

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

Injury No.: 07-114673

Employee: Kathleen Peters
Employer: General Motors (Settled)
Insurer: Self-Insured (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, heard the parties' arguments, 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 by this supplemental opinion.

We offer this supplemental opinion to address the primary argument raised in the brief of the Second Injury Fund.

Second Injury Fund Argument

The Second Injury Fund argues that employee's right shoulder repetitive motion injury does not qualify as "a subsequent compensable injury" for purposes of triggering Second Injury Fund liability under § 287.220.1 RSMo, which provides, as follows:

...If any employee who has 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,...receives a subsequent compensable injury resulting in additional permanent partial disability...so that the degree or percentage of 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 preexisting 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

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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.
(Emphasis added).

We summarize our understanding of the Second Injury Fund's legal reasoning: "Injury" as defined in § 287.020.3 RSMo excludes occupational diseases. A repetitive motion injury is an occupational disease by virtue of § 287.067 RSMo. Thus, a repetitive motion injury is not an "injury." A repetitive motion injury can never be a compensable "injury" that can trigger Second Injury Fund liability under § 287.220.1.

We summarize the Second Injury Fund's argument as applied to the facts of this claim: Employee's right shoulder injury is a repetitive motion injury. Employee's right shoulder injury is an occupational disease. Employee's right shoulder injury is not an injury. Employee's right shoulder injury is not a "subsequent compensable injury." Employee has failed to prove she suffered a subsequent compensable injury, so the Second Injury Fund is not implicated in this matter.

Discussion

The Second Injury Fund argument fails. The Second Injury Fund fails to give effect to the complete definition of injury in § 287.020.3. The complete definition includes occupational diseases within the definition of "injury" where specifically provided in Chapter 287.

Section 287.020.3(5) RSMo states:

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. *These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.*

(Emphasis added).

Chapter 287 specifically provides for injuries by occupational disease and specifically says those injuries are compensable.

Section 287.067 RSMo states, in relevant part:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

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3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.
(Emphasis added).

The above sections specifically refer to a condition of ill caused by occupational disease, including one caused by repetitive motion, as an "injury." That is, the legislature specifically provided that the term "injury" includes occupational disease and that injuries by occupational disease are compensable.

Based upon the foregoing, we construe the term "injury" as it appears in the phrase "subsequent compensable injury" in § 287.220.1 to include occupational diseases.

Conclusion

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

The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued October 18, 2011 is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kathleen Peters

Injury No. 07-114673

Dependents: None

Employer: General Motors (Settled)

Additional Party: Second Injury Fund

Insurer: Self (Settled)

Hearing Date: July 13, 2011

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: GCG/ch

FINDINGS OF FACT AND RULINGS OF LAW

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: November 5, 2007
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:
Claimant sustained injury by repetitive use of the right shoulder in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: 22.5% of right shoulder
Pre-existing disability 25% of left shoulder, 26% of right foot (155 week level), 22% of left foot (155 week level)
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$163.00

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- 17. Value necessary medical aid not furnished by employer/insurer? Not Applicable
- 18. Employee's average weekly wages: \$1,400.00
- 19. Weekly compensation rate: TTD \$742.72/PPD \$389.04
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: Not applicable

22. Second Injury Fund liability: Yes

23.97 weeks of permanent partial disability from Second Injury Fund \$9,325.29

TOTAL: \$9,325.29

23. Future requirements awarded: None

Said payments to begin as of the date of this award and to be payable and 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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Gary Kullmann

Employee: Kathleen Peters

Injury No. 07-114673

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kathleen Peters

Injury No: 07-114673

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: General Motors (Settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party Second Injury Fund

Insurer: Self (Settled)

Checked by: GCG/ch

PRELIMINARY STATEMENT

The parties appeared before the undersigned Administrative Law Judge on July 13, 2011 for a final hearing to determine the liability of the Second Injury Fund in the matter of Kathleen Peters ("Claimant"). Attorney, Gary W. Kullmann, represented Claimant. Assistant Attorney General Barbara Toepke represented the Second Injury Fund. The Employer, General Motors, and its Insurer, previously settled with Claimant and did not participate in the hearing. The parties submitted post-trial briefs.

STIPULATIONS

The parties stipulated to the following:

1. On or about November 5, 2007, Claimant sustained an occupational disease arising out of and in the course of employment that resulted in an injury to Claimant's right shoulder. The occupational disease arose in St. Charles County.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation Law.
3. At the time of the accident Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
4. Venue is proper in St. Charles.
5. Employer received proper notice of the claim.
6. Claimant filed the claim for compensation within the time allowed by law.
7. The Claimant's average weekly wage was \$1,400.00 with a TTD/PPD rate of \$742.72/\$389.04
8. Employer paid \$163.00 in medical expenses.

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9. Employer paid \$0.00 in TTD representing 0 weeks of compensation.
10. Claimant and Employer entered into a compromise lump sum settlement on October 14, 2010. The settlement was approved by the Division and represents 22.5% permanent partial disability of the right shoulder.
11. Claimants' pre-existing disabilities before the date of injury on November 5, 2007 are:
 - a. 25% Left Shoulder
 - b. 26% Right Foot (155 week level)
 - c. 22% Left Foot (155 week level)
12. Claimant and the Second Injury Fund agree that if the claim against the Second Injury Fund is found to be compensable, then the Second Injury Fund's liability amounts to 23.97 weeks of permanent partial disability.

Issue Presented:

1. Liability of the Second Injury Fund

SUMMARY OF EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge. Further, any such markings had no impact on any rulings made in this case.

Exhibits:

Claimant offered the following exhibits, which were received into evidence without objection:

- A. Memorandum of Agreement
- B. General Motors – 1/1/09 to 11/17/09 and 1/1/05 to 12/7/09 – Medical Records
- C. Dr. Stephen Smith – 5/15/09 to 7/1/09 – Treatment Records
- D. Dr. James Emanuel – 7/21/09 to 12/29/09 – Treatment Records
- E. City Place Surgery Center – 9/9/09 – Surgery Records
- F. Creve Coeur Surgery Center – 12/17/04 – Surgery Records
- G. Dr. James Emanuel – 11/16/04 to 4/12/05 – Treatment Records
- H. Dr. Daniel Kiddy – 5/9/97 to 7/25/97 – Treatment Records
- I. Dr. John McAllister – 1/22/98 – Treatment Record
- J. Certified Copy – Stipulation for Compromise Settlement – Injury No.: 07- 114673; and Certified Copy – Division of Workers' Compensation Files Nos: 97-495001 & 01-169917

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K. Dr. David Volarich – 10/4/10 – Medical Rating Report

The Second Injury Fund did not offer any exhibits.

Evidence:

1. On September 4, 2001, Claimant sustained an injury to her left shoulder that required surgical repair. Due to the limitations from the 2001 left shoulder injury Claimant did her job primarily using her right arm. Her job entailed fitting doors on vehicles as the vehicle went down the assembly line. If the door did not fit properly she would have to hang on them, beat them, pound them and pry them into proper position. As a result of having to use her right arm primarily for this job Claimant began to develop right arm symptoms.
2. Claimant received medical care as described in Exhibits B through E.
3. Claimant and Employer settled the workers' compensation claim arising out of the occupational disease for 22.5% of the right shoulder.
4. Claimant has the following limitations or complaints regarding the work injury:

Claimant has limited range of motion of the right shoulder and pain with use of the right arm.

5. Prior to the December 19, 2003 work injury, Claimant had the following disabling injuries or conditions:
 - a) In April 1997 Claimant developed bilateral plantar fasciitis due to her work at General Motors. Claimant's treatment consisted of taping, injections and orthotics. As a result of this condition, Claimant gave up driving a stick shift vehicle, was unable to run and continues to have difficulty walking, especially down hills and stairs. Claimant continues to wear orthotics. Claimant settled this claim against the employer for 26% of the right foot and 22% of the left foot, both at the 155 week level.
 - b) On September 4, 2001 Claimant developed an injury to her left shoulder while working at General Motors on the assembly line. Claimant was diagnosed with subacromial bursitis impingement syndrome and underwent arthroscopic subacromial decompression and distal clavicle resection. The diagnosis and treatment for this injury is summarized in the treatment records of Dr. James Emanuel (Exhibit G). The injury to Claimant's left shoulder was disabling and constituted a hindrance and obstacle to employment. Claimant settled this claim against the Employer for 25% of the left shoulder. The report of Dr. David Volarich indicates that Claimant still experiences constant aching and increased pain with repetitive use. Claimant has a loss of range of motion and has difficulty reaching behind her back. Claimant can no longer lift more than 10 to 12 pounds on a single lift and repetitive lifting causes her left arm to give out.

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Opinion Evidence:

Dr. David Volarich (Exhibit K) examined Claimant, took a history, and issued a report. He found that Claimant had sustained an occupational disease arising out of and in the course of employment that resulted in an injury to Claimant's right shoulder. Dr. Volarich diagnosed Claimant with:

1. Overuse syndrome right upper extremity causing impingement and partial rotator cuff tear – S/P arthroscopic subacromial decompression, distal clavicle excision and debridement of partial rotator cuff tear.
2. Overuse syndrome right elbow causing mild ulnar neuropathy.

Dr. Volarich rated Claimant's right shoulder at 35% permanent partial disability. Dr. Volarich was of the opinion that Claimant's preexisting conditions caused a hindrance or obstacle to employment and found the combination of Claimant's disabilities created a substantially greater disability than the simple sum of each separate injury or illness.

FINDINGS OF FACT & RULINGS OF LAW

Claimant has established a right to recover from the Second Injury Fund. A claimant in a workers' compensation proceeding has the burden of proving all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. 2008). For a claimant to recover from the Second Injury Fund, he must prove that he sustained a compensable injury, referred to as "the last injury," which resulted in permanent partial disability. Section 287.220.1 RSMo. A claimant must also prove that he had a preexisting permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. 2008) (citations omitted). To recover permanent partial disability benefits from the Second Injury Fund, a claimant must prove that the last injury, when combined with the pre-existing permanent partial disabilities, causes greater overall disability than the simple sum of each separate disability. *Elrod v Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. 2004). I find that Claimant has met the burden imposed by law.

The Second Injury Fund asserts as a defense that after the 2005 amendments to Chapter 287 RSMo., Fund liability is not triggered when the primary injury is an occupational disease claim. The argument is essentially that the language of §287.220.1 requires "a subsequent compensable *injury*" to trigger fund liability, and the definition of injury in §287.020.3(5) states that except as specifically provided for in the Chapter it is not to include occupational disease. The Fund argues applying strict construction; an occupational disease does not create Fund liability.

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However, the definition of “injury” or “personal injury” in Section 287.020.3(5) only excludes occupational diseases **“except as specifically provided in this chapter.”** (emphasis added). Thus the definition of injury can include occupational disease under some circumstances. Section 287.067.2 provides that an **“injury** by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” (emphasis added) Likewise, §287.067.3 provides **“An injury** due to repetitive motion is recognized as an occupational disease for purposes of this chapter.” (emphasis added). Sections 287.067.2 and 3 both specifically provide for injury by occupational disease. Further, §287.067.3 specifically provides that occupational disease by repetitive motion, which is the primary injury in this case, is an “injury”. The claim against the Second Injury Fund is compensable.

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. On November 5, 2007, Claimant sustained a compensable last injury which resulted in permanent partial disability of 22.5% of the right shoulder. I find that the medical records and the report of Dr. David Volarich are credible and support this finding.
2. As of the time the last injury was sustained, Claimant had the following pre-existing permanent partial disabilities, which meet the statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment:
 - a. 26% of the right foot
 - b. 22% of the left foot
 - c. 25% of the left shoulder
3. The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, to cause greater overall disability than the independent sum of the disabilities in the amount of 23.97 weeks.
4. The Second Injury Fund liability pursuant to the parties’ stipulation is 23.97 weeks of overall greater disability.

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CONCLUSION

The Second Injury Fund is liable to Claimant for \$9,325.29 in permanent partial disability benefits. Attorney for Claimant, Gary Kullmann, shall be entitled to an attorney fee of 25% of this award for necessary legal services provided.

Made by: /s/ GRANT C. GORMAN
Grant C. Gorman
Chief Administrative Law Judge
Division of Workers' Compensation