

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

Injury No. 08-010379

Employee: Kenneth D. Phillips
Employer: S & H Transportation (Settled)
Insurer: Commerce and Industry Insurance Co. (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 § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 30, 2015, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued April 30, 2015, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 6th day of November 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kenneth D. Phillips

Injury No. 08-010379

Dependents: None

Employer: S & H Transportation (Settled)

Additional Party: Second Injury Fund

Insurer: Commerce and Industry Insurance, Co.

Hearing Date: August 20, 2014

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

Checked by: GCG/kr

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 (Settled)
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 13, 2008
5. State location where accident occurred or occupational disease was contracted: Phelps 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 was stepping over snow and ice when he slipped and fell, landing on his 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: 65% Right shoulder (permanent and total disability from last injury alone).
15. Compensation paid to-date for temporary disability: \$79,521.92
16. Value necessary medical aid paid to date by employer/insurer? \$154,352.73

Employee: Kenneth D. Phillips

Injury No. 08-010379

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$877.41
- 19. Weekly compensation rate: \$584.72 TTD/\$389.04 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: (\$58,667.23 from settlement with Employer)

22. Second Injury Fund liability: No

TOTAL: \$0

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:

Jonathan Isbell

Employee: Kenneth D. Phillips

Injury No. 08-010379

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kenneth D. Phillips

Injury No: 08-010379

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: S & H Transportation (Settled)

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

Additional Party Second Injury Fund

Insurer: Commerce and Industry Insurance, Co.

Checked by: GCG/kr

PRELIMINARY STATEMENT

Hearing on the above-referenced case was held before the undersigned Administrative Law Judge on August 20, 2014 at the Division of Workers' Compensation in St. Charles County, Missouri. Kenneth D. Phillips ("Claimant") was present and represented by Jonathon Isbell. The liability of S & H Transportation ("Employer"), and its insurance carrier, was previously settled. Assistant Attorney General Tracey Cordia represented the Second Injury Fund. Mr. Isbell requested a fee in the amount of 25%. The parties submitted post-trial briefs.

Stipulations:

The parties entered into the following stipulations:

1. On or about February 13, 2008, Claimant sustained an accident arising out of and in the course of his employment that resulted in injury to Claimant's right shoulder, neck and body as a whole referable to psychological impairment. The accident occurred in Phelps County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in St. Charles County, Missouri.
4. Employer received the proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. At the time of the accident, Claimant earned an average weekly wage of \$877.41, resulting in applicable rates of compensation of \$584.72 for permanent total disability benefits and \$389.04 for permanent partial disability benefits.
7. Employer paid TTD benefits in the amount of \$79,521.92, representing a period of 136 weeks.
8. Employer paid \$154,352.73 in medical benefits.
9. Claimant reached maximum medical improvement ("MMI") on September 14, 2010.

Issues:

1. Liability of the Second Injury Fund.

Employee: Kenneth D. Phillips

Injury No. 08-010379

SUMMARY OF EVIDENCE

Only evidence necessary to support this Award will be summarized. Any objections not expressly ruled on during the hearing or in this Award are now overruled. Certain exhibits offered into evidence may contain handwritten markings, underlining and/or highlighting on portions of the documents. Any such markings on the exhibits were present at the time they were offered by the parties. Further, any such notes, markings and/or highlights had no impact on any ruling in this case.

Exhibits

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

1. Deposition of Robert P. Poetz, D.O. , F.A.C.O. F.P. taken March 5, 2013, including deposition exhibits: Curriculum Vitae; Independent Medical Examination report.
2. Deposition of Delores E. Gonzalez taken June 20, 2013, including deposition exhibits: Curriculum Vitae; Vocational Rehabilitation Evaluation.
3. Advanced Radiology Medical Record d/o/s 2-11-09 through 9-10-09.
4. Barnes Jewish Hospital outpatient Medical Record d/o/s 10-27-09 through 2-16-10.
5. Barnes Jewish Hospital inpatient Medical Record d/o/s 1-28-10.
6. Barnes Jewish Hospital outpatient Medical Record d/o/s 3-16-10 through 9-14-10.
7. Jimmy Bell, FNP Phelps County Medical Group Medical Record d/o/s 11-26-08 through 6-3-10.
8. BJC Urgent Care Medical Record d/o/s 2-14-08 through 2-25-08.
9. BJC Urgent Care Medical Record d/o/s 12-14-08 through 12-19-08.
10. Christopher Miller M.D., Orthopedic Specialists of Springfield Medical Record d/o/s 10-6-08 through 9-17-09.
11. Ken Yamaguchi, M.D., Washington University Dept of Orthopedic Surgery Medical Record d/o/s 10-27-09 through 1-30-10.
12. Ken Yamaguchi, M.D., Washington University Dept of Orthopedic Surgery Medical Record d/o/s 1-30-10 through 9-14-10.
13. Ken Yamaguchi, M.D., Washington University Dept of Orthopedic Surgery Medical Record d/o/s 11-5-10 through 11-1-11.
14. Phelps County Regional Medical Center Medical Record d/o/s 3-12-08 through 1-6-10.
15. Phelps County Regional Medical Center Medical Record d/o/s 3-28-10 through 9-17-10.
16. Rolla Radiology Group Medical Record d/o/s 2-25-08.
17. Salem Memorial District Hospital Medical Record d/o/s 2-25-08 through 2-26-08.

Employee: Kenneth D. Phillips

Injury No. 08-010379

18. Christopher M. Miller, M.D. Springfield Surgical Specialists d/o/s 10-17-08 through 3-5-09.
19. St. John's Clinic DOT Physical Medical Record d/o/s 3-5-07.
20. St. John's Clinic Medical Record d/o/s 3-3-06 through 7-22-11.
21. St. John's Clinic Operative Report Medical Record d/o/s 4-11-11.
22. Mercy Clinic Medical Record d/o/s 4-19-12.
23. Approved Stipulation for Compromise Settlement/ Employer Only 1-26-12.
24. Original and Amended Claim for Compensation.
25. Contract of Employment for Legal Services.

The Second Injury Fund offered the following Exhibits which were received into evidence. The objection by Claimant to the admission of SIF Exhibit II in its entirety, for the stated purpose of providing additional information to the ALJ, was overruled:

- I. Deposition of James M. England, Jr., taken on November 19, 2013, including deposition exhibits: Curriculum Vitae and Vocational Rehabilitation Evaluation.
- II. Mercy Clinic – Rolla, Medical Records

Live Testimony

Claimant is a 55 year old right hand dominant male. Claimant is a high school graduate and also received a diesel mechanic certification. He worked for S & H Transportation for 15 years as an over the road truck driver. Claimant's last date of employment was February 13, 2008. Claimant's job duties required him to load and unload, drive approximately 650 miles a day, and perform lift and pull type motions. Claimant's work was occasionally strenuous. Claimant took a DOT physical every two years and passed the most recent physical before 2008 work injury.

Claimant allegedly sustained a work injury on February 13, 2008, when falling on his right shoulder while at work. Claimant testified he experienced no symptoms in his left or right shoulder before the primary work injury.

On October 17, 2008, Claimant underwent a rotator cuff repair of the right shoulder and acromioclavicular joint arthrosis. On February 19, 2009, Dr. Miller diagnosed a re-tear of the supraspinatus of the right shoulder. On March 5, 2009, Claimant underwent a right shoulder diagnostic arthroscopy and open revision rotator cuff repair. On September 17, 2009, Dr. Miller diagnosed a re-tear of the rotator cuff with retraction and significant atrophy in the muscle belly of

Employee: Kenneth D. Phillips

Injury No. 08-010379

the supraspinatus of the right shoulder. On January 28, 2010, Claimant underwent a right shoulder reverse total arthroplasty.

On June 30, 2010, Dr. Kowalsky opined that Claimant would not be able to return to manual labor due to persistent disability of the right shoulder and noted that Claimant may have to file for disability. On September 14, 2010, Dr. Yamaguchi placed Claimant at MMI and indicated he will have severe restrictions on his activity level because of the reverse ball and socket arthroplasty. Dr. Yamaguchi opined that Claimant cannot do any overhead elevation activities higher than shoulder height, no lifting greater than 10 pounds, and no repetitive activity. On June 14, 2011, Dr. Yamaguchi rated the right shoulder at 70% and noted Claimant had severe impairment of the shoulder. (Exhibit 11).

Claimant testified that in October of 2010, he tried to work with a friend to see if he could get back to truck driving. He testified that he obtained a temporary card to drive. He testified that he had difficulty getting in and out of the truck because of his back, knees, and shoulder. He only lasted work for three days. He testified his knees became worse which led to knee surgery. Claimant testified that he now has to take shots for his diabetic condition and, therefore, now cannot drive a truck.

Claimant testified he currently experiences many symptoms and limitations as a result of the primary injury. Claimant testified he was unable to return to work because of the limitations that Dr. Yumaguchi placed. He can no longer use his dominant right arm. He used to garden, hunt, fish, work on cars, mow his law, and use a weed eater but can no longer do any of these activities since the primary work injury. He has difficulty sleeping, sitting, and driving because of his right shoulder.

Claimant testified that he sustained a pre-existing injury in 1989 to his left knee when he crushed his knee between a wall and air gun. In 1994, Claimant injured his left knee again when slipping on ice. Claimant testified that his knee pain has become worse over the years.

Subsequent to the primary work injury, Claimant received treatment on his left knee. On November 5, 2010, Claimant sought treatment for left knee pain at St. John's Clinic. Clamant reported that his knee was exacerbated with activity and lifting. Claimant underwent a MRI on November 5, 2010, which revealed chondromalacia, tears of the medial and lateral menisci, and displaced fragments associated with the medial meniscal tear. On April 11, 2011, Claimant underwent a left knee arthroscopy, partial left medial meniscectomy, partial chondroplasty of the left patella, and arthroscopic debridement of the left anterior cruciate ligament. Claimant testified he did not sustain a specific injury in 2011, but his knee pain became worse over time to where he could hardly move it.

Employee: Kenneth D. Phillips

Injury No. 08-010379

In addition, in 1996, Claimant sustained a pre-existing injury to his cervical spine. Claimant never received injections or surgery on his cervical spine. He had no further treatment after 1996 for his cervical spine. He testified that this condition has become gradually worse since he stopped working.

In 1998, Claimant sustained a pre-existing injury to his ribs in a motor vehicle accident. He cracked his ribs. Claimant testified that the pain became worse with age. No treating doctor placed any restrictions for this condition.

Subsequent to the primary injury to his right shoulder, Claimant received treatment for his left shoulder. Claimant testified that he over compensated with his left shoulder because of his injured right shoulder. Claimant admitted that at his deposition he could not raise his arm, but now he can after the surgery. He testified that he had symptoms of pain and weakness from approximately 2009 up until his surgery in 2013.

Expert Testimony

Dr. Robert Poetz

Dr. Robert Poetz performed an independent medical examination on behalf of the Claimant on January, 18, 2011, approximately 3 years after the primary work injury. Dr. Poetz testified that he did not review any treating records for Claimant's pre-existing injuries to his rib cage, neck, or left knee. (Exhibit 1, p.24). Dr. Poetz admitted that everything that is listed under past medical history came from the Claimant himself and not the medical records. (Exhibit 1, p.24). Dr. Poetz testified regardless of any pre-existing injuries and conditions, he would impose the same recommendations and/or restrictions numbered 1-12 in his report for the primary injury alone. (Exhibit 1, p. 25-26).

Dr. Poetz testified that in forming his opinions and conclusions, he included all of the Claimant's physical findings upon exam from the 2011 evaluation. (Exhibit 1, p.29). Dr. Poetz testified that the Claimant underwent a MRI in 2010 because Claimant had knee pain. (Exhibit 1, p. 29). Dr. Poetz testified that there were no objective physical findings on exam for the left rib cage and only based the 10% PPD on Claimant's history and treatment. (EE Exhibit 1, p. 29). Dr. Poetz related all of the findings of the cervical spine on the physical exam to the primary work injury. (Exhibit 1, p. 29-31). Dr. Poetz testified that he included all of the physical findings from the exam in 2011 to the right arm, left knee, and neck in forming his opinions of disability and liability. (Exhibit 1, p.31). Dr. Poetz testified that chief complaints listed in his report stem from the February 2008 work injury. (Exhibit 1, p.31).

Employee: Kenneth D. Phillips

Injury No. 08-010379

Ms. Delores Gonzalez

Ms. Delores Gonzalez performed an independent vocational evaluation on behalf of Claimant on December 28, 2012, approximately 4 years after the primary work injury. Ms. Gonzalez testified that she relied primarily on the restrictions placed by Dr. Poetz and Dr. Yamaguchi. (Exhibit 2, p.38). Ms. Gonzalez testified that her opinion that the Claimant is permanently and totally disabled includes all of the medical conditions to Claimant's shoulder, knee, neck, and chest as of the date she saw him in 2012. (Exhibit 2, p.37-38).

Mr. James England

Mr. James England performed a records review on behalf of the SIF. Mr. England testified that the Claimant is precluded from even sedentary employment on a consistent basis regardless of any pre-existing injuries. (SIF Exhibit , p. 9-10). Mr. England testified that the primary injury to the right shoulder alone or the primary injury plus his subsequent left shoulder injury in and of themselves render the Claimant unemployable in the open labor market. (SIF Exhibit , p.10). Mr. England testified that based on Dr. Poetz's restrictions or limitations from the last injury alone along with the Claimant's age, education, transferable skills, and work experience, the Claimant is not employable in the open labor market with just those restrictions. (SIF Exhibit , p.10-11).

FINDINGS OF FACT & RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. W.D.2002); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo. App. E.D. 1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo. App. E.D. 1996)). However, the employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974).

Employee: Kenneth D. Phillips

Injury No. 08-010379

PERMANENT TOTAL DISABILITY

The main issues for determination in this are whether the employee has met his burden of proving first, if he is permanently and totally disabled, and second, that it is the responsibility of the SIF. Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean inability to return to any employment, and not merely inability to return to the employment in which the employee was engaged in at the time of the accident.

Then, assuming a finding that the employee is permanently and totally disabled, the next issue to determine in this case is whether the employer-insurer or the Second Injury Fund is liable for the employee's permanent total disability. Section 287.220 RSMo., provides 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 minimum standards under this subsection for a body as a whole injury or major extremity shall not apply and 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 Section 287.200 out of a special fund known as the "Second Injury Fund"...

The statutorily prescribed formula for determining Second Injury Fund liability for permanent and total disability clearly incorporates a medical causation component. The employer's liability must be determined first, and provides that the employer "shall be liable only for the disability resulting from the last injury considered alone and of itself." The statute then provides "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 PTD, 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 PTD..."

Applying this language, it is clear that if the last injury "considered alone and of itself" results in permanent total disability, the Second Injury Fund has no liability and the employer is responsible for the full permanent total disability benefits. *Roller v. Treasurer of the State of Missouri*, 935 S.W. 2d 739 (Mo. App. 1996)

Employee: Kenneth D. Phillips

Injury No. 08-010379

On the topic of restrictions, during cross-examination, Dr. Poetz testified that regardless of any pre-existing injuries and conditions, he would impose the same recommendations and/or restrictions numbered 1-12 in his report for the primary injury alone. (Exhibit 1, p. 25-26). Mr. England found that when considering Dr. Poetz's restrictions to the last injury along with Claimant's age, education, and transferable skills that the Claimant is unemployable. (SIF Exhibit I, p.10-11). Mr. England reiterated that Claimant is unemployable based on the primary right shoulder injury alone. (SIF Exhibit I, p. 10).

Claimant's testimony supports the finding he is permanently and totally disabled due to the last injury alone. Claimant testified he was unable to return to work because of the limitations that Dr. Yumaguchi placed on his right shoulder alone. Claimant testified he can no longer use his dominant right arm. He used to garden, hunt, fish, work on cars, mow his law, and use a weed eater, but can no longer do any of these activities since the primary work injury. He has difficulty sleeping, sitting, and driving because of his right shoulder. Prior to the February 13, 2008 injury he was able to complete his job duties with no restrictions, and was able to pass a medical physical examination every two years to continue his employment with S & H Transportation.

Moreover, Claimant reported severe complaints regarding his right shoulder to Dr. Poetz. The Claimant experiences burning pain in his shoulder with limited movement. He has difficulty sleeping because he cannot get comfortable. He can only lift approximately 2 pounds and has numbness in his right fourth and fifth fingers. His right hand locks when he holds a phone, eats or writes. Based on Claimant's symptoms and Dr. Poetz's restrictions, Claimant is permanently and totally disabled due to his primary work injury to his right shoulder alone.

Furthermore, the opinions of Ms. Gonzalez are not credible on the issue of PTD as a result of a combination of the primary and pre-existing injuries. Ms. Gonzalez found Claimant to be permanently and totally disabled due to a combination of Claimant's pre-existing injuries and the primary right shoulder injury. On cross-examination, the SIF asked Ms. Gonzalez several times about Dr. Poetz's restrictions for the last injury alone. Yet, Ms. Gonzalez failed to provide a clear answer regarding Dr. Poetz's testimony that all of the restrictions placed on Claimant in his report are also placed solely for the primary injury alone. Ms. Gonzalez also attributes Claimant's inability to sleep and his need for daily naps to a combination of his injuries, however, Claimant testified it was the pain in his right shoulder which caused his inability to sleep. Because Ms. Gonzalez does not evaluate all of the evidence, her testimony regarding permanent and total disability is suspect and is not given weight.

Regardless, Ms. Gonzalez relied on the restrictions of Dr. Poetz and Dr. Yamaguchi when finding Claimant unemployable. (Exhibit 2, p. 38). Dr. Yamaguchi only placed restrictions for the last injury alone to the right shoulder. Dr. Poetz testified that all of his restrictions would be placed for the primary injury alone to the right shoulder as well. Thus, Claimant is permanently and totally disabled as a result of the last injury of February 13, 2008 to his dominant right shoulder alone. Therefore, the Second Injury Fund is not liable to Claimant for any benefits, permanent partial or permanent total. The Claim against the Second Injury Fund is denied.

Employee: Kenneth D. Phillips

Injury No. 08-010379

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