

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

Injury No.: 06-065456

Employee: Zola Marshall
Employer: R J Reynolds Tobacco (Settled)
Insurer: ACE American Insurance (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, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Preliminaries

The parties asked the administrative law judge to resolve the issues of accident and Second Injury Fund liability.

The administrative law judge rendered the following findings and conclusions: (1) employee did not meet her burden of proving she sustained a compensable last injury resulting in permanent partial disability; (2) any pain employee experienced as a result of the last injury was an exacerbation of preexisting lumbar complaints; and (3) the Second Injury Fund has no liability in this matter.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) because the evidence demonstrates employee suffered a new herniated lumbar disc at L3-4 as a result of the accident; and (2) because the administrative law judge appears to have believed the law required employee to report a work-related injury at the emergency room and to her primary care physician, in contravention of *Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254 (Mo. App. 2010).

Findings of Fact

Preexisting conditions of ill-being

Prior to the work injury at issue in this matter, employee suffered from longstanding low back and neck pain. Employee also experienced symptoms of her arms and hands falling asleep. Beginning in 2005, employee sought treatment at the Mayo Clinic in Minnesota for these conditions. A cervical spine MRI of April 27, 2005, revealed spondylosis, bulging of the annulus fibrosis, uncovertebral joint spurring, and facet hypertrophy from C3 to C7. Treating physicians diagnosed cervical spondylosis, as well as multi-level degenerative joint disease of the lumbar spine, and ordered physical therapy and a series of injections for both the neck and low back.

Employee missed two months of work in order to attend extensive physical therapy sessions from May 16, 2005, until July 16, 2005. Employee also missed two or three

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days of work for each trip to the Mayo Clinic. Apart from the time she missed for physical therapy and trips to the Mayo Clinic, employee's preexisting low back and neck pain did not prevent her from working and completing her duties for employer. This is because employee was able to manage her pain symptoms with Tramadol and Vicodin prescribed by her primary care physician.

Employee's preexisting low back and neck complaints kept her from performing much activity away from work. Employee's husband hired a housekeeper and helped employee with the laundry and cooking. Employee's husband also performed all the yard work and gardening.

Dr. Truett Swaim evaluated employee on September 7, 2010, and again on March 12, 2012. Dr. Swaim opined that employee suffered from preexisting permanent partially disabling conditions of the body as a whole referable to the lumbar spine and cervical spine, which he rated at 15% and 25%, respectively.

The Second Injury Fund did not present any expert medical testimony to rebut the testimony from Dr. Swaim as to employee's preexisting disabling conditions. We find persuasive Dr. Swaim's opinion (and so find) that, as of July 18, 2006, employee suffered from preexisting permanent partially disabling conditions of the body as a whole referable to the lumbar spine and cervical spine. We find that employee's preexisting disability referable to the cervical spine amounted to a 15% permanent partial disability of the body as a whole. We find that employee's preexisting disability referable to the lumbar spine amounted to a 10% permanent partial disability of the body as a whole.

Primary injury

Employee worked as a retail representative/merchandiser for employer. Her duties involved the placement and changing out of point-of-sale materials such as banners, counter displays, and promotional signage at various convenience stores, gas stations, and smoke shops. On July 18, 2006, employee was standing on a stool replacing signage when she began to lose her balance. Through a quick motion, employee was able to regain her balance on the stool, but experienced a sudden burning or stinging pain in her low back. The pain subsided long enough to permit employee to finish hanging the sign, but then returned. Employee took a Tramadol that afternoon and went to bed early.

At about 2:00 a.m. on July 19, 2006, employee woke with severe, uncontrollable pain in her low back. Employee took more Tramadol, but this was not effective in relieving her pain, so employee's husband took her to the emergency room at Lee's Summit Hospital, where employee received a steroid shot with Demerol and Phenergan. The treatment records suggest that employee had run out of Vicodin and was suffering acute burning and radiating pain that was similar to her prior back pain. The treatment notes do not contain any reference to a work injury. The next day, employee sought treatment at the Lee's Summit Family Care Center, where Dr. Mark Martin noted employee's history of lumbosacral disc disease, and recommended employee not work for two days. Dr. Martin recommended that if employee's pain did not get better, an MRI would be indicated. Employee returned to the Lee's Summit Family Care Center

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for treatment on July 26, 2006, and reported that her problems were continuing, with increased pain in the right leg. Dr. Cabot Sweeney ordered an MRI, which was subsequently obtained on July 31, 2006, and which revealed a diffuse bulging annulus at L3-L4 contacting the right L3 nerve root.

Employer eventually authorized treatment with Dr. James Zarr, who evaluated employee on September 19, 2006, and noted that the July 2006 MRI findings at L3-L4 were new. Dr. Zarr opined that the July 2006 work injury was the cause of employee's current symptoms and recommended lumbar epidural injections. Employee underwent a series of injections which provided temporary relief from her low back pain. On December 13, 2006, Dr. Zarr evaluated employee and found that her pain had completely resolved following the injections. Dr. Zarr released employee from his care and opined that employee suffered 0% permanent partial disability as a result of the July 2006 work injury.

After Dr. Zarr released employee from treatment, she suffered a recurrence of severe pain in her low back and underwent treatment at the St. Joseph Pain Clinic in 2007 and 2008 including lumbar injections to address pain referable to the L3-L4 nerve root. On July 8, 2008, Dr. Vincent Johnson indicated he would recommend a consultation with a surgeon if employee's pain continued. Employee continued to experience pain and ultimately underwent a lumbar laminotomy and foraminotomy with decompression of the L3-L4 nerve on the right.

Employee's low back pain improved after the surgery, but employee still suffers pain after activity such as housecleaning. Employee doesn't take as much pain medication as she did before the surgery, and she is able to sleep through the night. Employee limits her stooping, bending, and reaching, and tries not to carry more than 20 pounds. Employee settled a Kansas workers' compensation case against the employer on January 23, 2012, for a lump sum of \$73,930.00 based on disability under Kansas law, plus a Medicare Set-Aside Agreement to cover employee's future medical expenses.

Dr. Swaim opined that employee's occupational injury of July 18, 2006, was the prevailing factor causing employee to suffer an injury to the L3-L4 disc, which he rated at 25% permanent partial disability of the body as a whole. Dr. Swaim opined that employee's preexisting disabling conditions combined synergistically with the injury of July 18, 2006, to the extent of creating an additional 10% permanent partial disability of the body as a whole. We find persuasive Dr. Swaim's opinion (and so find) that employee suffered permanent partial disability as a result of the July 18, 2006, incident. We find that employee suffered a 7.5% permanent partial disability of the body as a whole referable to the lumbar spine as a result of the primary injury.

Conclusions of Law

Accident

The parties dispute whether employee sustained an accident. Section 287.020.2 RSMo provides, as follows:

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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. An injury is not compensable because work was a triggering or precipitating factor.

We have found that on July 18, 2006, employee was standing on a stool replacing signage in the course of performing her duties for employer when she began to lose her balance, that employee was able to regain her balance through a quick motion, and that employee experienced a sudden burning or stinging pain in her low back. These facts satisfy each of the foregoing statutory criteria. We conclude that employee suffered an "accident" for purposes of § 287.020.2.

Second Injury Fund liability

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." That section provides that one of employee's preexisting disabilities must meet the applicable threshold before Second Injury Fund liability is triggered. See *Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, SC92834 (Nov. 12, 2013). We have found that, at the time she suffered the compensable work injury, employee suffered from a 10% preexisting permanent partial disability of the body as a whole referable to lumbar spine, and a 15% preexisting permanent partial disability of the body as a whole referable to the cervical spine. Employee's preexisting disability referable to the cervical spine exceeds the applicable 50-week threshold under § 287.220.1 RSMo for injuries affecting the body as a whole. Consequently, Second Injury Fund liability is triggered in this case. *Witte*, at pg. *20-21.

Section 287.220.1 RSMo also requires that a preexisting disabling condition constitute a "hindrance or obstacle to employment or to obtaining reemployment." The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a hindrance or obstacle to employment:

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We are convinced employee's low back and cervical spine conditions were serious enough to constitute hindrances or obstacles to employment at the time she sustained the primary injury. This is because we believe these conditions had the potential to combine with a future work injury to cause a greater degree of disability than would have resulted in the absence of the conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

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Section 287.220.1 provides, in relevant part, as follows: "After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund ..."

We have found that employee suffered a 7.5% permanent partial disability of the body as a whole referable to the low back as a result of the primary injury, and credited Dr. Swaim's testimony that employee's primary injury combines synergistically with her preexisting disabling conditions. We are persuaded that a 10% load factor is appropriate to account for the synergistic combination of preexisting and primary disabilities. We conclude, therefore, that the Second Injury Fund is liable for 13 weeks of permanent partial disability benefits at the stipulated rate of \$376.55, for a total of \$4,895.15.

Award

We reverse the award of the administrative law judge. The Second Injury Fund is liable for \$4,895.15 in permanent partial disability benefits.

This award is subject to a lien in favor of Elizabeth Diane Baker, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Mark Siedlik, issued January 3, 2013, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 17th day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

**FINAL AWARD DENYING COMPENSATION
as to Second Injury Fund Only**

Employee: Zola Marshall Injury No: 06-065456
Dependents: N/A
Employer: RJ Reynolds Tobacco (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: ACE American Insurance (Settled)
Hearing Date: October 9, 2012
Briefs Filed: November 10, 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: July 18, 2006
5. State location where accident occurred or occupational disease was contracted: Clinton, Henry 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? No
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 standing on a stool hanging a sign in a retail establishment when she alleges she slipped, but caught her self, causing injury to her 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: lumbar spine
14. Nature and extent of any permanent disability: none
15. Compensation paid to-date for temporary disability:
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:
19. Weekly compensation rate: PPD \$376.55
20. Method wages computation: stipulation
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: N/A

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Zola Marshall Injury No: 06-065456
Dependents: N/A
Employer: RJ Reynolds Tobacco (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: ACE American Insurance (Settled)
Hearing Date: October 9, 2012
Briefs Filed: November 10, 2012 Checked By: MSS/cy

The above Claim was heard on October 9, 2012. The parties stipulated to the following:

1. On July 18, 2006, Employee was employed with Pathways Community Behavioral Healthcare.
2. On July 18, 2006, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. PPD rate is \$376.55.

ISSUES

The parties requested the Division to determine:

1. Whether or not Claimant suffered an accident in the course and scope of employment.
2. The nature and extent of permanent disability, including the liability of the Second Injury Fund.

EXHIBITS

Claimant
A. Claim for Compensation
B. Withdrawal of Michael Knepper

- C. RJ Reynolds Employee Incident Report
- D. Settlement (not as to amount)
- E. Records of Lee's Summit Hospital
- F. Certified records of Rustici Chiropractic
- G. Records of Lee's Summit Hospital
- H. Records of St. Joseph Medical Center
- I. Records of Mayo Clinic as of August 28, 2006
- J. Records of Mayo Clinic as of August 13, 2010
- K. Records of Laser Spine Institute
- L. Deposition of Dr. Truett Swaim with exhibits (excluding Dr. Clymer's reports)
- M. Letter from Dr. Hurdle

Second Injury Fund

1. Lee's Summit Family Care Records

Claimant (Zola Marshall) is a 58 year old Caucasian female. Ms. Marshall worked for RJ Reynolds (Employer) from 1988 to 2007 with a brief period of layoff around 1991. In 2006 she began working full time as a retail representative. She was assigned 120 places to call on and was expected to visit approximately 11 per day. Each call required her to change out Point of Sale ads, check distribution of cigarettes, check displays, promotions and pricings. She visited grocery stores, convenience stores, and cigarette outlets.

Ms. Marshall reports that prior to July 18, 2006 she had problems with her cervical and lumbar spine. She was receiving treatment through the Mayo Clinic in Minnesota. She had an MRI dated May 10, 2004 which revealed severe degenerative changes involving multiple levels of the cervical spine with a broad-based disk bulge at C4-5 with some central canal stenosis. She had an MRI of the low back dated June 7, 2004 which showed disk bulging at L4-L5 and L5-S1. She had a clinical history of low back pain in both buttocks, worse on the right. After receiving epidural injections in Kansas City for her cervical and lumbar spine, Ms. Marshall elected to continue treatment at the Mayo Clinic. She missed work to attend her appointments in Minnesota. An April 11, 2006 note indicates that Ms. Marshall visited a Dr. Hurdle with a chief complaint of low back pain. She stated her pain had been well controlled until over the last several months which become more severe. She reports having a prescription for and taking Vicodin as needed for this pain. The Vicodin was prescribed by Dr. Sweeney, her primary care physician. He gave her a prescription for Vicodin and Ultram on March 27, 2006.

Ms. Marshall alleges that she injured her low back on July 18, 2006. She reports that she was at a cigarette retailer, standing on a stool to reach an overhead sign when she began to fall. She caught herself, but when snapping herself upright, had immediate pain in her low back. She drove herself home that evening and took a Vicodin for pain. Overnight, she reported to Lee's

Summit Hospital Emergency room. She received medication and a steroid injection and was released to follow up with her primary care physician. The ER notes from that visit do not indicate that she had injured her back the day before, or indicate any mechanism of injury. The report does state that she “ran out of Vicodin yesterday” and that the pain is “similar to prior back pain” and “similar symptoms previously”. She followed up at Lee’s Summit Family Care the next day. The notes dated July 19, 2006 indicated back pain radiating down (r) leg, recurring since 2004. It further indicates that she had her Vicodin prescription refilled. She stated she was anxious to have another MRI. It had been over two years to see where she stands. There is no mention of work, or a new event as the source of the pain in this note either. Ms. Marshall testified that she didn’t mention the cause of her pain at the ER because her pain was overwhelming and she just wanted treatment. She reported to her primary care physician later the same day that her pain was improved 50%, but she still didn’t report any new injury or an incident at work.

Ms. Marshall received treatment from Dr. Zarr. On December 13, 2006 Dr. Zarr reported that Ms. Marshall had a 0% disability attributable to this injury. He opined that she had symptoms secondary to her July 2006 event, but that there was no permanent disability associated with the exacerbation.

Ms. Marshall continues to have pain in her cervical and lumbar areas. She reports that she limits lifting to 20 pounds, and that her pain is exacerbated by housecleaning. She received surgery on her back through her husbands insurance. On January 26, 2011 she received a lumbar laminectomy.

Ms. Marshall was evaluated by Dr. Truett Swaim at her own request. Dr. Swaim rated this July 18, 2006 injury as a 20% disability to the body, and rated her pre-existing lumbar condition as 15% ppd to the body and 25% ppd for her preexisting cervical condition. He rendered a 12% loading factor. In a subsequent report he changed his rating for the primary injury to 25% ppd to the body as a whole.

Section 287.220 R.S.Mo. directs when the Second Injury Fund is liable for permanent partial disability benefits. The statute directs that “In order for a claimant to recover from the Second Injury Fund, he must prove he sustained a compensable injury, referred to as the ‘last injury’, which resulted in permanent partial disability.” I find that the Claimant, Ms. Marshall did not meet this burden. I find credible Dr. Zarr’s assessment of 0% disability attributable to the event on July 18, 2006. I do not find the testimony of Dr. Swaim credible. In making this determination I rely on the significant complaints Ms. Marshall had in her lumbar region. As recently as March 2006 she had complained to her Primary Care Physician in Missouri that her back pain was getting worse again. Again in April, she reported to her spine physician at the Mayo Clinic that her lumbar pain was becoming more intense. Further, when she reported to the Emergency Department and her Primary Care Physician immediately following the incident at work she reported that had similar pain in the same are previously. I find that Dr. Zarr’s assessment that any pain Ms. Zarr had as a result of that injury was an exacerbation of her pre-existing lumbar complaints, and that the symptoms resulting from that injury date were simply an

exacerbation which resolved, and resulted in no permanent disability attributable to the July 18, 2006 event.

Therefore, the Second Injury fund is not liable for any disability in this matter.

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