

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

Injury No.: 03-091952

Employee: Robert Mayne
Employer: Sitton Motor Lines (Settled)
Insurer: Sitton Motor Lines (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged September 16, 2003
Place and County of Accident: Unknown

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 May 13, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert H. House, issued May 13, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28th day of December 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Robert Mayne
Dependents: N/A
Employer: N/A
Additional Party: Second Injury Fund
Insurer: N/A

Injury No. 03-091952

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

Hearing Date: February 22, 2005

Checked by:

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? N/A
3. Was there an accident or incident of occupational disease under the Law? N/A
4. Date of accident or onset of occupational disease: SEPTEMBER 16, 2003
5. State location where accident occurred or occupational disease was contracted: UNKNOWN
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? N/A
7. Did employer receive proper notice? N/A
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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
PULLING A PIN ON TANDEM
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: SHOULDER
14. Nature and extent of any permanent disability: N/A
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?
18. Employee's average weekly wages: \$488.60
19. Weekly compensation rate: \$347.05
20. Method wages computation: AGREED

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: -0-
0 weeks of temporary total disability (or temporary partial disability)
0 weeks of permanent partial disability from Employer
0 weeks of disfigurement from Employer

22. Second Injury Fund liability: DENIED

TOTAL: -0-

23. Future requirements awarded: NONE

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Mayne Injury No: 03-091952
Dependents: N/A
Employer: N/A
Additional Party: Second Injury Fund
Insurer: N/A Checked by:

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

AWARD ON HEARING

A hearing was held on this matter on February 22, 2005. At that hearing only one issue was presented for determination, the liability of the Second Injury Fund for any permanent disability benefits to claimant. Claimant alleges permanent total disability against the Fund. The parties agree that the rate of compensation in this case is \$488.60/\$347.05.

Claimant was an employee of Sitton Motor Lines when he was injured on September 16, 2003, while "yanking" a pin bar on a tandem to move it forward to redistribute the weight, he heard a pop that sounded like a loud hand clap. He felt pain from his shoulder down to his hand. Employer/insurer provided claimant with treatment for his injury which included two surgeries. The first surgery was an arthroscopic subacromial decompression and mini-open rotator cuff repair on October 6, 2003. Following the complication of adhesive capsulitis or frozen shoulder syndrome, claimant was treated by subacromial bursal injection of cortisone on November 10, 2003, and by a manipulation under anesthesia and arthroscopic debridement on February 11, 2004. Following his two surgical interventions and release from treatment, claimant was given a permanent lifting and pushing/pulling restriction of less than ten pounds with the right arm. He also was restricted to no overhead reaching. His treating physician, Todd Gothelf, an orthopedic surgeon of Lawton, Oklahoma, rated claimant's impairment as being 15 percent of the right upper extremity or 9 percent of the whole person. Claimant's examining physician, Dr. Koprivica, rated claimant's disability to be 50 percent of the right arm and restricted his lifting and carrying ability to 10 pounds maximum and to perform no activities above the shoulder level on the right. He also restricted claimant to no climbing activities using his right upper extremity and restricted him to avoid forceful pushing and pulling using the right arm at the right shoulder girdle. Claimant settled his claim with the employer/insurer for that injury at 35 percent of the right shoulder on October 13, 2004.

Claimant alleges that he is permanently and totally disabled as a result of the combination of the disability from his last injury and his preexisting disabilities. It is clear that claimant has had significant prior medical problems. One prior injury of January 20, 1995, involved an injury to claimant's back in which he underwent a right L5-S1 hemi-laminectomy and discectomy. He was rated as having an 11 percent impairment by one physician and 25 percent by another. He settled his claim in South Dakota for an 18 percent body as a whole impairment for that injury.

Claimant additionally claims prior disabilities resulting from a 1984 injury in which he alleged that he had been run over by a loader he was hauling in 1984 in California resulting in what he alleges to be a right foot fracture and compound fracture of the right leg which resulted in a rod being placed in his leg and then removed. Claimant's testimony was that he didn't have a lot of problems with anything other than his right knee following the injury. The only information concerning claimant's injuries are from his testimony and the history he gave to his physicians which included the information concerning the insertion and removal of a rod as well as an arthroscopy of the right knee performed at that time. Claimant also indicated to Dr. Koprivica that he was limited in his "tolerance to squatting or crawling, kneeling" and that he has worn a brace on his right knee since 1989 associated with his injury. Claimant also reported to Dr. Koprivica a 1995 injury from which he was limited in his ability to sit and his ability to tolerate repetitive bending at the waist, perform pushing or pulling activities and which restricted his lifting capacity to 35 pounds. From information in the record it appears that claimant's treating physician for the 1995 injury was Dr. G.W. Jenter -- rather than Genter, as Dr. Koprivica referred to him. The records from Dr. Jenter contained in Claimant's Exhibit H do not include a rating. However, there were some additional Dr. Jenter records that were contained in Second Injury Fund Exhibit

1A. Claimant continued to receive treatment with Dr. Jenter into 1996. It is apparent that Dr. Jenter had rated claimant as having a 25 percent impairment to the body as a whole compared to the rating of 11 percent to the body as a whole by Dr. Dwight Caughfield as set out in the compromise agreement as to compensation in South Dakota as set out in Claimant's Exhibit O. However, neither rating was attached to the settlement agreement nor could I find it in the medical records presented by either party. Nevertheless, it appears that those records were presented to Mr. Eldred for his vocational evaluation of claimant. However, nothing cited by Mr. Eldred nor in any of the records in evidence indicated that Dr. Jenter placed any restrictions upon claimant. Mr. Eldred simply cited the last record of Dr. Jenter of March 1, 1996, which was included in the material provided by the Second Injury Fund in its Exhibit 1A in which Dr. Jenter stated that "[t]he patient has slowly evolved into a good candidate as far as returning to work." Dr. Jenter then continued that claimant would hopefully return to work in one month. There is no additional medical record of Dr. Jenter in evidence. Mr. Eldred cites the rating of Dr. Jenter as being entered on December 16, 1995. However, from the medical records admitted into evidence, I cannot find any entry on that date that would indicate a rating or the findings asserted in Mr. Eldred's summary of the records. Nevertheless, it is clear that claimant settled his claim for the 1995 injury for 18 percent impairment to the body as a whole.

Claimant also alleged that in 1998 he was pulled out of a cab and hit with a baseball bat on the head. He made that allegation at trial, to Dr. Koprivica, and to the physicians who treated him in California. Nevertheless, it is clear from the medical records that claimant instead suffered a stroke from excessive high blood pressure rather than any injury through blunt force trauma. Claimant filed a claim in Arkansas for that injury which apparently was denied by the employer/insurer. There is nothing admitted into evidence to indicate an adjudication of that claim in Arkansas, but it is clear as set forth by Dr. Koprivica and the examining doctors in California that claimant did not suffer an industrial disability from an accident at work in 1998. Indeed, Dr. Koprivica has indicated that claimant created the factual basis for his claim through what he termed "confabulation since he was operating under incomplete data because of neurologic defect." It was noted in the records at the time of claimant's allegation of injury that claimant had at least two drinks of an alcoholic beverage on the date of the alleged injury and had used marijuana within two weeks of the injury. The medical records in that case also indicate that claimant had used marijuana since his discharge from the military in 1969.

Claimant stated that he had seizures since the alleged 1998 work injury and was taking anti-convulsants. Nevertheless, claimant gave a history of weaning himself off of his seizure medication and that his last seizure was in August of 2000.

Claimant also alleges that he had an injury in 2001 when he fell out of his cab hitting the back of his head and neck on the pavement in April of 2001. Following the fall claimant underwent an anterior cervical discectomy and fusion at C6, C7 on July 2, 2001, by Dr. Adamentz. Claimant was off work only two weeks following his surgery and returned to light duty activities. He was released on October 3, 2001, to full duty as a truck driver. Claimant stated to Dr. Koprivica that he had a permanent limitation from his injury and surgery from doing overhead activities and had headaches as a result of that injury. And that he had pain that went from his neck to the right shoulder which was more severe following his shoulder injury. Claimant testified that he had a 15 pound limit for lifting following that. Dr. Adamentz rated claimant as having a permanent partial impairment of 9 percent to the body as a whole on November 30, 2001, but he set out no permanent restrictions. There had been an earlier restriction of lifting 20 pounds while claimant was still under treatment.

Again, claimant is alleging that the combination of his preexisting disabilities with the disability from his last injury combine to result in permanent total disability for which the Second Injury Fund would be liable. That is the opinion of Dr. Koprivica. Dr. Koprivica found that claimant was not permanently and totally disabled as a result of the last injury alone, but he felt that "there is synergism that occurs when you look at the impact of the restrictions necessitated by the multiple disabilities" and from the combination of the prior disabilities with the last disability he was not capable of employment in the open labor market. Dr. Koprivica assessed that claimant had a 35 percent permanent partial disability of the right lower extremity at the knee and stated that claimant was limited in his tolerances to squatting, crawling, kneeling, and climbing. He also restricted claimant from his back injury at L5-S1 as keeping him from repetitive bending at the waist, pushing, pulling, and twisting. He also indicate that claimant should avoid sustained or awkward postures of the lumbar spine and opined that his captive lifting and carrying capability prior to his last injury was restricted to 35 pounds. He found that claimant's lumbar condition represented a 20 percent permanent partial disability to the body as a whole although claimant has settled that injury for 18 percent to the body as a whole. Dr. Koprivica initially rated claimant as having a 12.5 percent disability to the body as a whole based upon the head trauma based upon the records that indicated that claimant actually had a subarachnoid hemorrhage. He did not change his rating based upon the last discovered causation issues. Dr. Koprivica also rated claimant's cervical injury at C6-7 based upon the cervical discectomy and fusion to represent a 25 percent permanent partial disability to the body as a whole. Dr. Koprivica concluded that claimant was "incapable of performing sustained employment activities on a five day per week sustained basis" as a result of the combination of those injuries and opined that claimant was "permanently and totally disabled based on the effect of combining the disabling conditions that predated September 16, 2003, with the additional disability attributable to the September 16, 2003, work injury." Dr. Koprivica's concluded that claimant was not permanently and totally disabled based on the injury of September 16, 2003, alone (his right arm). Dr. Koprivica also stated in his deposition that "in terms of his left upper extremity I have restricted him from any repetitive reaching or overhead activities on the left."

It is clear from an examination of the other medical records in this case for claimant's preexisting injuries that no permanent restrictions were given by any of the physicians treating claimant. That is confirmed by Phillip Eldred's testimony in his deposition as follows:

Q. My question is did any of the doctors that we just went through that treated Mr. Mayne prior to September, 2003, assess any permanent work restrictions?

A. No.

Nevertheless, there were disability and impairment ratings rendered and at least one settlement of a work-related injury in South Dakota (18% to the body as a whole). However, claimant's other alleged preexisting disabilities, including from any 1984 injury, come from his history (as

given to Dr. Koprivica) and his testimony alone or from the settlement of 18 percent impairment to the body as a whole from his 1995 injury, and not from any medical records introduced into evidence. Additionally, claimant's alleged accidental injury of 1998, what in fact was a stroke, is colored by claimant's false history of the event and his use of alcohol and drugs at or near the time of the injury. Moreover, the ultimate result of that event was his having suffered seizures which apparently ended in August 2000.

Phillip Eldred has found that claimant is vocationally permanently and totally disabled from a combination of his preexisting disabilities with the disability from the last injury and not from the last injury alone. Mr. Eldred based that finding upon Dr. Koprivica's restrictions and findings along with the testing Mr. Eldred performed of claimant which indicated claimant's restricted physical ability and limited educational ability. Mr. Eldred found claimant to be restricted to the sedentary level of work through Dr. Koprivica's restrictions from the last injury alone and less than sedentary through Dr. Gothelf's restrictions from the last injury alone. Mr. Eldred opined that based upon the restrictions of Dr. Koprivica there were no sedentary jobs that claimant was capable of performing. In his cross-examination testimony Mr. Eldred testified that there "may be a few unskilled jobs in the sedentary work he could do." Nevertheless, the OASYS profile or testing program that Mr. Eldred used failed to identify any job that claimant could do using the sedentary classification of work. In his redirect testimony Mr. Eldred stated, "well, if he were able to do a sitting job, and all we did was limit him sedentarily without other restrictions place upon him, pushing, pulling, sitting, mainly sitting and standing, that type thing, three are always jobs that possibly come up I have seen before that he may be able to do. Those are usually unskilled, doesn't take a lot of training, usually you set him down and shown him what is going to happen. For instance a job where I always see come up is a security monitor where you sit, and if you don't have to problem of getting up and down a lot, maybe you could sit and monitor security cameras, that type of thing. That's just an example." Also, in redirect, Mr. Eldred opined that claimant possibly could be a Wal-Mart greeter if he had no trouble standing and walking. Nevertheless, on recross Mr. Eldred stated that the only place in the OASYS profile where you take into consideration sitting, standing, and walking tolerances is in the strength level of sedentary, light, medium, etc. Mr. Eldred further opined that the sedentary sector of employment was only 11 percent of the jobs available and that would eliminate 89 percent of the other jobs in the labor market. Mr. Eldred also admitted that the restrictions of Dr. Gothelf were less than sedentary and produced no jobs that claimant could perform from the right arm injury alone.

Claimant is seeking permanent total disability. Total disability in Missouri is defined in §287.020 RSMo. That section defines total disability to mean the "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." Moreover, "[t]he test for permanent total disability in Missouri is the worker's ability to compete on the open labor market in that it measures the worker's prospects for returning to employment." *Patchin v. National Super Markets, Inc.*, 738 S.W.2d 166, 167 (Mo.App. 1987). Permanent total disability specifically is the inability of a claimant to return to any employment in a manner that such duties are customarily performed by the average person. Any employment has been defined to mean any reasonable or normal employment or occupation and not merely a demeaning and undignified occupation such as selling peanuts, pencils or shoestrings on the street. *Vogle v. Hall Implement Company*, 551 S.W.2d 922 (Mo.App. 1977). "Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert. The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical condition reasonably expecting him to perform the work for which he is hired." *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App. 1990).

After reviewing all of the evidence in this case, I must first determine whether claimant was permanently and totally disabled from the last injury alone. *Stewart v. Johnson*, 398 S.W.2d 850, 854 (Mo.1966). If I were to find that claimant were permanently and totally disabled from the last injury alone, then my inquiry into claimant's disability ends. *Vaught v. Vaughts, Incorporated*, 938 S.W.2d 931, 939 (Mo.App. S.D. 1997). Claimant has settled his claim with the employer/insurer in this case for less than permanent total disability. However, that settlement does not bind the Second Injury Fund as to the amount of disability. *Totten v. Treasurer of State* 116 S.W.3rd 624 (Mo.App. E.D. 2000). Based upon all of the evidence in this case, I find that claimant is permanently and totally disabled from the last injury alone. Based upon the restrictions given by Drs. Koprivica and Gothelf for the last accidental injury at work, claimant's capacity for work is at the sedentary or less than sedentary level. Essentially, it was the vocational assessment of Mr. Eldred, that there were no jobs available to claimant at the sedentary level or at the less than sedentary level. As Mr. Eldred stated, Mr. Mayne's "potential for future employment is based on his physical capacity to perform work tasks, along with his age, education, work experience, vocational skills and aptitudes. These variables relate to claimant's ability to perform work for which he has transferable work skills, his training potential, or has the ability to perform unskilled jobs." Claimant is over 55 years of age. As Mr. Eldred stated:

Persons of advanced age (55 or over) are at that point where age significantly affects a person's ability to do gainful work. Such individuals when restricted to Sedentary Work and who can no longer perform relevant past work and have no transferable skills have little prospect for obtaining competitive employment. In order for there to be transferability of skills to Sedentary Work for individuals who are of advanced age (55 and over) there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry. Persons near retirement age (60-64) and who have a severe impairment are not considered able to adjust to Sedentary or Light Work unless they have skills which are highly marketable.

Additionally, Mr. Eldred found that claimant had "no training potential and cannot perform unskilled jobs." I agree with Mr. Eldred that claimant's age, education, and vocational skills and aptitudes are important to the determination of his disability especially when considered in relation to claimant's physical limitations for his last injury alone regardless of any preexisting disabilities. *Reves v. Kindele's Mercantile Co. Inc.*, 793 S.W.2d 917 (Mo.App. S.D. 1990). Claimant has been found to be at the sedentary or less than sedentary physical capability from the restrictions for his last injury alone based upon his physical conditions opined by

the medical records and the opinions of the treating physician, Dr. Gothelf, and of his examining physician, Dr. Koprivica. As a result of Mr. Eldred's assessment, there are no jobs for which claimant could perform based upon claimant's sedentary or less than sedentary physical capacity, other than the two he listed in his deposition as a security monitor or Wal-Mart greeter. That assessment does not make claimant employable or placeable in the open market.

Based upon the foregoing I find that claimant is permanently and totally disabled from the last injury alone regardless of his settlement for less than that disability with the employer/insurer. As a result, I find that the Second Injury Fund is not liable to claimant in this case. I deny the claim against the Second Injury Fund.

Date: 5/13/05

Made by: /s/ Robert H. House

Robert H. House
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secret

Patricia "Pat" Secret
Director
Division of Workers' Compensation