

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

Injury No.: 03-134201

Employee: Charles D. Pate
Employer: Atmos Energy Corporation (Settled)
Insurer: Travelers Property Casualty Corporation (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 17, 2010. The award and decision of Administrative Law Judge Gary L. Robbins, issued March 17, 2010, 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 28th day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Charles D. Pate

Injury No. 03-134201

Dependents: N/A

Employer: Atmos Energy Corporation

Additional Party: Second Injury Fund

Insurer: Travelers Property Casualty Corporation

Hearing Date: January 26, 2010

Checked by: GLR/rf

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? December 18, 2003.
5. State location where accident occurred or occupational disease contracted: Pemiscot 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: The employee injured his back and body as a whole when he was setting a residential meter.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Back and body as a whole.
14. Nature and extent of any permanent disability: See Award. 40% permanent partial disability due to the accident occurring in 2003 (settled by compromise settlement) and 15% permanent partial disability due to the accident occurring in 1987.
15. Compensation paid to date for temporary total disability: Not disclosed at trial.
16. Value necessary medical aid paid to date by employer-insurer: Not disclosed at trial.
17. Value necessary medical aid not furnished by employer-insurer: The employee did not claim any medical bills.
18. Employee's average weekly wage: \$556.02
19. Weekly compensation rate: \$556.02 per week for temporary and permanent total disability and \$347.05 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark A. Keersemaaker.

FINDINGS OF FACT AND RULINGS OF LAW

On, January 26, 2010, Charles D. Pate, the employee, appeared in person and by his attorney, Mark A. Keerseemaker, for a hearing for a final award. The employee settled his claim against the employer-insurer prior to trial. The Second Injury Fund was represented at the hearing by Assistant Attorney General Clifford Verhines. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. 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 statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Travelers Property Casualty Corporation.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Atmos Energy Corporation and was working under the Workers' Compensation Act.
3. On or about December 18, 2003 the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The employer had notice of the 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 was stipulated to by the parties as \$556.02 per week. The parties agreed that the employee's rate for permanent partial disability is \$347.05 per week.
7. The employee's injury was medically casually related to his accident or occupational disease.
8. The parties agreed that there was not an issue as to medical aid.
9. The parties agreed that there was not an issue as to temporary disability benefits.
10. The employee has no claim for any past medical bills.
11. The employee has no claim for mileage or other medical expenses under Section 287.140 RSMo.
12. The employee has no claim for future medical bills.
13. The employee has no additional claim for temporary disability benefits.
14. The employee has no claim for permanent total disability benefits.

ISSUE

Liability of the Second Injury Fund for permanent partial disability benefits.

EXHIBITS

The following exhibits were offered and admitted into evidence without objection other than objections made at the time depositions were taken:

Employee's Exhibits

- A Affidavit of Charles D. Pate
- B Stipulation for Compromise Settlement
- C Deposition of Shawn L. Berkin, D.O. (with attachments)
- D Medical Records of Methodist Central Hospital
- E Operative Reports from April 12, 2004 and March 30, 2006
- F Medical Records of Ferguson Medical Group
- G Medical Records of Cape Radiology Group
- H Medical Records of Patrick J. Lecorps, M.D.
- I Medical Records of Three Rivers Health Care
- J Medical Records of Cape Neurological Surgeons
- K Medical Records of River City Imaging
- L Medical Record of Auburn Surgery Center
- M Medical Records of Phoenix Neurosurgery
- N Medical Records of Kevin A. Vaught, M.D.
- O Medical Records of Southeast Missouri Hospital

The Second Injury Fund offered no exhibits in this case.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

The Second Injury Fund presented no evidence in this case. The Second Injury Fund did not offer any documentary evidence and did not call any witnesses in this trial.

The only witness to testify live at trial was Charles D. Pate. All other evidence was presented in the form of medical records, written records and reports, or by deposition testimony.

Mr. Pate, the employee, was born in 1944 and lives with his wife of 23 years in Portageville, Missouri. They had no children or other dependents living with them on December 18, 2003.

Mr. Pate began working for Associated Natural Gas Company in 1987. They were eventually purchased by Atmos Energy Corporation. In 1987, the employee was a working foreman whose general duties involved the movement and setting of meters weighing as much as 1,000 pounds with most of the meters weighing around 200 pounds. He had to lift and carry the meters on the job. Prior to 1987 Mr. Pate had no problems in performing the duties of his job.

Prior Accident

Mr. Pate injured himself at work in 1987. He testified that he was sandblasting a meter regulation station and was moving bags of sand blasting material weighing about 80 pounds. He indicated that he twisted his back in the process of moving one of the bags. Mr. Pate had to have back surgery as a result of this accident. Medical records indicate that Dr. Bakhtian performed back surgery on March 6, 1987. His operative report shows that he performed a subtotal hemilaminectomy left at L4, an extruded L3 discectomy and a L5 root foraminotomy. The postoperative diagnosis was an extruded left L3 disc migrating to posterior L4 vertebral body.

The employee returned to work after his 1987 back surgery. He testified that he had to ease back into his job but did return to full duty. He stated that he was able to do all of his work even though he still had back pain, a little leg weakness and some foot drop. However, as of 1990, Mr. Pate testified that he could not handle the heavy workload and he changed jobs, becoming a service technician. He stated he had to do this as he had problems with heavy lifting and had pain in his back and weakness in his left leg. Mr. Pate indicated that he asked for the lighter work and had to take a \$2.00 an hour pay cut in order to take the job as a service technician and get a lighter workload. He said he held this job from 1990 to 2003 even though he experienced the same symptoms.

The employee injured his back again on December 18, 2003 when he was setting a residential meter. He indicated he was using an 18" pipe wrench that slipped. When the wrench slipped the employee twisted his back when he fell against the house.

Mr. Pate testified that the symptoms after the 2003 accident were much like the symptoms from the past but much worse. He testified that he had increased back pain and a lot of weakness in his hips and legs. In addition, he testified that his foot drop worsened. He underwent separate back surgeries on April 12, 2004 and March 30, 2006 due to this accident. On April 12, 2004, Dr. Lecorps performed back surgery. His operative report shows that he performed a lumbar laminectomy at L5, a discectomy at L5 and a foraminotomy on the left side. On March 30, 2006, Dr. Vaught performed another back surgery. His operative report shows that he performed a complete L4 laminectomy, medical facetectomy, and bilateral foraminotomy and a bilateral L5-S1 redo microdiscectomy. Mr. Pate testified that the 2004 surgery actually made him worse and that is why he had to have the second back surgery in 2006.

The employee testified that he returned to work but did not do well. He indicated that he was unable to do a lot of the things he should but he kept doing them anyway. He testified that he had trouble getting up from reading low meters and he would give out after half a day when reading meters. Overall, he indicated he was limited in his regular job duties. After 2003, Mr. Pate indicated he had trouble with walking, standing and bending. He indicated that he had so many problems doing his job after the 2004 surgery that he saw another doctor that led to the second surgery. He testified that he had the same types of problems after the 2006 surgery as he had after the 2004 surgery.

Mr. Pate testified that after the 2006 surgery he could not return to his regular routine. At that time his employer was nice enough to let him perform office duties where his duties consisted of answering the phone and looking up bills. He said he planned to retire at age 62 and when he reached 62 he retired from the company.

During cross examination Mr. Pate agreed that he had back pain, left leg pain and left foot drop, and weakness after the 1987 surgery. He also agreed that no physician imposed any medical restrictions as a result of this surgery. After the 2004 and 2006 surgeries, Mr. Pate agreed that he had the same kinds of disabilities that he had after the 1987 surgery except the conditions were much worse. He said the last two surgeries magnified his problems. In addition, he said the left foot drop was much worse, so much so that after the 2006 surgery Dr. Vaught prescribed a brace for the left foot. Mr. Pate testified that due to the increased problems he has to wear the brace most of the time.

The employee settled his 2003 accident with the employer-insurer on July 10, 2007 by Stipulation for Compromise Settlement. The settlement was for 40% permanent partial disability to the employee's body as a whole, back, legs and hips. A medicare set aside in the amount of \$40,995.22 was also part of the final stipulation. The employee retired from Atmos Energy in July 2006 after working there for over 32 years.

RULINGS OF LAW-

Liability of the Second Injury Fund for permanent partial disability benefits.

The only issue presented for consideration is the issue of Second Injury Fund liability for permanent partial disability benefits. Second Injury Fund liability is governed by Section 287.220 RSMo. In order for an administrative law judge or the commission to find Second Injury Fund liability, "a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability." **Uhlir v. Farmer, Treasurer of the State of Missouri**, 94 S.W.3d 441, 444 (Mo App. 2003) (internal citations omitted, overruled on other grounds). As the employee is only claiming permanent partial disability the second portion of the statute quoted above is irrelevant. With regard to the first enumerated way to establish Second Injury Fund liability, the claimant must establish that the prior injury and the subsequent injury meet a minimum threshold which, "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".

The employee has previously settled his primary or subsequent injury against employer for 40% permanent partial disability of the body as a whole referable to the back, legs and hips. Employee's Exhibit B is the Stipulation for Compromise Settlement. There is nothing in the record which would provide any basis for disturbing that permanent partial disability settlement. The Court finds that the disabilities suffered by employee as a result of the subsequent or primary injuries are consistent with the settlement. The Court specifically finds that the employee has a

40% permanent partial disability from the 2003 accident. The disabilities for the primary or subsequent injury clearly meet the statutory minimum threshold required by Section 287.220 RSMo.

The remaining question to be decided by the Court is whether the previous disability resulting from the 1987 accident meets the statutory minimum threshold and combines with the subsequent injuries and disabilities from the 2003 accident resulting in a greater overall disability than that which would have resulted from the 2003 injury alone and of itself.

Since the burden of proof rests with the employee, benefits can only be awarded if the Court is persuaded that the employee's evidence meets the requirements of Section 287.220 RSMo. After considering the live testimony of the employee, the testimony of the experts and the medical records admitted, the Court finds that employee is entitled to permanent partial disability benefits from the Second Injury Fund.

As quoted, *supra*, in order for an employee to establish a right to Second Injury Fund benefits for permanent partial disability, the employee must satisfy two requirements for the preexisting disability: (1) it is of sufficient severity to meet the statutory minimum requirements and, (2) the preexisting disability combines with the primary injuries resulting in a greater overall disability than that which would have resulted from the new injury alone and of itself.

Dr. Berkin testified that the preexisting disability to the employee's back due to the 1987 injury and surgery amounted to a 25% permanent partial disability of the body as a whole at the level of the lumbosacral spine. The Court finds that employee's preexisting disability to the lower back amounts to 15% of the body as a whole due to the injury and the surgical repair. Thusly, the disability from the 1987 accident meets the statutory minimum threshold.

Dr. Berkin also opined that the preexisting disability represented a hindrance or obstacle to employment and that the employee's preexisting disability to his lower back combines with the disabilities from the 2003 accident to create a significantly greater disability than the sum of the individual disabilities.

The Court finds that the preexisting back disability from the 1987 accident combines with the disabilities from the 2003 accident resulting in a greater overall disability than that which would have resulted from the new injury alone and of itself.

The parties are certainly aware of the so-called "Back on Back Rule". "Indeed, as a general rule where the first and second injuries are to the same part of the body, as in this case, the second supplements the first rather than combining to create a greater disability than the sum of the two." **Searcy v. McDonnell Douglas Aircraft Co.**, 894 S.W.2d 173 (Mo. App. 1995) (overruled on other grounds). While that is the general rule, the same body part limitation is not found in Section 287.220. If the employee can demonstrate the two injuries to the same part of the body do, in fact, produce a synergistic effect, compensation will lie. **Uhlir**, *supra*. "In the instant case, Respondent's two injuries combined to produce a synergistic effect of greater overall disability pursuant to Section 287.220, despite the fact that the two injuries were to the

same part of his body.” **Id.** at 445. Although the rule is still applicable in most cases, there are clearly special circumstances that may justify a finding of a synergistic combination in certain cases. One example of such an exception is when an employee has a preexisting low back injury that causes pain to radiate down one lower extremity and then subsequently has another accident that injures the employee’s low back with pain that radiates down the opposite lower extremity. Under those facts, the evidence might justify a conclusion that the preexisting injury and the primary injury did cause a synergistic combination because of the involvement of two opposite extremities. While the factual situation is somewhat different, the same principal exists in this case.

When you read the medical records and the operative reports, the 1987 surgery generally involved the L3-L4 levels of the lumbar spine while the 2004 and 2006 surgeries generally involved the L5-S1 levels of the lumbar spine. After the 1987 accident and surgery, the employee returned to work. His complaints involved back pain, leg weakness and foot drop and even though he took a lighter job in 1990 he testified that he did his job. The 2003 accident resulted in a back surgery in 2004 and due to bad results a second back surgery in 2006. The employee again complains of back pain, weakness in his hips and foot drop, except much worse. The evidence delineates differences between the disabilities from the 1987 accident and the 2003 accident that is more than the simple sum. First of all, the surgeries were at different levels. Secondly while the types of disabilities were similar, the problems from the last accident were much worse. Thirdly, while there was foot drop from the 1983 accident, braces were never required. The employee now has to wear a leg brace due to the severe case of foot drop. In addition, the employee returned to full duty, despite his problems after the 1987 accident. His continued problems required him to seek a less strenuous position that he held up until 2003. The employee could not due the physical aspects of his job in 2006. To his employer’s credit, they assigned him to office duties until he reached his 62nd birthday. All of these facts considered together document the something more that is necessary for Second Injury Fund liability. These facts document the synergism that is necessary to support a finding that the requirements of Section 287.220 RSMo. have been met and therefore, mandate that the Second Injury pay permanent partial disability benefits to the employee. These facts go beyond the general rule that the two back injuries supplement each other but do not combine to create a greater disability than their simple sum.

Based on the testimony of Dr. Berkin and the VERY credible testimony of the employee, the combination of the prior back injury from 1987 and the primary back injury from 2003 is found to result in disability that is greater than the simple sum of the two disabilities. The Court notes that the Second Injury Fund offered no evidence or witnesses on its behalf. There is no evidence to offset the position or credibility of the employee or Dr. Berkin. It is also found that a 10% loading factor is appropriate to quantify that synergistic effect. Therefore, the combined disability from the 1987 accident and the 2003 accident primary knee is found to be: 1987-15% of the body as a whole = 60 weeks, 2003-40% of the body as a whole = 160 weeks for a total of 220 weeks. With a 10% loading factor the Second Injury Fund has permanent partial disability liability of 22 weeks, $220 \text{ weeks} \times .10 = 22 \text{ weeks}$.

Based on the live testimony of the employee, the deposition testimony of an expert witness, and the medical records admitted into evidence, the Court finds that employee is entitled to, and hereby awards the employee \$7,635.10 (22 x \$347.05 = \$7,635.10). The Second Injury Fund shall pay this amount to the employee.

ATTORNEY’S FEE

Mark A. Keerseemaker, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST

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

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation