

AWARD

Employee: Stephen L. Redfern Injury No. 08-051583

Employer: Autozone

Insurer: Fidelity & Guaranty Insurance Company

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: September 12, 2011

Checked by: ESF/lh

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: May 5, 2008.
5. State location where accident occurred or occupational disease was contracted: Jackson County, Missouri.
6. Was above employee an employee 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, by Fidelity & Guaranty Insurance Company.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was walking into a bathroom when he slipped and fell.
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: Neck and left arm.
14. Compensation paid to date for temporary disability: \$20,880.00.
15. Value of necessary medical aid paid to date by employer/insurer: \$79,607.80.
16. Value of necessary medical aid not furnished by employer/insurer? None.

17. Employee's average weekly wage: \$540.00.
18. Weekly compensation rate: \$360.00/\$360.00.
19. Method wages computation: By agreement.

COMPENSATION PAYABLE

20. Amount of compensation payable: The following amounts are awarded as benefits to Claimant:

The Employer has paid 150 weeks of permanent partial disability benefits for the period July 14, 2009 to May 30, 2012. Beginning May 31, 2012, The Second Injury Fund shall pay permanent total disability payments at the rate of \$360.00 per week. The Second Injury Fund shall continue to pay Claimant \$360.00 per week during his lifetime. In the event that Claimant predeceases his wife, Linda Redfern, those payments shall be paid to her during her lifetime.

Said payments to be payable and be subject to modification and review as provided by law.

This Award is subject to a lien in favor of Thomas Stein, attorney at law, in the amount of twenty-five (25%) for legal services rendered.

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On September 12, 2011, the parties appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The Employee, Stephen Redfern, appeared in person and with counsel, Mr. Thomas Stein. The Second Injury Fund appeared through Assistant Attorney General, Benita Seliga. There was no appearance on behalf of the Employer and Insurer as the claim between the Employer and the Employee has previously been settled.

STIPULATIONS

The parties stipulated to the following:

- 1) that Autozone was an employer operating under the subject Missouri Workers' Compensation Law on May 5, 2008;
- 2) that on May 5, 2008, an employer/employee relationship existed between Autozone and Claimant;
- 3) that the employer was insured under the law by Fidelity & Guaranty Insurance Company;
- 4) that the employee filed a claim for compensation within the time prescribed by law;
- 5) that notice was properly given;
- 6) that the employee sustained an accident on May 5, 2008 that arose out of and in the course of his employment; and
- 7) that the claimant's average weekly wage was \$540.00 and the applicable compensation rate is \$360.00 for permanent partial and permanent total disability benefits.

The issues to be decided are as follows:

- 1) Whether Claimant suffered any permanent disability from the May 5, 2008 accident and any prior injuries or conditions;
- 2) The liability of the Second Injury Fund for permanent partial or permanent total disability benefits;
- 3) Whether *Schoemehl v. Treasurer of Missouri*, 217 S.W.3d 900 (Mo. banc 2007), applies to this claim;
- 4) Whether *Schoemehl* applies to Claimant's wife should he predecease her.

Claimant and his wife, Linda Redfern, testified on his behalf and offered the following exhibits, all of which were admitted into evidence:

- A Medical records—Nicholas Michalski, M.D.
- B Medical records—Shawnee Mission Medical Center (5/19/08)
- C Medical records—Shawnee Mission Medical Center (6/9/08)
- D Medical records—Paul O'Boynick, M.D.
- E Medical records—Premier Spine Care
- F Medical records—Heartland Spine & Specialty Hospital
- G Medical records—SERC
- H Deposition—James Stuckmeyer, M.D.
- I Deposition—Mary Titterington
- J Deposition—Steve Redfern
- M Notice of Award from Social Security
- N Marriage License
- O Original claim for compensation
- P 1st amended claim for compensation
- Q 2nd amended claim for compensation
- R Stipulation for Compromise Settlement

The Second Injury Fund offered no witnesses or exhibits.

Claimant testified that he was born on February 27, 1951 and is 60 years old. When he was 18 months old, he was diagnosed with polio. This affected him from the waist down. He was required to wear a brace on his left leg. His right leg, although it did not require a brace, was very weak. To compensate for his polio, Claimant walked with the use of crutches under both arms. This is how he walked up until the time of the accident on May 5, 2008.

Claimant graduated from Ruskin High School. He did not obtain a college degree or any other degree. He held a number of different jobs before the accident, including door to door sales of encyclopedias. Although he was able to do this job, his polio made it difficult to walk up and down stairs and walk between houses for door to door sales.

Claimant then went to work in the auto parts business. He worked in that industry for a number of years before his accident. He was able to work full time in several different positions. The jobs he worked in this business required certain accommodations as a result of his polio. He was unable to carry bulky or heavy boxes. He was unable to climb ladders to stock or retrieve product from high shelves. Because of his inability to perform these job duties, his fellow employees performed them for him. He was also given a handicapped parking sticker by his last employer, Autozone. Claimant's polio also affected certain activities of daily living, such as dressing and bathing.

At the time of the accident, Claimant was working for Autozone at their location in Independence, Missouri. As he was going into the bathroom, one of his crutches slipped on a freshly mopped floor and caused him to fall. He tried to catch himself with his crutches. This caused immediate pain between his shoulders. He eventually got up and went back to his work duties. His supervisor saw the water on his shirt and asked him what had happened. He told him he slipped on water in the bathroom. His supervisor asked him if he needed to see a doctor, but Claimant told him he would be all right.

Claimant testified that before the accident, he had slipped and fallen hundreds of times over his lifetime because of his polio. The pain he suffered from these slips and falls had always gone away. He assumed that the pain he was experiencing from this fall would eventually go away as well.

Claimant finished his work day and continued to work there for the next two weeks. During this time, he continued to have pain between his shoulders as well as neck pain and headaches. On May 19, 2008, he was admitted to Shawnee Mission Medical Center for pneumonia. He was discharged after several days and went back to work. A few weeks later, he went back to Shawnee Mission Medical Center for left arm weakness. He was diagnosed with a herniated disc in his neck. Dr. Paul O'Boynick operated on his neck.

The herniated disc caused Claimant to lose strength in his left triceps. Dr. O'Boynick's surgery did not restore that strength. After a few months, Claimant's care was transferred to Dr. Adrian Jackson at Premier Spine Care. Dr. Jackson performed a second surgery on Claimant. Unfortunately, this did not restore the strength to his left triceps. Because of this, he was unable to use the crutches. He continues to have no strength in his left triceps. This has prevented him from using his crutches and walking. He has not been able to walk since this surgery in June, 2008.

In addition to left triceps weakness, Claimant continues to have neck pain and pain between his shoulders.

Claimant has not worked since his second surgery. He does not feel capable of working anywhere. He cannot walk. He cannot drive. He cannot walk up stairs or open doors in public. He rarely leaves the house because it is difficult for him to get out of the house. He now gets around in a motorized scooter that has to be loaded and unloaded in a special van by his wife. He has been on Social Security disability for more than two years.

He takes several naps during the day. Part of the reason for napping is that his neck pain and headaches interrupt his sleep during the night. The main reason he naps is because he cannot walk and spends almost the entire day laying in bed or sitting in a chair. Because most of his time is spent sitting or lying around, he has no energy and is constantly fatigued.

James A. Stuckmeyer, M.D. testified by deposition (Exhibit H). He is a board certified orthopedic surgeon. (p. 3) He evaluated Claimant on August 17, 2009. (p. 4) He stated that as a result of the accident; "Claimant sustained a two-level disk herniation in his neck. (p. 30) The accident necessitated surgery at C5-6 and then a second surgery at C5-6 and C6-7. (p. 30) Unfortunately, Claimant has been left with left triceps weakness, diminished triceps reflex and decreased grip strength in his left wrist. (p. 30) This has been a devastating injury for the Claimant, taking into account the preexisting polio with complete paralysis of his left leg and weakness in his right leg. (p. 30) Claimant was completely dependent on significant upper extremity strength to walk." (p. 30)

At the time of Dr. Stuckmeyer's evaluation, Claimant was barely able to get out of a chair from a seated position. (p. 30)

Dr. Stuckmeyer assessed a 40% permanent disability rating for Claimant's neck and 45% permanent disability for his preexisting polio. (p. 30) He also stated that it was more likely than not that he was permanently and totally disabled as a combination of his polio and the 2008 neck injury. (p. 31) He suggested that Claimant undergo a vocational assessment. (p. 31)

In regard to work restrictions specific to the polio, Dr. Stuckmeyer did not feel Claimant would be able to work any job that required prolonged standing greater than 5 to 10 minutes at a time and recommended no walking greater than 5 to 10 minutes with no stair climbing. (p. 36)

In regard to work restrictions from the neck injury, Dr. Stuckmeyer restricted Claimant from repetitive utilization of his left upper extremity with no lifting greater than 5 to 10 pounds on an occasional basis. (p. 36)

Mary Titterington testified by deposition. (Exhibit I) She is a vocational rehabilitation counselor. (p. 3) She examined Claimant on September 29, 2009. (p. 3) He presented to her evaluation in a wheelchair as he could not ambulate with his crutches. (p. 44) Claimant required assistance from one of Ms. Titterington's staff members to access the restroom, which is wheelchair accessible. (p. 44) Claimant was unable to open the internal doors to the restroom or to the stalls without assistance. (p. 44) He was also unable to push his manual wheelchair and required assistance from Ms. Titterington, Claimant's wife and another person. (p. 44)

Claimant reported the following medical problems to Ms. Titterington:

- 1) Total paralysis in the left leg from the hip down. Wears a full leg brace for support.
- 2) Incomplete but significant paralysis and atrophy of the right leg resulting in limited use.
- 3) Severe headaches, approximately once a month lasting one to two days.
- 4) Limited range of motion in both shoulders.
- 5) Constant pain in both shoulders, worsening with use.
- 6) Sleep disturbance.
- 7) No strength in left triceps and arm resulting in very limited use of the left arm.
- 8) Weakness in left hand.
- 9) Inability to fully pronate and supinate right hand.
- 10) Extremely compromised in his ability to perform independent activities of daily living. (p. 45)

Ms. Titterington noted that Claimant is unable to ambulate independently and has been unable to since he was an infant. (p. 45) Before his accident, Claimant had required two crutches and a full leg brace to walk. (p. 45) He now relies on a wheelchair when having to walk. (p. 45) He cannot open regular office or restroom doors unassisted. He cannot transfer in and out of a car without assistance. (p. 45) He is unable to climb ladders or lift weights as they throw him off balance and he does not have any strength in his left arm. (p. 46) Stairs are very difficult for him to maneuver. (p. 46)

She further noted that Claimant has chronic pain with any extended use of his arms and left hand. (p. 50)

After evaluating Claimant and performing several tests on him, Ms. Titterington noted that the restrictions from Dr. Stuckmeyer preclude him from returning to any of his former jobs. (p. 50) She also concluded that he would not be able to compete in the open labor market. (p. 50) He would not be able to report to work on a consistent daily basis. (p. 50) He would not be able to stay on task throughout the day. (p. 50) He would be unable to meet production goals. (p. 50) Any basic action such as using the restroom, obtaining supplies or going to lunch would

require an attendant. (p. 50) His work speed would be very slow due to how long it takes him to change positions and due to his pain. (p. 50)

Ms. Titterington testified in her deposition that Claimant was permanently and totally disabled as a result of the combination of his preexisting polio and the restrictions from his neck injury. (p. 23) As a result of his polio and 2008 neck injury, he will never be able to compete in the open labor market. (p. 23)

Claimant's wife, Linda Redfern, testified in person. She testified that they have been married since 2007. At the time of the accident, she worked for OHS Compcare in the administration department. She was subsequently let go as part of a reduction in force. She has not worked since. She has been financially dependent on Claimant since then. His Social Security checks are their only source of income.

The Second Injury Fund called no witnesses and did not offer any evidence at all.

The relevant statute is Mo. Rev. Stat. §287.220. To be entitled to permanent total disability benefits from the Fund, a claimant must prove that the last injury combined with his pre-existing permanent partial disabilities to result in permanent total disability. ***Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund, 272 S.W.3d 267, 272 (Mo. App. 2008)***. If a workers' compensation claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Fund has no liability and the employer is responsible for the entire amount. ***Feld v. Treasurer of Missouri as Custodian of Second Injury Fund, 203 S.W.3d 230, 233 (Mo. App. 2006)***.

The evidence clearly shows that it is the combination of Claimant's preexisting polio and the disability from his neck injury that renders him permanently and totally disabled. The last injury, in and of itself, would not have rendered Claimant permanently and totally disabled. Assuming Claimant did not have polio, it can reasonably be inferred that he would, despite his neck surgeries, still have the ability to dress and wash himself in a normal fashion, walk, go up and down stairs, go up ladders, open public doors, report to work on a consistent daily basis, use the restroom, obtain supplies, and go to lunch without help. Because of his polio and neck injury, he is unable to perform these activities.

In order to determine the Second Injury Fund's liability this Court must determine whether the Employee suffered any disability and if so, the nature and extent of Employee's disability. Subsequent to that, this Court must also determine whether the Second Injury Fund is liable to the Employee for any disability, either permanent partial or permanent total disability. In this case the Employee has alleged that he is permanently and totally disabled. There is no credible evidence that the Employee was rendered permanently and totally disabled as a result of the injury caused by his May 5, 2008 accident considered alone and without regard to his alleged preexisting disability. An employer is liable for permanent total disability compensation under §287.220 RSMo 1994 only where it is found that the primary accident alone caused the employee to be permanently and totally disabled. ***Mathia v. Contract Freighters, Inc.***, 929 S.W.2d 271,276 (Mo. App. 1996); ***Feldman v. Sterling Properties***, 910 S.W.2d 808 (Mo. App. 1995); ***Moorehead v. Lismark Distributing Company***, 884 S.W.2d 416, 419 (Mo. App. 1994); ***Kern v. General Installation***, 740 S.W.2d 691, 692 (Mo. App. 1987). Compensation cases in which there has been a previous disability are to be determined under §287.220.1 RSMo (1994). In partial disability cases, the Employer is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. In total disability cases, the Employer is liable only for the disability resulting from the last injury considered alone and of

itself. The Employer's liability for permanent partial disability compensation is determined under §287.190; Stewart v. Johnson, 398 S.W.2d 850 (Mo.App. 1996). Based upon a review of the medical records including the opinions of the medical and vocational experts Employee was not rendered permanently and totally disabled due to his last accident alone. The Employer in this case is only liable for permanent partial disability payments for 37.5 percent to the body as a whole, which has previously been determined pursuant to the stipulation and settlement agreement between the Employer and Employee. This Court finds this determination of disability to be reasonable.

Since I have determined that Employee's May 5, 2008 accident resulted only in permanent partial disability and that that disability did not cause the Employee to be permanently and totally disabled in and of itself, the next issue is the Second Injury Fund's liability. In order to establish Second Injury Fund liability for permanent total disability benefits, the Employee must prove the following: number one, that he has permanent disability resulting from a compensable work-related injury. See §287.220.1 RSMo (1994). Two; that he 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 unemployable." §287.220.1 RSMo (1994); Messex v. Sach's Electric Co., 989 S.W.2d 206 (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); Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo.App. 1995); and Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo.App. 1995). And, number three, 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 the last injury was sustained 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); Frazier v. Treasurer, 869 S.W.2d 152 (Mo.App. 1994). See Miller v. State Treasurer, 978 S.W.2d 808 (Mo.App. 1998), where the Court held Claimant's fibromyalgia from last injury, combined with preexisting aneurysm, was sufficient to establish permanent total disability against the Second Injury Fund.

The first requirement has already been met, and a determination of percentage of that disability has been made pursuant to the settlement stipulation entered into between Employee and the employer and submitted as Employee's Exhibit R.

With regard to the second requirement, a determination must be made as to the degree or percentage of disability that is attributed solely to the preexisting conditions at the time of the last injury. Lammert v. Vess Beverages, Inc. 968 S.W.2d 720 (Mo. App. 1999); Carlson v. Plant Farm, 952 S.W. 2d 369 (Mo. App.1997). Employee testified to his problems due to his pre-existing polio. Before his 2008 neck injury, he was limited in what he could do at work. He could not carry heavy or bulky boxes. He could not climb ladders. He had difficulty walking and going up and down stairs. He needed assistance stocking shelves. Dr. Stuckmeyer assessed a 45% permanent partial disability rating for his polio. Based upon the disability Employee suffered due to his pre-existing polio, I find that Employee did, in fact, suffer a 45 percent permanent partial disability to body as a whole due to his polio which pre-existed his last accident. Further based upon Dr. Stuckmeyer's assessment as well as Mary Titterington's report and their testimony along with Employee's this Court finds that the disabilities caused by Employee's pre-existing polio were a hindrance or obstacle to his employment.

The last requirement in establishing Second Injury Fund liability is proving that the Claimant is permanently and totally disabled as a result of the combined effect of the disabilities. The first part of this inquiry involves the findings as to whether the Employee is permanently and totally disabled. §287.020.7 RSMo (1986) defines total disability as the inability to return to any

employment and not merely the inability to return to employment in which the Employee was engaged at the time of the accident. It is clear that Employee suffered from disabilities predating the compensable work-related injury which are of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the Employee becomes unemployed. These disabilities are related to his polio. Mary Titterington felt Employee was unemployable in the open labor market. Dr. Stuckmeyer also believed that Employee was unlikely to obtain gainful employment should a vocational expert find him unemployable based upon his restrictions, which Mary Titterington did. It was the opinion of both Dr. Stuckmeyer and Mary Titterington that Employee is permanently and totally disabled and that this permanent total disability is the result of a combination of all of his disabilities. This Court finds these opinions credible and further finds there is no other evidence which would contradict such findings. Wherefore, this Court, based on the above and foregoing finds that Employee is permanently and totally disabled due to the combination of his pre-existing disabilities and his disability from his injury from his last accident.

The parties stipulated to an average weekly wage of \$540.00. This would yield a compensation of rate of \$360.00 per week for permanent total disability.

Dr. Stuckmeyer testified that Claimant reached maximum medical improvement on May 13, 2009. Claimant was paid 58 weeks of temporary total disability benefits from June 9, 2008 to July 13, 2009. He settled his claim for permanent partial disability benefits against the Employer for 37.5% permanent partial disability. This entitled Claimant to 150 weeks of permanent partial disability at the rate of \$360.00 per week for the period July 14, 2009 to May 30, 2012. Beginning May 31, 2012, Claimant shall be entitled to permanent total disability benefits against the Fund at the rate of \$360.00 per week. I, therefore, award future permanent total disability benefits against the Fund at the rate of \$360.00 per week beginning May 31, 2012.

I find that Claimant and Linda Redfern were married at the time of the accident and at all times during the pendency of this claim. I find that she was a dependent of Claimant. Pursuant to the Missouri Supreme Court's July 31, 2012 decision in *Gervich v. Condaire, Inc., et al.*, I find that Claimant's wife, Linda Redfern, shall be entitled to Claimant's permanent total disability benefits in the amount of \$360.00 per week for the rest of her life should Claimant predecease her.

Claimant's attorney is awarded a fee of 25% of the past due and future permanent total disability benefits awarded herein.

Made by: _____
Emily S. Fowler
Administrative Law Judge
Division of Workers Compensation