

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

Injury No.: 10-020750

Employee: Daneen Pennington
Employer: Timberlake Care Center (Settled)
Insurer: Missouri Nursing Home Insurance (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.¹ We have read the briefs, reviewed the evidence, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the August 28, 2012, award and decision of the administrative law judge. Nonetheless, we adopt the findings and conclusions of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and award herein.

Issues Presented

The primary issue to be decided is whether employee was rendered permanently and totally disabled due to the effects of her work injury considered in isolation or due to the effects of the work injury in combination with her preexisting conditions.

Findings of Fact

Preliminaries

Employee sustained a work-related low back injury on March 22, 2010. Employee underwent low back fusion surgery. On March 15, 2011, Dr. Ciccarelli released employee from his care with permanent restrictions of no lifting over 25 pounds and avoiding repetitive bending or lifting on a frequent basis. Employee's employment with employer ended because employer could not accommodate employee's restrictions. Employee has not returned to work since her release from care.

Employee settled her workers' compensation claim against employer/insurer based upon an approximate permanent partial disability of 22.5% of the body as a whole referable to the low back.

Employee proceeded to trial of her claim against the Second Injury Fund. The administrative law judge denied employee's claim against the Second Injury Fund because she found employee was rendered permanently and totally disabled due to the effects of the work injury considered in isolation. Employee appeals.

Work Injury

On March 22, 2010, employee injured her back lifting a box of paper. Dr. Ciccarelli treated employee for her back injury, which he diagnosed as a herniated disk at L4-5 (with unstable segment), L4-5 radiculopathy, L4-5 spondylolisthesis, L4-5 lumbar

¹ Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

Employee: Daneen Pennington

- 2 -

stenosis, L4 foraminal stenosis, and chronic low back pain. After conservative care failed, Dr. Ciccarelli performed surgery on employee's back which included the following procedures, among others; bilateral laminectomies at L4 and L5, a lumbar foraminal discectomy at L4-5, a partial bilateral laminectomy at L3, and a lumbar fusion spanning L4-L5. Dr. Ciccarelli released employee from his care with permanent restrictions of no lifting over 25 pounds and directions to avoid frequent repetitive bending or lifting.

Preexisting Conditions

In July 2006, employee sustained a shoulder injury that was ultimately diagnosed as impingement syndrome. Dr. Frevert was employee's treating physician for this injury. He treated employee conservatively with injections and physical therapy. Dr. Frevert last treated employee on December 6, 2006. On that date, Dr. Frevert noted employee was still experiencing stiffness with her shoulder and that employee was having a little bit of a problem with overhead activity. Dr. Frevert concluded:

From my standpoint I think the shoulder will gradually improve if she will continue with a home exercise program and get to the point where I think she does very well with this. With that, we will release her from care at this time and let her do pretty much activities as she can tolerate with no specific restrictions. I encouraged her to continue with a home exercise program.

The administrative law judge found that Dr. Frevert released employee from his care without restrictions. This is not quite accurate. It is clear from Dr. Frevert's final treatment record that Dr. Frevert believed employee was still having some problems with her left shoulder and that Dr. Frevert believed employee's shoulder would continue to improve. And although he gave employee "no specific restrictions," Dr. Frevert did generally limit employee's activities to those "she can tolerate." This direction to limit activity to tolerance is itself a physical restriction that may expand or contract in relation to the employee's symptoms. Of course, this fluid restriction makes sense in light of Dr. Frevert's opinion that employee was not yet at maximum medical improvement with regard to her shoulder condition.

We find that the last time Dr. Frevert treated employee, he released her with a restriction to limit her shoulder activities to those activities employee can tolerate as to pain, strength, and range of motion.

The record belies the administrative law judge's finding that virtually all of employee's complaints, restrictions, and disabilities are directly attributable to her March 22, 2010, work injury. Employee credibly testified about how her shoulder condition caused her tremendous pain with reaching and that she suffered a loss of range of motion, shoulder strength, and grip strength. The effects of the shoulder condition hindered employee in the performance of her duties and forced employee to change the way she performed her work. Employee basically has to do everything with her right arm. When she worked at a residential care facility, employee had to push resident wheel chairs with only her right arm. Employee was unable to use her left arm to reach overhead so she performed overhead activities like changing a room-dividing curtain with only her right arm. Employee testified that she learned to mop using only her right arm. She learned to change the mop water using her right arm and her knee. At the conclusion of a work shift, employee's shoulder tingled and would burn with pain.

Employee: Daneen Pennington

- 3 -

Employee rates her shoulder pain at a five on a scale of one to ten. She still has significant left shoulder problems with strength, reach, grip and dexterity. A home care aide must assist employee with dressing her torso because she cannot lift her left arm over her head.

Expert Vocational Opinions

Michael Dreiling was the only vocational expert to testify in this case. Mr. Dreiling is of the opinion that employee is permanently and totally disabled due to the effects of the primary injury in combination with her preexisting shoulder disability, vocational history, limited education, and lack of transferable skills.

The administrative law judge found that Mr. Dreiling's opinion is not credible because he did not consider whether the effects of the work injury alone rendered employee permanently and totally disabled. The following exchange between employee's counsel and Mr. Dreiling during Mr. Dreiling's testimony highlights that Mr. Dreiling did, in fact, consider whether employee's back injury considered in isolation rendered employee unemployable.

Q. And this unemployability, in your opinion as a vocational expert, is it due solely to her back injury in 2010 or is it a combination of the effects of the back as well as the effects on the earlier shoulder?

A. I felt that -- when I took into account the vocational profile and all the factors, including her medical condition, at least at face value, it appeared to me that it was both the shoulder problems she had in '06 as well as the back injury in 2010, along with the other vocational factors.

Expert Medical Opinions

Dr. Stuckmeyer was the only medical expert to testify. After examining employee and reviewing employee's medical records, he testified that employee sustained a 25% permanent partial disability of the body as a whole referable to the primary injury. Dr. Stuckmeyer believed employee's shoulder condition was a hindrance to employee's employment.

The administrative law judge found that Dr. Stuckmeyer's opinion is not credible because he did not consider whether the effects of the work injury alone rendered employee permanently and totally disabled. As he should have, Dr. Stuckmeyer opined as to employee's physical restrictions and deferred to Mr. Dreiling regarding whether or not employee can compete in the open labor market in her present physical condition.

We find employee to be credible. We also find credible the opinions of Dr. Stuckmeyer and Mr. Dreiling. We find that as of the date of the work injury, employee's shoulder condition constituted a measurable permanent disability and was a hindrance and obstacle to employment or reemployment. We find employee reached maximum medical improvement on March 15, 2011, as opined Dr. Ciccarelli.

Discussion

We agree with the administrative law judge's conclusion that employee is permanently and totally disabled. But we disagree with the conclusion that employee's permanent total disability is due to the effects of the work injury considered in isolation as that

Employee: Daneen Pennington

conclusion is directly contrary to the opinions of the only experts to testify in this matter. We find employee sustained permanent partial disability of 25% of the body as a whole as a result of the March 22, 2010, back injury considered in isolation.

We find that employee was rendered permanently and totally disabled due to the combination of the effects of the work injury with her preexisting disabilities. Consequently, we find the Second Injury Fund is liable for permanent total disability benefits.

Because there is no difference between employee's permanent partial disability and permanent total disability compensation rates, the Second Injury Fund's obligation to pay benefits does not begin until the benefit period for the primary injury expires. Employee reached maximum medical improvement on March 15, 2011. The primary injury resulted in 100 weeks of disability. Consequently, for 100 weeks following March 15, 2011, the Second Injury Fund has no weekly obligation. Thereafter, employee is entitled to weekly permanent total disability benefits from the Second Injury Fund.

Award

We reverse the administrative law judge's award denying permanent total disability benefits from the Second Injury Fund. Beginning February 20, 2013, the Second Injury Fund shall pay to employee weekly permanent total disability benefit of \$297.42. The weekly payments shall continue for employee's lifetime, or until modified by law.

Frederick Bryant, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued August 28, 2012, is attached and incorporated by this reference, to the extent it is not inconsistent with this award.

Given at Jefferson City, State of Missouri, this 17th day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

 V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD As to the Second Injury Fund

Employee: Daneen Pennington Injury No. 10-020750
Employer: Timberlake Care Center
Insurers: Missouri Nursing Home Insurance
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 18, 2012 Checked by: PAM/lh

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? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: March 22, 2010
5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte 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 occurred or occupational disease contracted: Pennington injured her back from moving a box of supplies.
12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Back, body as a whole.
14. Nature and extent of any permanent disability: 22.5% permanent partial disability body as a whole.
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? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$297.42
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Second Injury Fund Liability: None
22. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Daneen Pennington Injury No. 10-020750
Employer: Timberlake Care Center
Insurers: Missouri Nursing Home Insurance
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 18, 2012 Checked by: PAM/lh

On July 18, 2012, the employee and the Missouri Treasurer as Custodian of the Second Injury Fund appeared for final hearing. The employee, Daneen Pennington, appeared in person and with counsel, Frederick Bryant. The Second Injury Fund appeared by and through Assistant Attorney General Eric Lowe. The Division had jurisdiction to hear this case pursuant to §287.110.

STIPULATIONS

The parties stipulated to the following:

- 1) That Timberlake Care Center was an employer operating subject to Missouri workers' compensation law;
- 2) That Daneen Pennington was its employee working subject to the law in Missouri;
- 3) That Daneen Pennington notified Timberlake Care Center of her alleged injury and filed her claim within the time allowed by law;
- 4) That Daneen Pennington sustained an accident on March 22, 2010 in the course and scope of her employment;
- 5) That Daneen Pennington had a compensation rate of \$297.42.

ISSUES

The parties requested the Division to determine:

- 1) Whether Daneen Pennington is permanently and totally disabled;
- 2) Whether the Second Injury Fund is liable for permanent total disability benefit.

FINDINGS OF FACT and RULINGS of LAW

Daneen Pennington is a 48-year-old former custodial supervisor for Timberlake Care Center. On March 22, 2010 Pennington injured her back while lifting a box of supplies.

Pennington received extensive authorized medical treatment which ultimately resulted in low back fusion surgery performed by Dr. Ciccarelli on August 4, 2010.

Pennington had significant residual complaints following her low back surgery. Pennington was released from Dr. Ciccarelli's care on March 15, 2011. Dr. Ciccarelli imposed permanent restrictions of no lifting over 25 pounds and avoiding repetitive bending or lifting on a frequent basis. Pennington was terminated from her employment when the employer was unable to accommodate her restrictions.

Pennington has not returned to work since her release from care. She did receive unemployment benefits for a period of time.

Pennington continues to have significant complaints regarding her low back. She is extremely limited and guarded in her daily activities. She takes several medications, including Hydrocodone and Xanax on a daily basis.

Pennington has little formal education. She did not graduate from high school or obtain a GED. Her work history included heavy physical demand jobs such as custodial, cleaning, home health care and babysitting. Most of her work duties included standing for long periods of time. Pennington did have some limited supervisory skills.

Pennington did sustain a shoulder injury in July 2006. She received conservative care from Dr. Frevert who diagnosed Pennington with left shoulder impingement. She was released from Dr. Frevert's care in December 2006 without restrictions. Pennington settled her claim for 16 percent permanent partial disability to her left shoulder. She continued to work for various employers without restriction until her March 22, 2010 injury.

Dr. Stuckmeyer evaluated Pennington on April 13, 2011. Dr. Stuckmeyer assessed 25 percent permanent partial disability to Pennington's March 22, 2010 back injury. He placed her on work restrictions of no repetitive pushing, pulling, lifting or twisting, no prolonged standing or walking and no lifting over 10 to 15 pounds on an occasional basis.

Dr. Stuckmeyer had previously evaluated Pennington's shoulder in 2007. He reiterated his assessment of 30 percent left shoulder disability. Dr. Stuckmeyer opined Pennington was permanently and totally disabled when considering Pennington's vocational assessment. Dr. Stuckmeyer attributes her total disability to a combination of her left shoulder, low back injury and chronic narcotic use which were given to her after her back injury.

Michael Dreiling, vocational expert, evaluated Pennington. Dreiling believes Pennington to be permanently and totally disabled. He does not believe she is employable in the open labor market in her present condition. Dreiling cites Pennington's significant complaints of pain that she experiences daily, as well as her lack of education and transferrable skills as a basis for permanent total disability. Dreiling relies heavily on Dr. Stuckmeyer's and Dr. Ciccarelli's restrictions which were imposed due to the primary accident. Dreiling cites no permanent work restrictions predating her last accident, which might have hindered or become an obstacle to Pennington's employment. Dreiling admits Pennington is capable of sedentary work.

Pennington claims that she is permanently totally disabled. Chatmon v. St. Charles County Ambulance District, 555 S.W. 3d 451 (Mo.App. 2001) outlines the basis for permanent total disability.

“Total disability” means inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident.” §287.020.7 (RSMo. 2000.) “The test for permanent total disability is a worker’s ability to compete in the open labor market and that it measures the worker’s potential for returning to employment.” Sutton v. Vee Jay Cement Contracting Company, 37 S.W 3d 803 (Mo.App. 2000.) “The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition.” Reese v. Gary and Roger Link, Inc., 5 S.W. 3d 522, 526 (Mo.App. 1999.)

The phrase “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. Gordon v. Tri-State Motor Transit Co., 908 S.W. 2d 849, 853 (Mo.App. 1995) and Kowalski v. M-G Metals and Sales, Inc.

Despite the evidence to suggest Pennington capable of sedentary work, I find there is evidence to support Pennington’s claim of permanent total disability. Dr. Stuckmeyer finds her permanently and totally disabled. Michael Dreiling, the vocational expert, testified that no employer would reasonably be expected to hire Pennington in her present condition for any job as it is customarily performed in the open labor market.

I find Pennington to be permanently totally disabled.

Since I have determined Pennington to be permanently and totally disabled, the next question is whether she is permanently and totally disabled due to the accident in isolation, or from a combination of preexisting disabilities.

[Section 287.220.1 RSMo creates the Second Injury Fund and provides, in relevant part, as follows:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, ... 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 employer at the time

of the last injury is liable is less than the 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 §287.200 out of a special fund known as the "Second Injury Fund"...

Missouri cases consistently instruct that employee's preexisting conditions are irrelevant until a determination of the extent of employer's liability for the primary injury considered alone and in isolation is made:

When determining whether the Fund has any liability, the Commission must first determine the degree of disability from the last injury considered alone. Preexisting disabilities are irrelevant until this determination is made. If the last injury in and of itself rendered the claimant permanently and totally disabled, then the Fund has no liability and the employer is responsible for all compensation.

Mihalevich Concrete Constr. V. Davidson, 233 S.W. 3d 747, 754 (Mo.App. 2007)

I find Dr. Stuckmeyer's and Michael Dreiling's ultimate opinions as to the reason for employee's permanent total disability lacking in credibility. I reached this determination after carefully weighing and considering the testimony from both experts, including the concessions obtained by the Second Injury Fund on cross-examination. It appears that both experts failed to consider the effects of the work injury in isolation when they rendered their ultimate opinions. I have also carefully weighed and considered Pennington's own testimony, in which she emphasized the effects of the primary low back injury with accompanying medications as the dominant factor in restricting her physical activities. Virtually all of Pennington's complaints, restrictions, and disabilities are directly attributable to her March 22, 2010 injury.

In light of my findings as to the effects of the work injury and determination that Dr. Stuckmeyer's and Michael Dreiling's ultimate opinions lack credibility, I conclude that the effects of the primary injury, considered alone and in isolation, render employee permanently and totally disabled.

It follows that the Second Injury Fund has no liability. ABB Power T & D Co. v. Kemper, 236 S.W. 3d 43, 50 (Mo.App. 2007.) Accordingly, I must deny employee's claim against the Second Injury Fund.

Made by: _____
Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation