

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

Injury No.: 97-499986

Employee: Darrell Ragland
Employer: Architectural Woodwork Corp. (Settled)
Insurer: Indiana Lumbermens Mutual Insurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been 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, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 4, 2011, 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 administrative law judge heard this matter to consider: (1) whether the employee's injuries arose out of and in the course of employment; (2) whether the accident or occupational disease caused the injuries and disabilities for which employee claims benefits; and (3) Second Injury Fund liability.

The administrative law judge found that: (1) employee's occupational disease of laryngeal carcinoma caused the injuries and disabilities for which employee seeks benefits; (2) employee suffered a 12.5% permanent partial disability of the body as a whole referable to contracting laryngeal carcinoma as a work-related occupational disease; and (3) employee suffered a 20% enhanced permanent partial disability in excess of the simple sum of employee's disabilities resulting from the primary injury and his preexisting conditions.

The Second Injury Fund filed an Application for Review alleging the administrative law judge erred in that: (1) employee failed to meet his burden of proving his medical symptoms and diagnoses arose out of the course and scope of his employment; (2) employee failed to meet his burden of proving he sustained permanent disability from the primary injury; and (3) the administrative law judge relied on inadmissible hearsay when he credited statements from other doctors contained in Dr. Stuckmeyer's report.

For the reasons set forth below, we modify the decision of the administrative law judge.

Findings of Fact

The findings of fact and stipulations of the parties are set forth in the award of the administrative law judge. We have incorporated those findings to the extent that they are not inconsistent with the modifications set forth in our award. Therefore, we address only those findings of fact pertinent to our modification herein.

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Preexisting conditions

Employee was in a car accident on December 1, 1968, that left him with 19 fractured bones in his legs, ribs, and face. Employee spent 7 months in a body cast and spent more than 2 years recovering. The effects of that injury left employee with pain in his legs, knees, ankles, and hip, difficulty walking up and down stairs, and difficulty with prolonged standing. Dr. Stuckmeyer opined that, as a result of the 1968 car accident, employee suffered preexisting permanent partial disabilities of 30% of the right knee, 30% of the left knee, and 25% of the left ankle. We find Dr. Stuckmeyer credible and adopt his ratings and opinions as to employee's preexisting conditions.

Primary injury

Doctors diagnosed employee with throat cancer in 1997. Treatment included a laryngectomy. The surgery involved removal of employee's vocal cords and he is now unable to speak without the use of a prosthesis. Employee has a hole in his throat that allows him to breathe but that requires constant vigilance and protection from dirt, dust, and moisture; employee is extremely limited and must avoid many of his previous activities as a result of this condition. We find that employee reached maximum medical improvement with regard to the effects of the primary injury on December 15, 1997, the approximate date, according to employee's testimony, that he returned to work. Employee continued to experience residuals from the 1997 surgery after returning to work. Perhaps the worst of these was the development of chronic bronchitis, which is the result of particles finding their way into employee's trachea.

Taking into account all of the residuals from the 1997 cancer diagnosis and surgery—including employee's environmental and activity restrictions following the laryngectomy, his inability to speak without a prosthesis, and his chronic bronchitis—we find that employee sustained a 50% permanent partial disability of the body as a whole as a result of the throat cancer diagnosed in 1997.

Permanent total disability

Dr. Stuckmeyer believes employee is permanently and totally disabled due to a combination of his preexisting disabilities with the disability resulting from the throat cancer diagnosed in 1997. We find the unopposed testimony from Dr. Stuckmeyer credible and find employee is permanently and totally disabled as a result of a combination of his preexisting disability and the effects of the primary injury.

Conclusions of Law

Liability of the Second Injury Fund

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "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 ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

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[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

We are convinced that employee's preexisting disabilities were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220 RSMo. Employee provided evidence of preexisting right knee, left knee, and left ankle conditions. Each of these conditions had the potential to combine with future work-related injuries so as to cause greater disability than would have resulted in the absence of these conditions. Dr. Stuckmeyer rated employee's preexisting left knee condition at 30% permanent partial disability, right knee condition at 30% and left ankle condition at 25%, and we have found these opinions of Dr. Stuckmeyer to be credible. We conclude that at the time he sustained the 1997 occupational disease, employee suffered from preexisting permanent partial disabilities of his left knee, right knee, and left ankle, and that each of these conditions constituted hindrances or obstacles to his employment or reemployment.

We now proceed to the question whether employee met his burden of establishing entitlement to compensation from the Second Injury Fund. Section 287.220.1 RSMo 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 section 287.200 out of a special fund known as the "Second Injury Fund" ...

The foregoing section requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, and not the Second Injury Fund, is responsible for the entire amount of compensation. See *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

We have found that, as a result of the last injury, employee sustained a 50% permanent partial disability of the body as a whole referable to throat cancer. Dr. Stuckmeyer opined that employee is permanently and totally disabled as a result of the work injury in combination with employee's preexisting conditions of ill, and we have found this testimony from Dr. Stuckmeyer credible. We conclude that employee did not sustain enhanced permanent partial disability, but rather that employee is permanently and

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totally disabled due to a combination of his preexisting disabilities in combination with the primary injury.

In sum, we are persuaded that employee has met his burden of establishing Second Injury Fund liability under § 287.220.1. We conclude that the Second Injury Fund is liable for permanent total disability benefits.

Award

We modify the award of the administrative law judge on the issue of Second Injury Fund liability. The Second Injury Fund is ordered to pay to employee weekly payments of \$139.25, the difference between employee's permanent total disability rate (\$426.67) and employee's permanent partial disability rate (\$287.42) for 200 weeks (the extent of employer's theoretical liability for the work injury) beginning December 15, 1997. Thereafter, the Second Injury Fund is liable to employee for weekly permanent total disability benefits in the amount of \$426.67 for his lifetime, or until modified by law.

The award and decision of Administrative Law Judge David L. Zerrer, issued April 4, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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 19th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary