

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

Injury No. 08-048192

Employee: Ruby Rasa
Employer: Higginsville Habilitation Center (Settled)
Insurer: C A R O (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, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge denying 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 with this supplemental opinion.

Discussion

Second Injury Fund liability

The administrative law judge denied employee's claim for permanent total disability benefits from the Second Injury Fund based on her finding that employee failed to provide sufficient evidence showing that she suffered from a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to her employment or to obtaining reemployment for purposes of § 287.220.1 RSMo. In reaching this determination, the administrative law judge pointed to inconsistencies between employee's testimony at her deposition and her testimony at the hearing; medical records from the doctors who treated employee following the primary injury suggesting employee's preexisting conditions were insignificant; and the failure on the part of employee's medical expert, Dr. James Stuckmeyer, to rate any preexisting permanent partial disability referable to employee's numerous claimed preexisting conditions of ill-being, apart from a mere 5% permanent partial disability of the body as a whole referable to what he opined was a chronic thoracolumbar strain resulting from a 1988 motor vehicle accident.

We have carefully reviewed employee's testimony from the hearing as well as her testimony set forth in her deposition. We note that employee is now taking a number of prescription medications to address chronic pain in her low back. Employee credibly testified (and we so find) that these medications, particularly Gabapentin, have severely affected her memory and concentration. It appears to us that employee's memory and concentration issues stemming from these medications account for the various inconsistencies (thoroughly catalogued in the brief from the Second Injury Fund) between employee's hearing and deposition testimony as to the question of the nature

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and extent of her preexisting disabling conditions, rather than any intentional or conscious effort on her part to confuse the record or to mislead the fact-finder.¹

It further appears to us that employee's memory was clearer on the date of the hearing before the administrative law judge than it was at her deposition; for this reason, we credit her testimony at the hearing. From this credible testimony it appears that, at the time of the primary injury of June 6, 2008, employee did suffer from a number of seriously disabling preexisting conditions which would seem to have amounted to hindrances or obstacles to employment or reemployment under the appropriate standard:

[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).

The problem with employee's case, however, is that her credible testimony at the hearing regarding her preexisting disabling conditions is not adequately supported by the medical testimony from Dr. Stuckmeyer. As noted by the administrative law judge, Dr. Stuckmeyer did not identify, rate, or offer any opinion as to employee's complaints of preexisting chronic headaches, neck pain, urinary incontinence, asthma, or daily burning in her feet referable to diabetes. With regard to employee's complaints of chronic headaches and neck pain, Dr. Stuckmeyer appeared to be misinformed, as he related them to the primary injury based on his (incorrect) belief that employee did not suffer ongoing symptoms of neck pain before June 2008.² With regard to employee's complaints of preexisting urinary incontinence, asthma, and daily burning in her feet referable to diabetes, Dr. Stuckmeyer was wholly silent.

More importantly, Dr. Stuckmeyer did not explain how the preexisting chronic thoracolumbar strain he identified and rated is responsible for any disabling symptoms or limitations that employee now experiences, and instead provided a conclusory opinion that employee is permanently and totally disabled owing to a combination of her preexisting and most recent disabilities. Although Dr. Stuckmeyer mentioned employee had a history of low back pain predating the primary injury, he did not specifically opine as to whether (and if so how) this condition combines with the low back injury that employee suffered as a result of the primary injury. Crucially, Dr. Stuckmeyer did not identify or endorse any restriction that employee be permitted to lie down during the day, or opine whether any such need would be a product of the primary injury alone or in combination with any preexisting condition of ill-being; at his deposition, Dr. Stuckmeyer suggested employee did not mention to him a need to lie down.³

¹ Indeed, employee repeatedly cited her poor memory and included caveats such as "to the best of my knowledge" during her deposition. See, e.g., *Transcript*, pages 578-79, 589-90.

² Employee testified at the hearing that her chronic headaches and neck pain *preexisted* the primary injury, and that they caused her to miss work and take so much ibuprofen that a doctor warned her about kidney damage. *Transcript*, pages 17-8.

³ Employee credibly describes a need to lie down 3 to 4 times per day owing to severe back pain. *Transcript*, pages 27-8, 565-66.

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Likewise, both vocational experts relied on incorrect information in rendering their opinions that employee is permanently and totally disabled owing to a combination of the primary injury and her preexisting disabling conditions. As noted by the administrative law judge, Mary Titterington incorrectly believed that Dr. Stuckmeyer's restrictions related to both the primary injury and employee's preexisting conditions of ill-being.⁴ We note that Michael Dreiling made the same mistake. *Transcript*, page 455. To the extent that both Ms. Titterington and Mr. Dreiling opine that the restrictions from Dr. Stuckmeyer render employee permanently and totally disabled, their opinions would seem to support an award of permanent total disability benefits against the employer, not the Second Injury Fund.

In sum, we acknowledge that the ultimate opinions from the experts suggest that employee is permanently and totally disabled owing to a combination of her preexisting conditions and the effects of the primary injury. But where the vocational experts relied on incorrect information, and where Dr. Stuckmeyer does not endorse the preexisting disabling conditions or present physical restrictions of which employee actually complains, we cannot credit their ultimate opinions in this matter. For these reasons, we must deny employee's claim against the Second Injury Fund.

Conclusion

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

The award and decision of Administrative Law Judge Lisa Meiners, issued September 25, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 3rd day of April 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

⁴ We acknowledge employee's argument, in her brief, that Dr. Stuckmeyer opined that the restrictions he assigned were an "overlap" of restrictions referable to preexisting conditions and those referable to the primary injury. A careful reading of Dr. Stuckmeyer's testimony reveals, however, that his use of the word "overlap" refers to the different parts of employee's body that he believed were affected by the primary injury, rather than any preexisting condition of ill-being. *Transcript*, page 396. At both his deposition and in his report, Dr. Stuckmeyer made clear that the restrictions he assigned are solely due to the effects of the primary injury. *Id.* at 405, 416.

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DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge should be reversed in favor of an award of permanent total disability benefits from the Second Injury Fund.

As acknowledged by the Commission majority, employee presented uncontested expert medical causation testimony from Dr. James Stuckmeyer that the effects of the primary injury in combination with employee's preexisting conditions of ill-being cause her to suffer the condition of permanent and total disability. The Second Injury Fund did not present any contrary medical testimony. It is well-settled in Missouri that "[t]he commission cannot find there is no causation if the uncontroverted medical evidence is otherwise." *Hayes v. Compton Ridge Campground, Inc.*, 135 S.W.3d 465, 470 (Mo. App. 2004). However, despite the uncontested medical causation evidence on this record, both the administrative law judge and now the majority of this Commission have denied employee's claim, for different reasons.

The administrative law judge found employee's evidence insufficient to support a finding that she suffered any preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment before the primary injury. The Commission majority, on the other hand, has specifically credited employee's hearing testimony and determined that employee *did* suffer from a number of seriously disabling preexisting conditions of ill-being which amounted to hindrances or obstacles to employment. Yet, they deny employee's claim owing to perceived problems with the testimony from Dr. Stuckmeyer. I am convinced that, in so holding, the Commission majority impermissibly substitutes their own lay theories regarding causation of employee's permanent total disability for the uncontradicted expert medical opinion from Dr. Stuckmeyer.

Specifically, in criticizing Dr. Stuckmeyer for failing to identify, rate, or offer any opinion regarding employee's complaints of preexisting chronic headaches, neck pain, urinary incontinence, asthma, and daily burning in her feet, the majority applies the unstated premise that these conditions are *necessary* causative factors in her permanent total disability. The majority reaches this finding without identifying any expert medical causation evidence to support such a premise. This situation is similar to that presented in *Abt v. Miss. Lime Co.*, 388 S.W.3d 571 (Mo. App. 2012), where the Commission threw out expert opinion evidence regarding the cause of employee's permanent total disability in favor of theories that found no support on the record. In reversing the Commission, the *Abt* court noted that "[r]ather than choosing one of the medical opinions, the Commission made a finding that is not consistent with any medical opinion in the record." *Id.* at 581.

It appears that the Commission majority believes it needs ratings from Dr. Stuckmeyer as to each of employee's preexisting conditions of ill-being in order to render an award of permanent total disability benefits. If so, the Commission majority is operating under a fundamental misapprehension of Missouri law, because "[s]ection 287.220.1 does not

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require a claimant to establish the specific percentage of the preexisting PPD at the time of the primary injury.” *Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 162 (Mo. App. 2014).

I acknowledge Dr. Stuckmeyer’s silence regarding certain of employee’s preexisting conditions of ill-being, but this circumstance simply is not dispositive or fatal to employee’s claim. Everyone involved with this claim would readily agree that employee is not the best of historians; as the majority notes, her memory is markedly impaired owing to her need to take daily medications including muscle relaxers to control her chronic pain. Dr. Stuckmeyer’s silence as to certain of employee’s preexisting conditions is thus an obvious byproduct of employee’s poor memory and consequent failure to apprise Dr. Stuckmeyer of all of her preexisting complaints, rather than any oversight on the part of Dr. Stuckmeyer which might undermine his opinions. In any event, this Commission is perfectly capable of evaluating employee’s preexisting conditions of ill-being and determining the nature and extent of disability associated with each absent *any* expert medical testimony on the subject, as it is well-settled in Missouri that questions as to the nature and extent of disability are fact questions within the “unique province” of the Commission to decide. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007). As noted above, the majority takes pains to specifically credit employee’s testimony that she suffered from a number of preexisting disabling conditions of ill-being at the time of the primary injury; no perceived defect in Dr. Stuckmeyer’s testimony should prevent this Commission from performing its fact-finding duty to evaluate their effects on employee’s overall condition.

In sum, I disagree with the majority’s choice to disregard the uncontradicted expert opinion evidence regarding Second Injury Fund liability. I find that employee met her burden under § 287.220 RSMo of establishing that she is permanently and totally disabled due to a combination of the primary injury and her preexisting disabling conditions. I would reverse the decision of the administrative law judge and award permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

FINAL AWARD
As to the Second Injury Fund Only

Employee: Ruby Rasa Injury No. 08-048192
Defendants: N/A
Employer: Higginsville Habilitation Center (Settled)
Insurer: Missouri Office of Administration (Settled)
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: August 22, 2014 Checked by: LM/drl

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? June 6, 2008
5. State location where accident occurred or occupational disease was contracted: Lafayette 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: Employee sustained injury of her low back and right knee assisting a patient while in the course and scope of employment.

12. Did accident or occupational disease cause death? No
13. Part(s) of the body injured by accident or occupational disease: Right knee, low back.
14. Nature and extent of any permanent disability: 17.5% of the right knee, 19.75% of the low back (400 week)
15. Compensation paid to date for temporary disability: \$1,501.36
16. Value necessary medical aid paid to date by employer/insurer? \$30,062.87
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$562.73
19. Weekly compensation rate: \$375.34/\$375.34
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Second Injury Fund liability? Claimant did not meet her burden of proof that she sustained a pre-existing disability that combined with the primary injury.

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. This Award is subject to attorney's lien for services rendered in the amount of 25 percent to David B. Byerley, attorney.

FINDINGS OF FACT and RULINGS OF LAW:

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Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: August 22, 2014 Checked by: LM/drl

The parties on August 22, 2014, appeared for hearing. The Employee, Ruby Rasa, appeared in person and with counsel, David Byerley. The Employer, Higginsville Habilitation Center, through its Insurer, Missouri Office of Administration, had settled in this matter, which leaves the remaining party as the Second Injury Fund who was represented by Colette Neuner.

STIPULATIONS

The parties stipulated:

1. That the Employer and the Employee were operating subject to Missouri Workers' Compensation Law on June 6, 2008;
2. That Ms. Rasa was their employee;
3. That Ms. Rasa was working subject to the law in Higginsville, Missouri;
4. That Ms. Rasa's average weekly wage was \$562.73 which makes the compensation rates \$375.34 / \$375.34;
5. That Ms. Rasa sustained an accident that arose out of and in the course of her employment on June 6, 2008;
6. That Ms. Rasa provided proper noticed; and
7. That the claim was filed within the time allowed by law.

ISSUE:

The only issue to be resolved by this hearing is the liability of the Second Injury Fund.

FINDINGS OF FACT

On June 6, 2008, Claimant was assisting a patient in the bathroom while in the course and scope of her employment with Higginsville Rehabilitation Center when the patient slipped and grabbed Claimant. The act of grabbing caused Claimant to strain her low back and twist her right knee. The Employer, upon prompt notification of the injury, sent Claimant to the emergency room at the Lafayette Regional Health Center. There the emergency personnel recorded complaints of low back pain radiating into her right lower extremity. Diagnostic tests were ordered and an MRI revealed a tear to the medial meniscus of the right knee.

On June 30, 2008, Dr. David Pulliam assessed Claimant with a meniscal injury of the right knee and opined Claimant's use of crutches aggravated her low back. Dr. Reardon performed a right knee arthroscopy with partial medical meniscectomy and chondroplasty of the patella. Dr. Reardon diagnosed medial meniscus tear, right knee with chondromalacia of the right patella. Thereafter, Claimant underwent physical therapy until October 16, 2008. At that time, Dr. Reardon recommended a hinged brace of the right knee and over-the-counter medications.

Regarding the low back, Claimant saw Dr. Pulliam for low back pain. In May of 2009, an MRI of the low back revealed multilevel degenerative disc and facet disease. An MRI of the cervical region taken in May of 2009 revealed multilevel degenerative disc disease and osteophyte formation at C3-4 and C4-5.

Claimant then received epidural injections of the low back with improvement of low back complaints. In fact, Dr. Bettinger, who performed a subsequent follow-up appointment, stated the severe radicular pain in the left leg had subsided almost totally after the third injection.

Claimant saw another doctor, Dr. Appelbaum, a neurologist. Dr. Appelbaum found Claimant sustained a low back strain and right knee injury as a result of the June 2008 accident. He placed Claimant on a 20-pound lifting restriction. Dr. Appelbaum noted in April of 2010 that Claimant now had neck and low back pain, with headaches, paresthesia of the left leg, weakness, general overall fatigue, difficulty climbing stairs, occasional incontinence, insomnia, and moodiness. Dr. Appelbaum did not feel these symptoms and complaints noted above were related to a prior 1988 motor vehicle accident. Instead, Dr. Appelbaum felt the lumbar strain with L5 radiculopathy and right knee injury was causally related to the June 2008 accident.

Dr. Appelbaum recommended, on September 23, 2010, additional medical care since Claimant's physical condition had worsened. As such, Claimant underwent another MRI of the low back that revealed an L4-5 disc herniation. Claimant then underwent more epidural injections of the low back. Claimant went for a surgical evaluation by Dr. Blatt who found no evidence of nerve root impingement and no surgical recommendation was given. Dr. Blatt released Claimant from treatment on September 19, 2011.

Dr. Appelbaum then in January of 2011 found Claimant reached maximum medical improvement and placed a permanent 20-pound lifting restriction. Dr. Appelbaum found Claimant sustained 10 percent permanent partial disability body as a whole as a result of the June 2008 accident. Dr. Appelbaum did not find Claimant had pre-existing disability.

Claimant also presented the opinion of Dr. James Stuckmeyer. Dr. Stuckmeyer found Claimant sustained 25 percent permanent partial disability body as a whole referable to the lumbar spine, 30 percent permanent partial disability of the right knee, and 10 percent permanent partial disability body as a whole to the cervical spine as a result of the June 6, 2008, accident. Dr. Stuckmeyer placed the following restrictions of no lifting greater than 20 pounds, no repetitive bending, twisting, lifting, prolonged standing or walking. These restrictions of Stuckmeyer were all related to the last accident.

Stuckmeyer assessed Claimant with a 5 percent pre-existing disability due to chronic thoracolumbar strain without radiculopathy due to a 1988 motor vehicle accident. Dr. Stuckmeyer then opined Claimant was permanently and totally disabled based on a synergistic effect of a 5 percent pre-existing thoracolumbar strain which combines with the last accident.

Despite Dr. Stuckmeyer's rating, the Employer and Employee reached a compromise settlement of 17.5 percent of the right knee and 19.75 percent permanent partial disability body as a whole referable to the lumbar spine.

Claimant testified she has constant low back pain so must change positions and lie down every day. She noted that sciatic nerve pain runs into her legs which causes difficulty with sitting and prolonged standing. Claimant testified the charley horses in her legs make it difficult to walk. Claimant testified she uses a walker at home since the last accident.

Claimant stated at hearing prior to June of 2008, she had problems about once a week with back, neck, and headaches. Claimant testified she had diabetes and had burning of her feet on a daily basis and that at times she would have to sit. Claimant testified prior to 2008 she had incontinence daily which made it difficult for her to perform her job duties.

I find as a result of the last accident, that Claimant sustained 19.75 percent body as a whole referable to the lumbar spine and 17.5 percent of the right knee as a result of the June 6, 2008 accident.

Claimant is alleging she is permanently and totally disabled as a result of a synergistic effect of pre-existing incontinence, diabetes, and conditions relating to a 1988 motor vehicle accident that combine with the last accident. I do not find Claimant met her burden of proof based on the evidence presented.

In order to establish Second Injury Fund liability for permanent total disability benefits, the Claimant must prove the following:

- 1) that she has sustained permanent disability resulting from a compensable work-related injury;
- 2) that she has permanent disability predating the compensable work-related injury which is 'of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the Employee becomes employable.' §287 RSMo Messex v. Sachs Electric Company, 989 S.W.2d (Mo. App. 1997); Garibay v. Treasurer, 964 S.W. 2d 474 (Mo. App. 1998); Rose v. Treasurer, 899 S.W.2d 563 (Mo. App. 1995).
- 3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time of the last injury results in permanent total disability. Boring v. Treasurer, 947 S.W.2d 483 (Mo. App. 1997); Reiner v. Treasurer, 837 S.W.2d 363 (Mo. App. 1992)."

I find Claimant sustained a compensable work-related accident on June 6, 2008, and find she has sustained 17.5 percent of the right knee and 19.75 percent body as a whole referable to the lumbar spine. However, I do not find Claimant had pre-existing conditions that were a hindrance or obstacle to her employment prior to June 6, 2008. Dr. Appelbaum did not note any pre-existing conditions. Another doctor, Dr. Reardon, who performed surgery on her knee, found her past medical history insignificant. Moreover, Claimant testified in a deposition (SIF Ex. 1) that she did not have problems that interfered with her ability to perform her work duties prior to June of 2008. She testified in her deposition that her bladder problems did not affect her working and that her blood sugars were okay. Moreover, there were no medical records or chiropractic records admitted showing that Claimant received any treatment as a result of a 1988 motor vehicle accident. Indeed, her own expert, Dr. Stuckmeyer, did not relate the headaches or the cervical problems to the 1988 accident. Instead, Claimant's expert relates those conditions to the June 6, 2008, accident. This leads me to find Claimant did not have pre-existing conditions that were a hindrance or obstacle to her employment. As such, I find Claimant did not meet her burden of proof that she sustained any pre-existing condition that was a hindrance or obstacle to her employment.

Moreover, I do not find she met her burden of proof that any pre-existing condition combines with the last accident to render her permanently and totally disabled. Even, at best, if I were to find Claimant had a pre-existing condition as listed by Dr. Stuckmeyer in the amount of 5 percent, I do not find that there was sufficient evidence to support Claimant is permanently and totally disabled based on a combination of the 5 percent unoperated thoracolumbar strain with the last accident .

Claimant's own vocational experts I find lack persuasion in this particular case. Mary Titterington finds Dr. Stuckmeyer's restrictions encompass Claimant's pre-existing 1988 motor vehicle accident and the last accident. I disagree and find Dr. Stuckmeyer clearly restricts Claimant based on the last accident alone.

The other vocational expert, Michael Dreiling testified there were no pre-existing medical restrictions or limitations that prevented her from performing her regular job duties prior to June 6, 2008, yet he then testifies Claimant is unemployable based on pre-existing conditions and the last accident. As such, I find both vocational experts' opinions in this particular case inconsistent and disregard their opinions.

I do not find Claimant provided sufficient evidence showing she suffered from a pre-existing disabling condition of such seriousness as to constitute a hindrance or obstacle to her employment or to obtaining re-employment. Rather, Claimant's testimony at hearing and the lack of medical records reveal that although she may have had some prior condition, none rose to the level of affecting her ability to perform her job duties before June of 2008. Claimant may very well be permanently and totally disabled, however, as noted above, at least one pre-existing permanent partial disabling condition is required in order to recover permanent total disability benefits from the Second Injury Fund. I am not convinced, based on the lack of medical records indicating a prior medical condition and the opinions of Drs. Appelbaum and Reardon's, that Claimant proved this essential element of her case and, as such, I deny the claim.

Made by: _____
Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation