

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

Injury No.: 09-002711

Employee: Alfred Mallot
Employer: Lafayette County, Missouri (Settled)
Insurer: Missouri Association of Counties (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 29, 2011. The award and decision of Administrative Law Judge Lisa Meiners, issued November 29, 2011, 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 22nd day of May 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD As to the Second Injury Fund Only

Employee: Alfred Mallot Injury No. 09-002711
Dependents: N/A
Employer: Lafayette County, Missouri
Insurer: Missouri Association of Counties
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: October 7, 2011 Checked by: LM/pd

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: January 6, 2009
5. State location where accident occurred or occupational disease was contracted: Lexington, Lafayette 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? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was loading pipe when he tripped resulting in injury to his low back.
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: Low back
14. Nature and extent of any permanent disability: Previously settled with the Employer for 12.5 percent of the body as a whole
15. Compensation paid to-date for temporary disability: \$5,461.22
16. Value necessary medical aid paid to date by employer/insurer? \$12,347.58
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$480.00
19. Weekly compensation rate: \$320.00/\$320.00
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Second Injury Fund liability:
22. Second Injury Fund liability: Weekly differential payable by Second Injury Fund of \$0 for 50 weeks beginning May 7, 2009, and thereafter at \$320 per week for Claimant's lifetime.
23. Future requirements awarded: Said payments to be brought up to date as of the date of this 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Mr. Scott Mach

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Alfred Mallot Injury No. 09-002711
Dependents: N/A
Employer: Lafayette County, Missouri
Insurer: Missouri Association of Counties
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: October 7, 2011 Checked by: LM/pd

On October 7, 2011, the Employer and the Second Injury Fund appeared for final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110 RSMo. The Employee, Alfred Mallot, appeared in person and with counsel, Scott W. Mach. The Second Injury Fund appeared through Assistant Attorney General Maureen Shine. There was no appearance on behalf of the Employer/Insurer as the claim between the Employer and the Employee was previously settled.

The primary issue the parties requested the Division to determine was whether the Second Injury Fund is liable to Mr. Mallot for any disability compensation, either permanent partial or permanent total. For the reasons noted below, I find that Mr. Mallot is permanently and usually disabled following the January 6, 2009 work accident as a result of a combination of his pre-existing disabilities and the residuals attributed to the January 6, 2009 accident and that Mr. Mallot's permanent total disability rate is \$320 per week by agreement of the parties.

STIPULATIONS

The parties stipulated to the following:

- 1) that Missouri has jurisdiction to hear this claim under the Missouri Worker's Compensation Act;
- 2) that on or about January 6, 2009, Lafayette County was an employer operating subject to Missouri's worker's compensation law, and that its liability under the Worker's Compensation Act was fully insured by Missouri Association of Counties;
- 3) that Mr. Mallot was an employee working subject to the law in Lexington, Lafayette County, Missouri;
- 4) that Mr. Mallot sustained an injury by accident within the course and scope of his employment with the employer on January 6, 2009;
- 5) that Mr. Mallot notified the employer of his alleged injury and filed his claim within the time allowed by law;

- 6) that Employer provided Mr. Mallot with medical care equal to \$12,347.58;
- 7) that Mr. Mallot's average weekly wage was \$480 per week, rendering a compensation rate of \$320 for permanent partial or permanent total disability; and
- 8) that the claim between the employee and employer was settled for twelve and a half (12.5) percent permanent partial disability to the body as a whole.

ISSUES

The issues to be determined by this Court are as follows: Whether the Second Injury Fund is liable to Mr. Mallot for disability compensation.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the evidence presented and testimony of the Employee, I make the following findings:

Alfred Mallot (hereinafter referred to as Employee) was born on January 9, 1954, and at the time of the hearing was 57 years old.

The highest level of formal education completed by him was the ninth grade at Wellington Missouri High School. Employee obtained a GED in approximately 2005. He suffered from behavioral and learning disability problems as a youth and believes he was held back in Kindergarten. He testified that he was diagnosed with some sort of learning disability and had difficulty filling out job applications. He even had difficulty writing checks. He testified that his wife would help him fill out various forms and that he had limitations in reading and in math.

Employee testified that he had a history in the military with two stints, one in the Army beginning in approximately 1975, and again in the Reserves from 1986-2006. His job in the military was heavy equipment operator wherein he received on-the-job training. He also served as a cook. Employee's job history is set out at length in Claimant's Exhibit C - Deposition of Mary Titterington, a Vocational Expert. Generally, Employee did work driving a dump truck, heavy farm labor, and asphalt and concrete work. He further testified that he served as a truck mechanic and worked on heavy equipment. He owned his own garage in approximately the mid 1980s. He also performed heavy work as a landscape laborer and worked on the Road and Bridge Crew for Lafayette County where he had his last injury on January 6, 2009. Employee testified that he has had no employment since the accident date of January 6, 2009.

Regarding prior injuries, Employee testified about an injury to his low back in 1994. He was treated at North Kansas City Hospital. However, there are no records available for that hospital stay. He testified that he was off work for a year and that he had a course of epidurals because of the injury to his low back. He testified that he had to "work around" the low back injury for the rest of his working career.

In 2002, Employee amputated his right great toe while mowing. He testified that he could not stand for long periods of time following that injury. He could not walk very far and he had permanent problems with standing relating to that injury.

Employee further testified about two injuries to his left shoulder. He first injured his left shoulder in 2003 when he suffered a partial tear of the rotator cuff while working with railroad ties in his driveway. He reinjured the left shoulder in 2005 while working for Tandem Paving. When he was released from treatment after that injury, he testified that he could no longer perform the heavy work of a paving contractor. He then changed to a machine operator with Terraspec, and later worked for the Road and Bridge Crew of Lafayette County from approximately August 2007 until several days after his last injury on January 6, 2009. After his release from his injury with the Road Crew he could not return to work because of restrictions. Employee testified that he is currently on Social Security disability.

The left shoulder injury in 2005 left Employee with a 6 cm tear in the left shoulder. That injury resulted in a major shoulder surgery. Following his release from medical care, Employee could not lift overhead with the shoulder, nor could he push and/or pull. He further testified that he was limited in his reach with the left arm. He lacked strength in the shoulder and testified about several things his coworkers would help him with, even while working for the Lafayette Road Crew. He indicated that his coworkers would pick up the slack for him when he could not lift with the shoulder.

When asked what he can do now, he testified that he will tinker in the yard or attempt to work on small engines. He has to lie down to weed his garden. He testified that he can do light household chores such as washing dishes. He drives short distances in his pickup truck. He also testified that he has difficulty hearing. His hearing problems were diagnosed in 2003 as a 40 percent hearing loss attributed to his military career.

On cross examination Employee testified that he has not had surgery since the shoulder surgery following the 2005 shoulder injury. He testified that his back would hurt following activity after the 1994 injury to his low back. He also testified that he needed help to obtain his GED and had the questions read to him when he passed the driving test. Almost all of his training was done as hands-on, rather than by written sources.

The medical and vocational evidence revealed the following information:

There are three main sources of expert opinion in this case; the rating report and deposition of Dr. Douglas Rope found in Claimant's Exhibit D and B respectively, the deposition of Mary Titterington, a Vocational Expert, who testified on behalf of Employee Alfred Mallot in Claimant's Exhibit C, and the deposition of Michael J. Dreiling and his report dated March 14, 2011, offered by the Second Injury Fund.

Dr. Rope noted the early episode of low back pain from 1994 and the epidural steroid injections during that time frame. He also noted the rotator cuff surgery on the left by Dr. Jonathon Blake at St. Mary's Hospital in Blue Springs, Missouri, in July 2005. Finally, Dr. Rope notes the amputation of the right great toe. Dr. Rope did not rate the preexisting back problems or the great toe amputation. He rated the preexisting left shoulder at 17.5 percent of the body and

the January 6, 2009, injury at 18 percent of the body relating to the low back.

Mary Titterington's vocational report indicated that she evaluated Employee on February 11, 2010, at her office in Prairie Village, Kansas. She reviewed medical records and noted that Dr. Galate gave Employee permanent restrictions of no bending, twisting, or lifting on May 1, 2009. Employee was also limited to loads of no more than 20 pounds. She quoted from Dr. Rope's evaluation of June 8, 2009, wherein he stated:

"A history of a shoulder surgery, including tendon repair with implantable devices, is an impediment to employment or to reemployment should he become unemployed. This is particularly true given his history of work in construction and road building, requiring among other things forceful use of the arms. The above disabilities furthermore can reasonably be expected to combine to yield a degree of disability exceeding the simple sum of the components."

Ms. Titterington also took an extensive work and education history from Employee. She noted of importance his education being that he only attended organized school through the ninth grade, and that his grades were primarily below average. He was in special education in fifth and sixth grades in all subject areas. He was able to obtain a GED through Lincoln High School online in either 2003 or 2005. His employment history is listed at length in four pages of her report which primarily consist of heavy manual-type labor. She also administered a wide range intelligence test, a wide range achievement test, and an adult basic learning examination. She found Employee's reading comprehension to be between an eighth and ninth grade level, and his language between a fifth and sixth grade level. She indicated that he routinely had difficulty following directions, and did not appear to have good focus or attention. She did not believe he was a candidate for retraining given his low test scores. She concluded that he would have difficulty performing jobs that require average academic skills. Ms. Titterington indicated that the testing revealed the Employee's academic skills were at the elementary school level. He was on the border line range of intellectual functioning. She indicated that these factors were highly significant when coupled with the lack of transferable job skills and the restrictions established by the doctors.

Ms. Titterington believed Employee's job pool to be very small with his low academic skills and intellectual capabilities. She also believed that Employee's work base is eroded because of his impairments combined with his limited academic skills and intellectual capabilities.

Ms. Titterington's final conclusion was that there is no expectation that any employer would be willing to hire Employee for work as it is customarily performed in the open labor market.

Likewise, Michael J. Dreiling, a vocational consultant, hired by the Second Injury Fund opined that Employee was unable to perform the duties of employment in a usual and customary way in the existing job market.

Therefore, both vocational experts believe that Employee is permanently and totally disabled.

The Second Injury Fund offered no medical reports nor did it offer any vocational evidence that would indicate that Employee was employable in the job market.

RULINGS OF LAW

Therefore, the only issue before this court is whether the Second Injury Fund is liable to Mr. Mallot for this permanent total disability.

Mr. Mallot claims that he is permanently and totally disabled as a result of a combination of his preexisting disabilities, coupled with the disabilities from his on-the-job accident of January 6, 2009. I agree. Therefore, I find by a preponderance of the credible evidence that Mr. Mallot's preexisting disabilities, combined with the work injury of January 6, 2009, creating a synergist effect of greater overall disability resulting in permanent total disability. As a result, I find Mr. Mallot is entitled to permanent total disability benefits from Second Injury Fund.

Section 287.020.5 RSMo 1986, defines "total disability" as the inability to return to any employment and not merely . . . to return to employment in which the employee was engaged in at the time of the accident. The terms "any employment" mean "any reasonable or normal employment or occupation." *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App. 1996). It is not necessary that an individual be completely inactive or inert 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. See *Fletcher v. Second Injury Fund*, above, and *Searcy v. McDonald Douglas Aircraft*, 894 S.W.2d 1173 (Mo.App. 1995).

Missouri courts have repeatedly held the test for determining permanent total disability as whether the individual is able to compete in the open labor market, and whether an employer in the usual course of its business would be reasonably expected to employ the employee in his present condition. *Sullivan v. Mastaers Jackson Paving*, 35 S.W.3d 879 (Mo.App. S.D. 2001). Thus, a determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri State Motor Transit*, 908 S.W.2d 849 (Mo.App. 1995).

Even though a claimant might be able to work for brief periods of time or on a part-time basis, it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (MO.App. 1995). Courts have held that various factors may be considered, including claimant's physical and mental condition, age, education, job experience, and skills in making a determination as to whether the claimant is permanently, totally disabled. See *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App. 1997).

In order to establish Second Injury Fund liability for permanent, total disability benefits, Mr. Mallot must prove that:

- (1) He has permanent disability resulting from a compensable work-related injury;
- (2) 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 reemployment if the employee becomes unemployed,’ Section 287.220.1 RSMo 1993; Garibay v. Treasurer, 930 S.W.2d 57 (Mo.App. 1996); Rose v. Treasurer, 899 S.W.2d 563 (Mo.App. 1995); Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo.App. 1995); and Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App. 1995) and finally;

- (3) The combined effect of the disability resulting from the work-related injury and the disability 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).

In deciding whether the Second Injury Fund has liability, the first determination is the degree of disability from the last injury. Stewart v. Johnson, 398 S.W.2d 850, 852 (Mo.App. 1966). “Until that disability is determined, it is not known whether the Second Injury Fund had any liability. . .” Stewart, 398 S.W.2d at 854. Accordingly, a claimant’s preexisting disabilities are irrelevant until employer’s liability for the last injury is determined. Kizior v. Trans World Airlines, 5 S.W.3d 195, 201 (Mo.App. W.D. 1999); Roller, 935 S.W.2d 739, 743 (Mo.App. S.D. 1996). If claimant’s last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and the employer is responsible for the entire amount.

As detailed above, the parties stipulated that Mr. Mallot sustained a compensable work injury on January 6, 2009, and that it was settled for 12.5 percent of the body as a whole. This generally would not be sufficient to render a person permanently and totally disabled, absent some other preexisting disabilities. Dr. Rope rated his disability from this last accident at 18.5 percent of the body.

The court finds that Mr. Mallot sustained permanent partial disability equal to 12.5 percent of the body as a whole as a result of the January 6, 2009, work injury.

The next element that he must establish is 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 employment.” I find that Mr. Mallot did have such preexisting permanent disability.

Mr. Mallot testified to the many ways that the prior low back injury caused him to have to “work around” the low back pain from 1994 until he reinjured his back in 2009. He also testified about how the great toe amputation made it difficult for him to stand for long periods of time. Finally, he also testified about the difficulty he had with his shoulder following the major shoulder surgery in 2005.

Dr. Rope assessed Mr. Mallot’s permanent partial disability from the shoulder surgery alone at 17.5 percent preexisting permanent partial disability. Dr. Rope specifically testified that the shoulder surgery would be a hindrance to Mr. Mallot’s employment or reemployment should he become unemployed.

I agree with Ms. Titterington and Mr. Dreiling that Mr. Mallot is permanently and totally

disabled. I find that Mr. Mallot's preexisting disabilities, which include the prior low back pain for which he was off work for approximately one year, the right great toe amputation after which he had difficulty standing, and the major shoulder surgery, all constituted preexisting disabilities and were all sustained prior to the January 6, 2009, work injury. I find that those injuries combined with the 2009 work injury to create a synergistic effect of greater overall disability resulting in permanent total disability. I do not believe any employer in the regular course of business would reasonably be expected to employ Mr. Mallot in his current condition.

Further, the last injury alone did not cause permanent total disability. Mr. Mallot reinjured an already weakened and compromised back, had various prior permanent injuries, and had a low functioning intellectual level, all of which combined with his last back injury to cause permanent total disability.

Therefore, I find the Second Injury Fund is liable to Claimant for permanent total disability benefits of \$320.00 per week for his lifetime. Beginning on the 7th day of May, 2009, the date he was released at maximum medical improvement, the Second Injury Fund is not liable to Claimant until 50 weeks of permanent partial disability paid by the Employer has run. Thereafter, the Second Injury Fund is and shall remain liable for the payment of \$320 per week for the life of Alfred Mallot.

The Court further awards to employee's attorney, Scott W. Mach, 25 percent of all benefits awarded herein.

Made by: _____

Lisa Meiners

Administrative Law Judge

Division of Workers' Compensation