Fund for permanent total disability benefits. Section 287.220.1 RSMo creates the Second Injury Fund and provides, in relevant part, as follows:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, ... the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself;

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except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

The administrative law judge failed to apply the analysis mandated by the foregoing language in that she did not resolve the extent of employer's liability for the last injury considered alone and of itself before she considered employee's preexisting disabling conditions. Instead, she recited Dr. Stuckmeyer's opinion, noted the settlement of the primary injury with employer, and found the Second Injury Fund liable for permanent total disability benefits.

The evidence certainly demonstrates (and we have found) that employee suffered from a significant preexisting shoulder injury that left him with some chronic pain and limitations. But the Missouri cases consistently instruct that employee's preexisting conditions are irrelevant until we determine the extent of employer's liability for the primary injury considered alone and in isolation:

When determining whether the Fund has any liability, the Commission must first determine the degree of disability from the last injury considered alone. **Preexisting disabilities are irrelevant until this determination is made.** If the last injury in and of itself rendered the claimant permanently and totally disabled, then the Fund has no liability and the employer is responsible for all compensation.

Mihalevich Concrete Constr. v. Davidson, 233 S.W.3d 747, 754 (Mo. App. 2007) (citations omitted) (emphasis added).

We have found Dr. Stuckmeyer and Mary Titterington's ultimate opinions as to the reason for employee's permanent total disability lacking in credibility. We reached this determination after a careful weighing and consideration of the testimony from both experts, including the significant concessions obtained by the Second Injury Fund on cross-examination. It appears to us that both experts failed to consider the effects of the work injury in isolation when they rendered their ultimate opinions. We have also carefully weighed and considered employee's own testimony, in which he emphasized the effects of the primary low back injury as the dominant factor in restricting his physical activities.

The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work.

Dunn v. Treasurer of Mo. As Custodian of Second Injury Fund, 272 S.W.3d 267, 272 (Mo. App. 2008) (citations omitted).

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In light of our findings as to the effects of the work injury and our determination that Dr. Stuckmeyer and Ms. Titterington's ultimate opinions lack credibility, we conclude that the effects of the primary injury, considered alone and in isolation, render employee permanently and totally disabled.

It follows that the Second Injury Fund has no liability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Accordingly, we must deny employee's claim against the Second Injury Fund.

Conclusion

We reverse the award of the administrative law judge. Employee's claim against the Second Injury Fund is denied.

The award and decision of Administrative Law Judge Paula A. McKeon, issued December 12, 2011, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 31st day of May 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Danny L. Mackey

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced employee met his burden of proof on the issue of Second Injury Fund liability.

The only expert testimony in this case is unanimous on the question of Second Injury Fund liability, but the majority has chosen to reject that testimony in favor of a result that I believe is unsupported by the record before us. I disagree because I am convinced the best evidence demonstrates that employee is permanently and totally disabled owing to the effects of the primary injury in combination with his preexisting conditions of ill.

Employee provided expert testimony from Dr. Stuckmeyer and Mary Titterington in support of his claim against the Second Injury Fund. Dr. Stuckmeyer does not believe employee's low back injury, considered in isolation, results in permanent total disability. Instead, he opined that it results in a 35% permanent partial disability of the body as a whole referable to the lumbar spine. Dr. Stuckmeyer examined employee's left shoulder and noted employee's ongoing complaints of chronic pain and considerable difficulty with lifting, pushing, pulling, reaching, and overhead work. Dr. Stuckmeyer opined that employee suffers from persistent tenderness in the subacromial space and glenohumeral joint, and that employee lacks 10 degrees of external rotation owing to his preexisting left shoulder condition. Dr. Stuckmeyer also noted a persistent positive impingement sign and weakness in the left shoulder. Dr. Stuckmeyer opined that employee is permanently and totally disabled owing to a combination of the effects of the primary injury and his preexisting conditions of ill. Mary Titterington, the expert most qualified in this case to opine as to employee's ability to compete in the open labor market, agrees with Dr. Stuckmeyer.

The majority chose to credit certain of these experts' findings but reject their ultimate opinions. I disagree with this approach, which strikes me as an impermissible substitution of the lay opinions of the majority for the qualified testimony from the experts. I find the unanimous opinions from both Dr. Stuckmeyer and Ms. Titterington to be most credible. I am convinced that the reason for employee's permanent and total disability is the combination of the effects of the primary injury and his preexisting left shoulder condition.

I would affirm the award of the administrative law judge with a supplemental opinion providing the appropriate analysis for purposes of Second Injury Fund liability. Because the majority has determined otherwise, I respectfully dissent from the decision of the Commission.

Curtis E. Chick, Jr., Member

FINAL AWARD AS TO THE SECOND INJURY FUND

Employee: Danny L. Mackey Injury No. 09-065400
Dependents: N/A
Employer: Superior Cartage, Inc. (Settled)
Insurer: Great West Casualty Co. (Settled)
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: October 24, 2011 Checked by: PAM/cy

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: August 10, 2009
5. State location where accident occurred or occupational disease was contracted: Overland Park, Kansas; Employee was dispatched from North Kansas City, Clay County, 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 claimed 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: Mackey was loading furniture onto the truck and injured his back.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Lower back and whole body.
14. Nature and extent of any permanent disability: 23.5% permanent partial disability body as a whole.
15. Compensation paid to date for temporary disability: N/A
16. Value necessary medical aid paid to date by Employer/insurer? N/A
17. Value necessary medical aid not furnished by Employer/insurer? N/A
18. Employee's average weekly wages: \$726.44 per stipulation
19. Weekly compensation rate: \$484.32/\$422.97
20. Method wages computation: Stipulated and agreed by the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A
22. Second Injury Fund Liability: Yes
Permanent total disability benefits beginning August 10, 2009 weekly differential of \$61.35 per week for 94 weeks and \$484.32 per week thereafter.
23. Future requirements awarded: N/A

Said payments to begin immediately 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant: Douglass F. Noland.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Danny L. Mackey Injury No. 09-065400
Dependents: N/A
Employer: Superior Cartage, Inc. (Settled)
Insurer: Great West Casualty Co. (Settled)
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: October 24, 2011 Checked by: PAM/cy

On October 24, 2011 the employee and the Missouri Treasurer as Custodian of the Second Injury Fund appeared for a final hearing. The employee, Danny L. Mackey, appeared in person and with attorney, Douglass F. Noland. The Second Injury Fund appeared through Assistant Attorney General Kimberley R. Fournier. The Division had jurisdiction to hear this case pursuant to §287.110.

STIPULATIONS

The parties stipulated to the following:

1. That on or about August 10, 2009, Superior Cartage, Inc. was an employer operating subject to Missouri Workers' Compensation law with its liability fully self-insured;
2. Danny L. Mackey was its employee working subject to the law in Missouri;
3. Danny L. Mackey notified Superior Cartage, Inc. of his alleged injury and filed his claim within the time allowed by law;
4. Danny L. Mackey had an average weekly wage of \$726.44 resulting in a compensation rate of \$484.32/\$422.97.

ISSUE

The parties requested the Division to determine:

- 1) The liability, if any, of the Second Injury Fund for permanent partial disability benefits or permanent total disability benefits.

FINDINGS OF FACT and RULINGS OF LAW

Danny Mackey is a 56-year-old white male who lives in Lowry City, Missouri. Mackey is single and has no dependents. He graduated from Winnetonka High School in 1974, then went into the United States Air Force from 1974-1978. After his military service, Mackey took several college courses, however, did not complete a degree.

Mackey's last job on the open labor market was with Superior Cartage as a city driver. Mackey's job duties with Superior Cartage required him to drop, hook and pin 18-wheel tractor trailers, to load and unload freight, including items that weighed fifty-plus pounds daily and drive a local route that took him all over the Kansas City metropolitan area. Prior to working for Superior Cartage, Mackey worked for other employers in the truck driving industry which included both driving trucks as well as instructing at the Swift Driving Academy. He has also done some custodial work in the past.

In 2004, Mackey was working as a truck driver for MoKan Distribution when he slipped and fell on ice in the driveway, injuring his left shoulder. He underwent two surgeries on the left shoulder and settled his claim with the employer. Following that accident, he indicated that he had pain when lifting overhead. Mackey did indicate that despite the ongoing pain in the shoulder, he was able to drive his truck, perform the lifting and loading tasks that he was assigned and was able to drop, hook and pin his trailer to his tractor. He had difficulty with steering and shifting while driving his truck after his left shoulder injury. Mackey was under no permanent restriction from any physician for the use of his left arm following that accident.

Mackey also injured his low back prior to 2009 and underwent surgical repair for that injury. Mackey had no ongoing problems following the prior low back surgery.

On August 10, 2009, Mackey was dispatched to Overland Park, Kansas to a residence to pick up freight. Mackey felt something pull and pop in his low back while maneuvering a mattress and box springs. Mackey took his truck back to the office in North Kansas City and went home for the day. Mackey sought medical treatment and was determined to have a ruptured disc. Dr. Gall performed laminectomies at L1, L2, L4 and L5, as well as a right L4-5 discectomy on Mackey. Following the surgery, it was discovered Mackey had a blood clot and excessive fluid build-up in his back. Mackey again underwent surgery to remove the clot and drain fluid. Mackey was released from treatment in February 2010.

Dr. Stuckmeyer evaluated Mackey and placed the following restrictions on him: no prolonged standing, no prolonged walking, no repetitive stair climbing, no repetitive bending at the waist, no lifting greater than 5 to 10 pounds from waist to shoulder. Dr. Stuckmeyer assigned the bulk of these restrictions to Mackey's back injury. Dr. Stuckmeyer opined that these restrictions placed Mackey in the "extremely" sedentary category. Dr. Stuckmeyer opined that Mackey had a 35% permanent partial disability to his lumbar spine from the August 2009 injury. Mackey settled his 2009 claim with the

employer for 23.5% permanent partial disability body as a whole.

Dr. Stuckmeyer testified that he examined Mackey's left shoulder and Mackey complained to him of chronic left shoulder problems, difficulty with overhead function and difficulty with pushing, pulling, lifting and reaching. Mackey had persistent tenderness in the subacromial space, as well as the glenohumeral joint. He had full abduction and full forward flexion, but he lacked 10 degrees of external rotation and could internally rotate to L3. He did have a persistently positive impingement sign and weakness with resisted abduction. He further testified that Mr. Mackey had received a prior 56% disability to his left shoulder.

Dr. Stuckmeyer testified, as a result of the significant spinal injury and lumbar condition sustained by Mackey in August 2009, in conjunction and combination with the significant prior disability of the left shoulder, Mackey would be deemed permanently and totally disabled.

Mary Titterington, vocational expert, testified that there is no expectation that any employer would be willing to hire Mackey for any job as it is customarily performed in the open labor market and he is unemployable. Titterington considered medical records, reports, interviews and testing results in reaching that conclusion. She testified that Mackey is unable to compete in the open job market and he has an inability to return to any type of reasonable or normal employment.

Mackey currently takes vicodin once approximately every five hours. Mackey has constant pain in his low back, both of his legs, is unable to move his toes and has anxiety and depression. Mackey has severe limitations on his functioning. He is unable to sit for longer than 10 – 15 minutes, stand for longer than 10 – 15 minutes, can only walk for a few minutes and can lift nothing. He needs recline on a daily basis due to his back pain. Mackey uses a cane to walk due to the pain, numbness, tingling and instability in his right leg. Mackey has disturbed sleep.

Mackey claims that he is permanently totally disabled. Chatmon v. St. Charles County Ambulance District, 555 S.W. 3d 451 (Mo.App. 2001) outlines the basis for permanent total disability.

“Total disability” means inability to return to any employment and not merely... inability to return to the employment in which the employee was engaged at the time of the accident.” §287.020.7 (RSMo. 2000). “The test for permanent total disability is a worker's ability to compete in the open labor market and that it measures the worker's potential for returning to employment.” Sutton v. Vee Jay Cement Contracting Company, 37 S.W. 3d 803 (Mo.App. 2000.) “The critical question then becomes whether any employer in the usual course of employment

would reasonably be expected to hire this employee in his or her present physical condition.” Reese v. Gary and Roger Link, Inc., 5 S.W. 3d 522, 526 (Mo.App. 1999.)

The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri-State Motor Transit Co., 908 S.W. 2d 849, 853 (Mo.App. 1995) and Kowalski v. M-G Metals and Sales, Inc.

There is substantial evidence to support Mackey’s claim of permanent total disability. Dr. Stuckmeyer finds him permanently and totally disabled. Ms. Titterington, the vocational expert, testified that no employer would reasonably be expected to hire Mackey in his present condition for any job as it is customarily performed in the open labor market.

I find Mackey to be permanently totally disabled.

Since I have determined Mackey to be permanently totally disabled, the next question is whether Mackey is permanently totally disabled due to the accident or from a combination of preexisting disabilities.

In order to establish Second Injury Fund liability for permanent total disability benefits, Mackey must prove the following:

- 1) That he has a permanent disability predating the compensable work-related injury;
- 2) That he has permanent disability predating the compensable work-related injury which is of “such seriousness as to constitute a hindrance or obstacle to employment or to obtain re-employment if the employee becomes unemployable” §287.220.1 RSMo; Garribay v. Treasurer, 930 S.W. 2d 57 (Mo.App. 1996); Rose v. Treasurer, 899 S.W. 563 (Mo.App. 1995); Leutizinger v. Treasurer, 895 S.W. 2d 591;
- 3) That the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained results in permanent total disability. Boring v. Treasurer, 947 S.W. 2d 483 (Mo.App. 1997); Reiner v. Treasurer, 837 S.W. 2d 152 (Mo.App. 1994.)

Mackey has met the first test for establishing Second Injury Fund liability.

Mackey has also met the second test for establishing Second Injury Fund liability. Dr. Stuckmeyer testified that Mackey’s prior left shoulder injury was a significant hindrance or obstacle to employment. Despite the lack of permanent restrictions from the left shoulder injury, Mackey testified his left shoulder caused chronic soreness, difficulty

with overhead work, pulling, pushing and reaching. While it is clear the bulk of Mackey's complaints and restrictions are from the last accident, it does not minimize the significance and severity of his preexisting shoulder injury.

Dr. Stuckmeyer opines Mackey is unable to work due to the combined effects of his injuries. Therefore, I find Mackey's permanent total disability was the result of a combination of his preexisting disability and Mackey's disability from the last injury. I find the Second Injury Fund liable for permanent total disability benefits.

Based on the evidence, I find that Mackey's disability became permanent August 10, 2009. The employer/insurer paid Mackey 23.5% permanent partial disability at the rate of \$422.97 for 94 weeks beginning August 10, 2009. The Second Injury Fund is liable for \$61.35 per week for the 94 weeks and \$484.32 per week thereafter. The Second Injury Fund shall remain liable for such benefits as long as Mackey remains so disabled and entitled to benefits pursuant to law.

The compensation awarded to Mackey shall be subject to a lien in the amount of 25% of all payments hereunder in favor of Douglas F. Noland for necessary legal services rendered.

Made by: _____
Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation