

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

Injury No.: 99-073706

Employee: Thomas Middleton
Employer: Pepsi Cola (Settled)
Insurer: CNA Insurance Company (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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 9, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Lisa Meiners, issued September 9, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 11th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

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

Attest:

Secretary

Employee: Thomas Middleton

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced the administrative law judge's award is erroneous and should be reversed.

In his appeal to this Commission, employee seeks permanent total disability benefits from the Second Injury Fund. Section 287.220 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." For the Fund to be liable for permanent, total disability benefits, employee must establish that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* In this regard, the administrative law judge (and the majority) incorrectly focused on the extent employee's preexisting degenerative disc disease hindered his activities prior to the work injury. The Missouri courts have made clear this is not the proper focus of our inquiry and 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).

Clearly, employee's degenerative disc disease had the potential to combine with a future work-related injury to cause greater disability than would have resulted in the absence of that condition—that's exactly what happened in this case, as employee's treating neurosurgeon, Dr. Wilkinson, explained. In addition to the credible testimony from Dr. Wilkinson, Drs. Clymer and Ebelke both agreed that individuals with degenerative disc disease are predisposed to having increased back pain.

In addition to applying the wrong test for whether employee's preexisting conditions constituted hindrances or obstacles to his employment, the majority's decision to deny benefits works the effect of punishing employee for his uncontested memory problems caused by the numerous pain medications he takes to manage his chronic pain. The majority apparently agrees with the administrative law judge that employee's failure to report a complete history of his preexisting degenerative disc disease to Dr. Koprivica is an appropriate basis for throwing out the testimony of all of employee's experts and

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denying him benefits. But it's uncontested employee was under the influence of several powerful medications when he was evaluated by Dr. Koprivica, including narcotic pain-killers, muscle relaxers, and an anti-psychotic, and these worked the effect of impairing his memory and his ability to provide an accurate medical history. It's clear to me that this is not a case of an employee being untruthful to an evaluating physician—rather, employee just couldn't remember the extent and seriousness of his past medical history. That history includes at least 67 separate visits to medical practitioners between July 1995 and April 1998 for complaints stemming from employee's preexisting degenerative disc disease. The administrative law judge dismisses this history, remarkably characterizing it as "minimal treatment." This is yet another example that the award is against the overwhelming weight of the evidence in this matter. I find Dr. Koprivica credible when, after being provided an accurate history with regard to employee's significant preexisting degenerative disc disease, he opined employee is permanently and totally disabled as a result of a combination of that condition with the effects of the work injury.

In sum, I disagree with the administrative law judge's determinations and ultimate conclusion on the issue of Second Injury Fund Liability. I find credible the testimony of Dr. Koprivica and find that employee met his burden under § 287.220 RSMo of proving he is permanently and totally disabled due to a combination of the April 8, 1999, injury and his preexisting degenerative disc disease. I would reverse the decision of the administrative law judge and award permanent total disability benefits against the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

Curtis E. Chick, Jr., Member