

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

Injury No. 10-097781

Employee: Raymond Priest
Employer: Breckenridge Material Co., Inc. (Settled)
Insurer: Liberty Mutual Fire Insurance Co. (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. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the sole issue of Second Injury Fund liability.

The administrative law judge determined that the Second Injury Fund is liable for 30.4 weeks of permanent partial disability benefits.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in failing to find preexisting disability due to hearing loss and a synergistic effect based thereupon; and (2) in failing to include permanent partial disability referable to employee's preexisting conditions of restless leg syndrome and periodic limb movement disorder, diabetes, hyperlipidemia, hypertension, congestive heart failure, and obesity in his calculation of Second Injury Fund liability.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact and conclusions of law referable to the numerous issues disputed at the hearing. We adopt and incorporate those findings and conclusions to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact and conclusions of law pertinent to our modifications herein.

Second Injury Fund liability

It is uncontested that employee has suffered from significant hearing deficits since childhood. The administrative law judge determined, however, that he could not calculate employee's preexisting disability referable to hearing loss because "[t]he

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hearing loss allegation is not predicated on the statutory and regulatory requirements for calculating hearing loss PPD[.]” *Award*, page 5. We disagree with the administrative law judge’s (implied) conclusion that the requirements for proving occupational hearing loss under § 287.197 RSMo and 8 CSR 50-5.060 apply for purposes of determining the nature and extent of preexisting hearing loss in the context of calculating Second Injury Fund liability. By its plain terms, § 287.197 applies only to claims against an employer for “losses of hearing due to industrial noise.” Here, employee is not pursuing a claim for industrial hearing loss against his employer, but rather a claim against the Second Injury Fund for the synergistic interaction between his primary injury and the hearing loss he has suffered since childhood.

The Second Injury Fund concedes that § 287.197 does not apply to this claim, but argues that we should nonetheless require employee to satisfy the requirements of 8 CSR 50-5.060, which would include providing the results from three separate audiograms. We are not persuaded. The plain language of 8 CSR 50-5.060, like that of § 287.197, refers to an employer’s liability for occupational hearing loss. Specifically, 8 CSR 50-5.060(4) provides that “[t]raumatic occupational hearing losse(s) shall be measured as prescribed in section 287.197, RSMo and this rule.” Nothing in the regulation requires (or even suggests) that its provisions apply to a claim asserting synergistic disability against the Second Injury Fund for preexisting hearing loss not caused by an occupational injury. As employee points out, both § 287.197 and 8 CSR 50-5.060 require the fact-finder to account for and deduct, in calculating permanent partial disability, preexisting hearing loss and hearing loss due to age, neither of which considerations make sense in the context of assessing an employee’s preexisting permanent partial disability for purposes of Second Injury Fund liability. We note also that neither § 287.197 nor 8 CSR 50-5.060 would permit us to include considerations such as disability referable to a speech impediment or other disorder linked to hearing loss, whereas nothing in § 287.220.1 RSMo would prevent us from including (if satisfactorily proven) preexisting permanent partial disability referable to such conditions. We conclude, therefore, that § 287.197 and 8 CSR 50-5.060 do not apply to claims against the Second Injury Fund alleging hearing loss due to non-occupational sources.

Turning to the testimony from Dr. Poetz, however, we note that he rendered his opinions regarding synergy in a purely conclusory fashion, and did not specifically describe or explain the interaction between employee’s preexisting hearing loss—or, for that matter, any other of his preexisting conditions—and employee’s primary injuries to the left shoulder and cervical spine. It is well-established that an award of workers’ compensation benefits cannot rest upon mere speculation and surmise. *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697, 703 (Mo. App. 1973). And the Missouri courts have declared that an employee fails to meet his burden of proof where his expert “fail[s] to provide any legitimate, persuasive explanation ... making only conclusory and unsupported statement[s].” *Royal v. Advantica Rest. Group, Inc.*, 194 S.W.3d 371, 378 (Mo. App. 2006).

On the other hand, the Second Injury Fund has not challenged the administrative law judge’s determination that a loading or synergy factor would be appropriate in this case. And, although Dr. Poetz’s conclusory testimony regarding synergy is, in our view, entitled to little weight, we cannot conclude in the absence of any contrary expert medical testimony that it is entirely “weightless.” Given these circumstances, we deem

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a finding of synergy to be adequately supported, and we calculate Second Injury Fund liability, as follows:

140 weeks (35% of the body as a whole referable to the combined effect of each of employee's preexisting conditions of ill-being including hearing loss, low back pain, sleep apnea, restless leg syndrome and periodic limb movement disorder, diabetes, obesity, hyperlipidemia, hypertension, and congestive heart failure) + 20 weeks (5% of the body as a whole referable to the cervical spine) + 69.6 weeks (30% of the left shoulder) = 229.6 weeks x 15% loading factor = 34.44 weeks x \$418.58 weekly compensation rate for permanent partial disability benefits = \$14,415.90.

We conclude the Second Injury Fund is liable for \$14,415.90 in permanent partial disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for \$14,415.90 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 25, 2014, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 17th day of June 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:	Raymond Priest	Injury No.:	10-097781
Dependents:	N/A		Before the
Employer:	Breckenridge Material Co, Inc. (settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Liberty Mutual Fire Ins. Co. (settled)		Department of Labor and Industrial
Hearing Date:	August 21, 2014		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	JED

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 17, 2010 (stipulated)
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 upon tripping over a floor mat.
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: head, left shoulder, left knee
14. Nature and extent of any permanent disability: 30% PPD of the left shoulder; 5% PPD of cervical spine; 30.4 weeks PPD from SIF.
15. Compensation paid to-date for temporary disability: \$28,311.33
16. Value necessary medical aid paid to date by employer/insurer? \$74,380.19

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$418.58 PPD
- 19. Method wages computation: Stipulation.

COMPENSATION PAYABLE

20. Amount of compensation payable:

89.6 weeks PPD from Employer (settled)

21. Second Injury Fund liability: Yes

30.4 weeks PPD from the SIF \$12,724.83

TOTAL: \$12,724.83

22. Future requirements awarded: None

Said payments to begin immediately 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:

Michael Gerritzen

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Raymond Priest	Injury No.:	10-097781
Dependents:	N/A		Before the
Employer:	Breckenridge Material Co, Inc. (settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Liberty Mutual Fire Ins. Co. (settled)		Department of Labor and Industrial
Hearing Date:	August 21, 2014		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	JED

This case involves a left shoulder and neck injury resulting to Claimant with the stipulated accident date of November 17, 2010 and an allegation of synergistic disability against the Second Injury Fund (“SIF”). Employer/Insurer previously settled its risk of liability. Both parties are represented by counsel. The single issue for trial is the liability of the SIF.

FINDINGS OF FACT

Dispositive Evidence

Claimant, age 59, worked for Employer as a concrete ready-mix truck driver. Claimant’s primary injury herein resulted in a settlement of thirty percent PPD of the left shoulder (post-surgically diagnosed as type III SLAP tear, subacromial bursitis and AC joint synovitis; released in August 2011) and five percent PPD of the cervical spine. Claimant returned to work with the same job and same duties.

In childhood, Claimant had hearing loss that continues today. He wears bilateral hearing aids constantly. Nevertheless, he maintained full-time employment as a driver for Employer all of his adult life. He takes his dispatch instructions in writing as an accommodation by Employer.

In 1997 and 1998, Claimant experienced low back pain and treated with Dr. Gene Bell, a chiropractor. In 2003, he developed radicular pain in his legs which continues episodically. These symptoms are aggravated by the work. Radicular symptoms and positive clinical findings appear in the pre-accident medical records. He asks for help from co-workers as necessary.

In 1999, Claimant was diagnosed with obstructive sleep apnea. He continues to treat this condition with the general complaint of poor sleep and daytime sleepiness. Claimant’s sleep apnea is aggravated by his obesity. Claimant admits he was never disciplined, accommodated or restricted and that he had no accidents due to sleepiness.

In 2010, Claimant was diagnosed with diabetes. He reports low energy and poor memory. Notes include characterization as “uncontrolled” together with notes of non-compliance.

Claimant testified that he had trouble bending and lifting and walking and standing. He lifts heavy chutes for pouring the concrete and must climb about the construction site and the truck. Claimant also has ongoing occasional radicular complaints in the forearm, fingers and legs.

Opinion Evidence

Claimant offered the deposition of Dr. Robert Poetz, as Exhibit 14. Dr. Poetz examined Claimant in 2012 and reviewed the medical record. Physical findings regarding the shoulder included severe range of motion losses and 3/5 strength deficit compared to the right shoulder, good grip strength and some range of motion loss in the neck. He reiterated the findings of cervical degenerative disc disease. Dr. Poetz assigned the primary injury a forty percent PPD of the left shoulder and fifteen percent PPD of the neck due to the reported injury.

Dr. Poetz testified that Claimant’s chief complaints at the IME in 2012 were:

He said, “I still have some pain in my neck, especially when bouncing in the truck. I have pain and numbness in my left shoulder and I don’t have full movement in the shoulder. My left arm is somewhat weaker than my right I still have tightness in my forearm and occasionally my hand goes numb.”
(p. 5)

Dr. Poetz further rated numerous documented but common ailments as pre-existing PPD items (see exhibit). Particularly relevant are his ratings for pre-existing hearing loss at forty percent PPD of the body; however, the rating is without regard to 8 CSR 50-5.060 and the records contain audiogram dating from 2003), obstructive sleep apnea at fifteen percent PPD, and lumbar spine at fifteen percent PPD. Dr. Poetz stated Claimant’s pre-existing disability combines with the disability caused by the primary injury to form an increased overall disability.

On cross-examination, Dr. Poetz admitted he did not know Claimant’s daily routine or how often he was required to lift or bend, etc. (p. 44-45). Dr. Poetz readily admitted facts that do not support his many PPD ratings. For example, he admitted he made no positive physical findings regarding Claimant’s heart, sleep apnea, or hyperlipidemia although he described what positive findings might obtain from physical examination (pp. 46-49). He noted no radicular complaints in the legs (p. 52). Regarding hearing loss, Dr. Poetz admitted effective communication with Claimant during the IME and that he performed no audiograms (p. 53). He had no knowledge of Claimant’s department of transportation physical examination for commercial driver’s license although he knew Claimant was still driving a truck. Dr. Poetz admitted that the obstructive sleep apnea was the “primary diagnosis” among the many systemic conditions he rated for PPD; he said they were related (p. 55).

RULINGS OF LAW

Nature and Extent of Permanent Disabilities

Claimant testified consistent with the medical records and his history to Dr. Poetz. As a result of his clinical limitations, Claimant experiences difficulty lifting chutes and climbing the truck at work. He seeks assistance as necessary and loses time from work throughout the year; he specifically testified he saves vacation in anticipation of exceeding his sick days. His sleep apnea results in general fatigue which affects his productivity and alertness.

The other systemic conditions identified by Claimant and Dr. Poetz were not shown by sufficient evidence to demonstrate them to be hindrances and obstacles to employment. Section 287.220.1 RSMo (2000).

The current disability for the reported (primary) injury is found to demonstrate thirty percent PPD of the left shoulder (69.6 weeks) and five percent PPD of the body referable to the cervical spine (20 weeks). The hearing loss allegation is not predicated on the statutory and regulatory requirements for calculating hearing loss PPD and, thus, cannot form the basis of any liability. Claimant failed to meet his burden of proof on the hearing loss allegation. Claimant's low back and sleep apnea were evidenced sufficiently to predicate fifteen percent PPD (60 weeks each). Claimant and Dr. Poetz admitted no permanent medical restrictions, or accommodations, for work.

Liability of the Second Injury Fund

SIF liability is premised on synergistic combination of the primary and pre-existing disabilities. Synergy is the concept in which the current PPD and the pre-existing PPD are found, in combination, to create a "substantially greater" disability, or an increased overall disability, for which the employer should not be held liable. The significance of permanent partial disability findings is predicated upon the statutory thresholds for injuries to the extremities and injuries to the body as a whole. Section 287.220.1 RSMo (2000). The medical evidence and other evidence suggest Claimant's low back and sleep apnea disabilities both reach threshold requirements. In addition, each is found to be a hindrance and obstacle to employment or reemployment, whereas the other SIF allegations of pre-existing disability are not so. Here, Claimant's primary injuries and low back condition constitute common *upper body-lower body* synergy. His sleep apnea is a systemic condition that may be said to combine with any other serious disability much like cardio-pulmonary conditions combine for *locomotive* synergy.

While Claimant is ambulatory and working full-time, he experiences ongoing pain and weakness on lifting. The opinion evidence and other evidence suggest Claimant's combined PPD equates to increased overall PPD of sixty percent of a body, or 240 weeks. Thus, after the pre-existing PPD plus the current PPD are deducted from the combined disability, the synergistic effect results in an additional 30.4 weeks of PPD liability against the SIF.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained an additional 30.4 weeks PPD from the SIF as a result of the combination between the primary injury and the synergistic pre-existing PPD.

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge

