

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

Injury No.: 08-079781

Employee: Frank McRoy
Employer: Central Pallet Supply, Inc. (Settled)
Insurer: Missouri Employers Mutual Insurance Company (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. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

The last injury considered in isolation

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." The statute requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). If employee is permanently and totally disabled due to the last injury considered in isolation, the Fund is not liable for permanent total disability benefits. *Id.*

After employee sustained the last injury in July 2008, treating doctors identified "some new symptoms of increased lower back pain and more exquisite severe symptoms going into the right lower extremity consisting mainly of shooting type pain, quite severe at times, going into the right groin and mainly down the anterior aspect of the right thigh, going slightly below the right knee." *Transcript*, page 422. Dr. Annamaria Guidos provided explicit ratings apportioning disability as between the effects of the primary injury and employee's preexisting low back injuries. When we consider the last injury in isolation, and specifically the increase in low back symptoms and pain radiating into the right leg, we are convinced that the administrative law judge's finding of a 20% permanent partial disability of the body as a whole referable to the low back is accurate. This rating fairly reflects the worsened low back symptoms resulting from the July 2008 injury. We are persuaded that employee is not permanently and totally disabled as a result of the July 2008 injury considered in isolation.

We note that Dr. Guidos opined, in both her written report and on direct examination at her deposition, that employee is permanently and totally disabled owing to a combination of factors, including the effects of the last injury and employee's preexisting

Employee: Frank McRoy

- 2 -

low back injuries and learning disability. Yet, on cross-examination by the Second Injury Fund, Dr. Guidos provided the following testimony:

- Q. All right. And just considering the low back injury of July of 2008, the back pain and radicular leg pain that Mr. McRoy presented to you, do you believe that Mr. McRoy could work just based upon those problems?
- A. The second injury?
- Q. The last injury, July of 2008.
- A. Do I feel he would be able to work based on the second injury? No. No, I do not. That's why I put my therapeutic plan I felt he was permanently and totally disabled.

Transcript, page 72.

To the extent Dr. Guidos understood the question posed, the foregoing testimony would seem to contradict her opinions as set out elsewhere in the record. We note that, in providing the above-quoted testimony, Dr. Guidos did not explain why the last injury, considered alone, would permanently and totally disable employee. We note also that Dr. Guidos asked for clarification of the question, and that her ultimate response does not specifically indicate she is considering the effects of the last injury in isolation. Rather, Dr. Guidos's comment referring to her therapeutic plan (which, itself, indicates employee's permanent total disability results from a combination of factors) suggests that she believed she was being asked to opine as to the more general question whether employee was permanently and totally disabled *after* the primary injury.

One reason for Dr. Guidos's apparent confusion might be that the question posed by counsel for the Second Injury Fund takes for granted that employee's symptoms of back pain and radicular leg pain are solely attributable to the July 2008 work injury, a proposition that is refuted by employee's credible testimony, the medical records, and Dr. Guidos's opinions as set forth in her report. Prior to the July 2008 injury, employee was suffering symptoms of low back pain that he described as a six out of a possible ten in intensity. Employee was being careful at work and even had to lie down occasionally to relieve his low back pain. In April 2008, treating doctors diagnosed low back pain with radiating pain into the left hip, and noted that employee needed to change positions frequently to obtain relief. Dr. Guidos identified employee's current low back problems as a synergistic interaction of his disability resulting from the July 2008 work injury and his preexisting low back disabilities. In light of those records, employee's credible testimony, and Dr. Guidos's credible opinion regarding the synergistic effect of employee's multiple low back injuries, we are not convinced that employee's intractable low back pain and radicular complaints are products of the July 2008 work injury considered in isolation.

Employee: Frank McRoy

- 3 -

For all of the foregoing reasons, we do not find Dr. Guidos's testimony, as quoted above, credible to the extent it identifies the July 2008 work injury, alone, as the source of employee's permanent total disability.

The vocational expert, Susan Shea, credibly opined (and we so find) that employee's pain factor and limitations in sitting, standing, and walking would preclude him from being able to work, especially when employee's learning disability and vocational background are considered. We find that employee's limitations in sitting, standing, and walking, and his need to lie down multiple times per day stem from his intractable low back pain. As we have noted above, employee's current low back condition is the product of a synergistic combination of both the July 2008 work injury and his preexisting low back injuries and disabilities. It follows that employee is permanently and totally disabled as a result of the effects of the last injury in combination with his preexisting low back condition and learning disability.

Uncontested expert evidence

On appeal before this Commission, the Second Injury Fund argues that the administrative law judge was under the impression that the Second Injury Fund had the burden to proffer evidence to discredit employee's medical and vocational experts. In the first paragraph on page 7 of his award, the administrative law judge states as follows:

Further, I find that Susan Shea's and Dr. Volarich's¹ opinions are more credible than any others to the contrary and are supported by the evidence. Since I find that the Second Injury Fund has failed to offer sufficient credible evidence to discredit the opinions of Dr. Volarich and Susan Shea, I cannot substitute my own opinion for uncontroverted medical evidence and an expert's opinions.

We believe some clarification is in order. Employee, of course, had the burden of proving each element of his claim. *Lacy v. Fed. Mogul*, 278 S.W.3d 691, 701 (Mo. App. 2009). As the Missouri courts have recognized, the Second Injury Fund is not required to present contrary or conflicting evidence with regard to an employee's claim for permanent total disability benefits. *Dunn v. Treasurer of Mo. As Custodian of Second Injury Fund*, 272 S.W.3d 267, 275 (Mo. App. 2008). At the same time, the courts have instructed that "[t]he Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached, and the Commission may not base their finding upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence." *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo. App. 2006).

We wish to make clear that we have analyzed this case with employee's evidentiary burden in mind. We also wish to make clear that employee's providing uncontested medical and vocational testimony does not mean that Second Injury Fund liability is a foregone conclusion. If, for example, employee had provided uncontested expert

¹ The context of the administrative law judge's comments make clear that he is in fact referring to testimony and opinions from Dr. Guidos, and that his reference to Dr. Volarich is merely a clerical error.

Employee: Frank McRoy

opinions that were simply not credible, then employee would have failed to meet his burden of proof. See *Carkeek v. Treasurer of Mo. - Custodian of the Second Injury Fund*, 352 S.W.3d 604, 609 (Mo. App. 2011). As it turns out, however, we agree with the administrative law judge that employee's experts credibly testified, and that their testimony places liability for employee's permanent total disability with the Second Injury Fund.

Given the foregoing supplemental findings and conclusions, and because we otherwise agree with the administrative law judge's award, we conclude that the Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Carl Strange is attached and incorporated by this reference.

We approve and affirm 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 14th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION



NOT SITTING

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Frank McRoy

Injury No. 08-079781

Dependents: N/A

Employer: Central Pallet Supply, Inc.

Additional Party: Second Injury Fund

Insurer: Missouri Employers Mutual Insurance Company

Hearing Date: September 26, 2012

Checked by: CS/rm

SUMMARY OF FINDINGS

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? July 18, 2008.
5. State location where accident occurred or occupational disease contracted: Stoddard 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 happened or occupational disease contracted: Employee was tearing down pallets and reinjured his low back.
12. Did accident or occupational disease cause death? N/A.

13. Parts of body injured by accident or occupational disease: Low Back.
14. Nature and extent of any permanent disability: 20% of the body as a whole referable to his low back.
15. Compensation paid to date for temporary total disability: \$0.00.
16. Value necessary medical aid paid to date by employer-insurer: \$0.00.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate:

\$243.36 for temporary total disability, permanent total disability, and permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
 - a. Employee's claim against the employer-insurer previously settled by compromise settlement agreement.
 - b. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$243.36 per week beginning January 13, 2011 (See Findings).
22. Second Injury Fund liability: Yes.
23. Future requirements awarded: N/A.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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 costs plus 25% of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the claimant: Michael Moroni and Jay Yorke.

FINDINGS OF FACT AND RULINGS OF LAW

On September 26, 2012, the employee, Frank McRoy, appeared in person and by his attorneys, Michael Moroni and Jay Yorke, for a hearing for a final award. The Second Injury Fund was represented by Assistant Attorney General, Jonathan Lintner. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about July 18, 2008, Central Pallet Supply, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Missouri Employers Mutual Insurance Company.
2. On or about July 18, 2008, the employee was an employee of Central Pallet Supply, Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about July 18, 2008, the employee sustained an accident arising out of and in the course of his employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total disability, permanent total disability, and permanent partial disability is \$243.36.
7. The employee's injury is medically causally related to the work injury occurring on or about July 18, 2008.
8. The employer has furnished no medical aid to employee.
9. The employer has paid no temporary total disability benefits.
10. The employee reached maximum medical improvement on July 1, 2009.

ISSUES:

1. Nature and extent of disability.
2. Liability of the Second Injury Fund.

EXHIBITS:

The following Employee's Exhibits were offered and admitted into evidence:

- A. Deposition of Dr. AnnaMaria Guidos;
- B. Deposition of Susan Shea;
- C. Stipulation for Compromise Settlement Injury No. 08-079781;
- D. Medical records of Advanced Pain Clinic;
- E. Medical records of Bloomfield Medical Clinic;
- F. Medical records of Cape Neurosurgical Associates;
- G. Dexter School Records;

- H. Medical records of Missouri Baptist Hospital;
- I. Medical records of Dr. Daniel Kitchens;
- J. Medical records of Missouri Southern Healthcare Radiology;
- K. Medical records of Ozark Physical Therapy;
- L. Medical records of St. Francis Medical Center;
- M. Medical records of Dr. Riyadh Tellow;
- N. Records of Walmart Pharmacy;
- O. Medical records of Cape Neurosurgical Associates;
- P. Off work Slips; and
- Q. List of current medications.

APPLICABLE LAW:

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

“All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. 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, hereinafter provided for.”

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and 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; except that if the compensation for which the employee at the time of the last injury is liable is less than 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” hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.
- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall 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.
- The phrase “the 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. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

Issue 1. Nature and extent of disability. & Issue 2. Liability of the Second Injury Fund.

Frank McRoy (“Employee”) has requested an award of permanent total disability benefits against the Second Injury Fund. In support of his position, Employee has offered the opinions of Dr. AnnaMaria Guidos and vocational rehabilitation expert Susan Shea. The Second Injury Fund has not offered any additional medical opinion in support of their position that they are not liable for benefits. If Employee is permanently and totally disabled, the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing disabilities and Employee's last injury occurring on July 18,

2008. The Second Injury Fund is also not liable if the last injury alone caused Employee to be permanently and totally disabled.

While in school, Employee was in special classes for reading and writing until he quit in the 10th grade (Employee's Exhibit G). Following high school, Employee had various jobs which included roofing work, shoe factory work, chicken factory work, and tree trimming. In 2005, Employee began working for the Central Pallet Supply, Inc. ("Employer"). In addition to having prior back problems and treatment, Employee injured his low back on February 25, 2008, when he fell 7 to 10 feet and landed on concrete. Employee first treated with Dr. Newell who took an MRI of Employee's low back that identified a herniation at L4-L5, protrusion at L2-L3, and degenerative changes (Employee's Exhibit J). Dr. Joel Ray examined Employee on April 16, 2008, and noted degenerative disc disease at L3-L4 and L4-L5, bulging at L1-L2, disc protrusion at L3-L4, and some narrowing within the left lateral recess of L5-S1. After discussing surgery and nonsurgical options, Dr. Ray referred Employee out for physical therapy (Employee's Exhibit O). While Employee was receiving physical therapy, Employer sent Employee to Dr. Daniel Kitchens. After performing a few more tests, Dr. Kitchens opined on June 18, 2008, that Employee's present medical condition is chronic lower back pain from lumbar disc disease and released him from care (Employee's Exhibit I).

On July 18, 2008, Employee was tearing down pallets and reinjured his low back. Employee returned to Dr. Ray on August 29, 2008, and he ordered more tests. According to Dr. Ray's analysis of the MRI dated September 8, 2008, Employee had six non-rib-bearing vertebral bodies and lumbarization of S1, degenerative disc disease at L3-L4 and L4-L5, foraminal discs at L3-L4 and L4-L5, and right-sided foraminal disc of L2-L3 (Employee's Exhibit F). On November 28, 2008, Dr. Ray performed a right L2-L3, L3-L4, and L4-L5 laminectomies with medial facetectomies and foraminotomies; L2-L3, L3-L4 and L4-L5 diskectomies; and TLIF at L2-L3, L3-L4, and L4-L5 with approach from the right side (Employee's Exhibit L). On May 18, 2009, Dr. Ray noted that "I would endorse the patient applying for disability at this point" (Employee's Exhibit F). At the time of the hearing, Employee continued to have problems with his low back which included pain, problems sleeping, needing to lay down during the day, difficulty with activity, and decreased strength.

On March 3, 2011, Dr. Guidos examined Employee and opined that Employee had a 10% permanent partial disability of the whole person from his 2005 back injury, a 15% permanent partial disability of the whole person from his February 25, 2008 back injury, and a 40% permanent partial disability of the whole person from his July 2008 back injury. Further, Dr. Guidos opined that the prevailing factor for the treatment of his low back pain and subsequent surgery are the work related injuries from February and July 2008. After noting that the disabilities create synergy and he had a pre-existing 15% permanent partial disability of the whole person for a learning disability, Dr. Guidos opined that Employee "is currently permanently and totally disabled secondary to a combination of factors that also include limited learning ability and education (Employee's Exhibit A). Ms. Susan Shea, a vocational rehabilitation expert, examined Employee on November 14, 2011, and opined that Employee is unemployable in the national open labor market as a result of a combination of factors (Employee's Exhibit B).

Employee settled his primary claim against Employer in this matter for 20% of his body as a whole referable to the low back at the 400 week level. Based on the evidence, I find Employee suffered a 20% permanent partial disability of his body as a whole referable to his low back at the 400 week level or 80 weeks of compensation as a result of the July 18, 2008 work injury. Further, I find that Susan Shea's and Dr. Volarich's opinions are more credible than any others to the contrary and are supported by the evidence. Since I find that the Second Injury Fund has failed to offer sufficient credible evidence to discredit the opinions of Dr. Volarich and Susan Shea, I cannot substitute my own opinion for uncontroverted medical evidence and an expert's opinions.

The Second Injury Fund has argued that Employee is permanently and totally disabled as a result of the last injury alone. In support of their position, the Second Injury Fund directly points to one small portion of Dr. Guidos' deposition testimony where Dr. Guidos stated "Do I feel he would be able to work based on the second injury? No. No, I do not. That's why I put in my therapeutic plan I felt he was permanently totally disabled" (Employee's Exhibit A). However, the Second Injury Fund misconstrues Dr. Guidos' opinion. Throughout her deposition, Dr. Guidos testified that Employee was permanently and totally disabled as a result of a combination of factors. When questioned by the Second Injury Fund concerning whether Employee would have suffered the July injury if he hadn't had the February injury, Dr. Guidos also testified "I don't know that I can answer that really. You know, the two injuries, he was injured and then he suffered a re-injury." Additionally, Dr. Guidos referred to her therapeutic plan in her response identified by the Second Injury Fund which also incorporates Employee's history of low back issues in 2005, the injury in February 2008, the reherniation in July 2008, and "chronic pain and physical limitations" (Employee's Exhibit A). Based on the evidence, I find that Dr. Guidos' opinions and response can only be logically construed to mean that the July 2008 injury was the final straw that led to Employee's permanent and total disability, but that the cause of Employee's permanent and total disability was a combination of his primary injury and pre-existing injuries.

Based on the evidence, I find that no employer would reasonably be expected to hire Employee in his present condition and that Employee is permanently and totally disabled as a result of a combination of his primary injury and pre-existing injuries. Further, I find that Employee reached maximum medical improvement on July 1, 2009. In accordance with my above findings, the Employer was ordered to pay 80 weeks of compensation at a rate of \$243.36 for the low back injury covering the time period of July 2, 2009 to January 12, 2011. Based on my above findings and the evidence, I find that the Second Injury Fund's liability for permanent and total disability benefits began on January 13, 2011. The Second Injury Fund is therefore directed to pay to Employee the sum of \$243.36 per week commencing on January 13, 2011, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of Employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which Employee is restored to his regular work or its equivalent as provided in Section 287.200.2. Since part of the Second Injury Fund's liability has accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for the appropriate amount that is past due.

ATTORNEY'S FEE:

Michael Moroni and Jay Yorke, attorneys at law, are allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorneys' fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

01/03/2013

I certify that on _____, a copy of the foregoing award, delivered to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By Jana Kach

Made by:



Carl Strange

*Administrative Law Judge
Division of Workers' Compensation*

