

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

Injury No.: 00-117396

Employee: George Moore
Employer: Allied Systems (Settled)
Insurer: Self-Insured (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 March 15, 2011. The award and decision of Administrative Law Judge Linda J. Wenman, issued March 15, 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 5th 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: George Moore

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 believe the decision of the administrative law judge (ALJ) should be modified and employee should be awarded permanent total disability benefits against the Second Injury Fund.

First, there is no dispute that employee suffered an accident that arose out of and in the course of his employment on August 12, 2000, and that the injuries resulting from said accident combined with employee's preexisting disabilities to trigger Second Injury Fund liability. The issue is whether the combination of employee's primary injury and preexisting disabilities resulted in employee's permanent and total disability.

Permanent and total disability is defined by § 287.020.7 RSMo as the "inability to return to any employment"

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. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Gordon v. Tri-State Motor Transit Company, 908 S.W.2d 849, 853 (Mo.App. 1995) (citations omitted).

Dr. Cohen examined employee on December 7, 2006, and rated employee's primary injury at 27-28% permanent partial disability of the body as a whole referable to the lumbar spine. Dr. Cohen rated employee's preexisting disabilities at 35% permanent partial disability of the left knee, 25% permanent partial disability of the right knee, 30% permanent partial disability of the right elbow, 30% permanent partial disability of the right wrist, and 2-3% permanent partial disability of the body as a whole referable to the lumbar spine.

Dr. Cohen opined that employee's primary injury combined with his preexisting disabilities to render employee permanently and totally disabled and not capable of gainful employment.

In relying on Dr. Cohen's opinions, Mr. England, the only vocational expert to testify, concluded that employee was not capable of competing in the open labor market.

The ALJ discredited all of Dr. Cohen's opinions based on one sentence of his testimony. Specifically, when asked why employee stopped working Dr. Cohen replied, "because of everything that happened to him in the past plus his shoulder injury and surgery." The ALJ interpreted this sentence as Dr. Cohen conceding that employee was not permanently and totally disabled until his April 27, 2001, shoulder injury. The

Employee: George Moore

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ALJ then concluded that the Second Injury Fund is only liable for enhanced permanent partial disability benefits.

Although it is my contention that the ALJ illogically interpreted Dr. Cohen's aforementioned testimony, even so, the Commission does not have to make its decisions based only upon testimony from physicians; it can make its findings based on the entire evidence. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 239 (Mo. App. 2003), quoting *Smith v. Richardson Bros. Roofing*, 32 S.W.3d 568, 573 (Mo. App. 2000). The entire evidence clearly establishes that employee is permanently and totally disabled irrespective of his April 27, 2001, shoulder injury.

Due to the primary injury, employee suffered chronic lumbar pain with radiculopathies involving both the right and left L5 nerve roots. Employee received 16 weeks of temporary total disability benefits from August 12, 2000 through December 4, 2000, and thereafter, commendably, attempted to return to work. Employee was 62 years old when he attempted to return to his very physically demanding job.

After employee's return to work in December 2000, but before his April 2001 shoulder injury, employee's performance and attendance were marginal, at best. He received an additional 11 weeks of temporary total disability benefits for his back injury and took 40-50 personal days to rest because his body hurt. Therefore, employee only worked approximately one or two weeks of the approximate 12 to 13 weeks leading up to his April 2001 shoulder injury. Employee's limited activity during this period of time does not mitigate against a finding of total disability. See *Grgic v. P & G Construction*, 904 S.W.2d 464, 466 (Mo. App. 1995).

Employee's attempted return to work from December 2000 to April 2001 demonstrated his "inability to perform the usual duties of his employment in the manner that such duties are customarily performed by the average person engaged in such employment..." and, therefore, in accordance with *Gordon*, employee was unable to return to any employment. *Gordon*, 908 S.W.2d at 853. No employer could reasonably be expected to hire employee in his condition as of the date of the primary injury.

I find that Dr. Cohen's opinions are the most credible and employee's primary injury combined with his preexisting disabilities to render him permanently and totally disabled. As such, I would modify the award of the administrative law judge merely awarding employee permanent partial disability benefits and award employee 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