

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

Injury No.: 01-108613

Employee: Bobby Richards
Employer: Sedalia Steel (Settled)
Insurer: Missouri Employers' Mutual (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: August 23, 2001
Place and County of Accident: Holts Summit, Callaway County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge (ALJ) dated November 1, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Hannelore D. Fischer, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the medical and lay evidence in reaching her conclusions. We adopt the findings of the ALJ as to the credibility, reliability and probative worth of the medical and lay evidence. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001); *Chatmon v. St. Charles County Ambulance District*, 55 S.W.3d 451 (Mo. App. E.D. 2001).

The law in Missouri is well established that a workers' compensation employee must prove all of the material elements of his claim. *Sanders v. St. Clair Corp.*, 943 S.W.2d 12 (Mo. App. S.D. 1997). In order to establish a claim against the Second Injury Fund (SIF) employee must establish disability from the primary injury, disability preexisting the primary injury and that the combined injuries result in disability which is substantially greater than that which would have resulted from the last injury alone. The preexisting disability must be shown to be "of such seriousness as to constitute a hindrance or obstacle to employment." Section 287.220 RSMo.

Employee offers the testimony of employee and of Dr. James Stuckmeyer to establish the necessary criteria for compensability. The ALJ found the offered proof to be wanting. We agree.

The ratings of Dr. Stuckmeyer, when reduced to weeks of compensation, as done by the ALJ, do not establish any impact from the combination of present disability added to the preexisting disability. Thus, section 287.220 RSMo., would bar recovery.

We do not accept the testimony of Dr. Stuckmeyer as credible nor as dispositive of the questions of disability. The acceptance or rejection of medical evidence is for the Commission. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884-85 (Mo. App. S.D. 2001).

Both employee and Dr. Stuckmeyer testified to a condition of carpal tunnel syndrome, which preexisted the primary injury in this case. Both witnesses endeavored to establish that the presence of the condition equated

with disability. This proposition has been rejected. The Court stated an employee can be diagnosed with an occupational disease and experience symptoms of the disease prior to the time that it becomes disabling. *Prater v. Thorngate Ltd.*, 761 S.W.2d 226, 228-29 (Mo. App. 1988). In this case, the condition has not been shown to have been disabling by harming employee's earning ability. *Feltrop v. Eskens Drywall and Insulation*, 957 S.W.2d 408 (Mo. App. 1997).

Employee attempts to alter the ratings given by Dr. Stuckmeyer in order to assure that the calculations establish SIF liability by shifting the allocation of weeks between past, present and combined disabilities. Even if we were to accept this argument, which we do not, employee still fails to establish his statutorily mandated burden of proof.

Given at Jefferson City, State of Missouri, this 22nd day of March 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

Secretary

DISSENTING OPINION

I must respectfully dissent from the opinion of the majority of the Commission.

I am aware of the requirements of section 287.220 RSMo, and, in my opinion, employee has met the statutory burden needed to recover from the Second Injury Fund (SIF).

I would accept the stipulation of the parties to the effect that the primary injury has resulted in a disability of 17.5% of the right shoulder.

I would accept employee's testimony as to the limitations on his ability to perform his ordinary tasks as demonstrating disability from his condition of carpal tunnel before the injury in question. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886 (Mo. App. E.D. 886). In addition, I would accept the expert opinion of Dr. Stuckmeyer that the preexisting conditions of carpal tunnel and of the thoracolumbar spine were disabling.

Accordingly, I would find the primary injury to have resulted in 40.6 weeks disability. I would find the disability preexisting the primary to have been 20% of each wrist plus 5% of the unscheduled 400 weeks for a total of 110 weeks. The total of the disabilities equals 150.6 weeks.

Based on the testimony of employee and Dr. Stuckmeyer, I would find that the two disabilities do, in fact, combine to produce a greater overall disability to the extent of 15.06 weeks of SIF liability.

AWARD

Employee: Bobby Richards

Injury No. 01-108613

Dependents:

Before the

**DIVISION OF WORKERS'
COMPENSATION**

Employer: Sedalia Steel

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

Additional Party: Second Injury Fund Only

Insurer:

Hearing Date: September 28, 2004

Checked by: HDF/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No. Claimant failed to prove Second Injury Fund liability.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law?
4. Date of accident or onset of occupational disease:
5. State location where accident occurred or occupational disease was contracted:
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
7. Did employer receive proper notice?
8. Did accident or occupational disease arise out of and in the course of the employment?
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer?
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
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:
14. Nature and extent of any permanent disability:
15. Compensation paid to-date for temporary disability:
16. Value necessary medical aid paid to date by employer/insurer?
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate:
20. Method wages computation:

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning , for
Claimant's lifetime

22. Second Injury Fund liability: No.

TOTAL:

23. Future requirements awarded:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Bobby Richards

Injury No: 01-108613

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Sedalia Steel

Additional Party Second Injury Fund

Insurer:

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on September 28, 2004. Memoranda were submitted by October 27, 2004.

The parties stipulated that on or about the 23rd day of August, 2001, the claimant was in the employment of Sedalia Steel; the claimant sustained an injury by accident; the accident arose out of and in the course of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the rate of compensation on the date of accident was \$329.42 per week for permanent partial disability benefits.

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

The parties stipulated that the permanent disability sustained by Mr. Richards as the result of his August 23, 2001 work injury is 17.5 percent of the right shoulder.

FINDINGS OF FACT

The claimant, Bobby Richards, testified that his original hand complaints resulted from a fall off of a truck which caused him to land on his hands in December of 1998. Thereafter, Mr. Richards described numbness and tingling in the hands causing trouble sleeping and causing Mr. Richards to drop things. Mr. Richards said that the condition of his hands continued to worsen up to and throughout 2003 and that he had surgery for his left hand complaints in October of 2003.

Dr. James Stuckmeyer, orthopedic surgeon, testified by deposition that he examined Mr. Richards on January 14, 2003. Dr. Stuckmeyer opined to a 20-percent permanent partial disability of Mr. Richards' right and left wrists and a 5-percent permanent partial disability of Mr. Richards' body referable to pain in the thoracolumbar spine. With regard to the total disability sustained by Mr. Richards as the result of the right shoulder, both wrists and back, Dr. Stuckmeyer opined to a permanent partial disability of 35 percent of the body. Specifically included was the permanent disability to the back. During redirect examination, Dr. Stuckmeyer stated that a "10 percent augmentation factor" should apply.

Dr. Gunter's records reflect treatment on December 16, 1998, and January 13, 1999, for complaints of bilateral hand pain, right greater than left. Dr. Gunter gave Mr. Richards splints and Daypro on the first visit and on the second visit noted improvement with the use of splints, but continued symptoms without the splints. At the time of the second visit, Mr. Richards was scheduled to return in one month if symptoms persisted. Mr. Richards did not return to Dr. Gunter.

APPLICABLE LAW

Section 287.220. 1, states, in part, as follows:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has 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, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation

liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

In Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 793 (Mo. app. S.D. 1992) the court held that Second Injury Fund

should not be liable for a non-disabling condition which exists at the time a work-related injury is sustained and subsequently "blossoms" into a disability. Further, the court held that workers' compensation law refers to a "preexisting disability," not a "preexisting condition," and that the Fund should not be liable unless the claimant can show that the preexisting condition became worse and was caused by the last injury. *Id.* at 793. The Claimant in the case at bar, like the claimant in Lawrence, failed to show that this preexisting injury met the threshold for compensability. In both cases, the claimants argued unsuccessfully that their preexisting disabilities worsened after their primary injuries.

AWARD

The formula for determining Second Injury Fund liability in cases of permanent partial disability is combined disability less pre-existing permanent partial disability and subsequent (work-related) permanent partial disability. Dr. Stuckmeyer set forth the combined disability as 35 percent of the body or 140 weeks and stated that prior disability is 5 percent of the body for the back and 20 percent of each wrist and that subsequent disability is 25 percent of the right shoulder. Translated into weeks, Dr. Stuckmeyer's ratings would be as follows:

Combined disability = 140 weeks

Pre-existing disability = 90 weeks

Subsequent disability = 58 weeks;

140 weeks less 90 and 58 is a negative 8 weeks. Thus, Dr. Stuckmeyer

failed to establish Second Injury Fund liability.

If only the disabilities meeting the statutory thresholds are included, then Dr. Stuckmeyer failed to opine regarding Second Injury Fund liability since his opinion clearly included the pre-existing permanent partial disability to the back of 5 percent.

Dr. Stuckmeyer's comment on redirect examination regarding a 10-percent augmentation factor is vague as it pertains to Second Injury Fund liability. Is Dr. Stuckmeyer stating that the combined disability over the sum of the pre-existing and subsequent disabilities is 10 percent of the body or 40 weeks, or is he stating that it is 10 percent of the sum of all pre-existing and subsequent disabilities including those that don't meet the statutory threshold or is it 10 percent of the sum of those pre-existing and subsequent disabilities that do meet the threshold?

The claimant, Bobby Richards, has failed to establish that his bilateral carpal tunnel complaints pre-existing his right shoulder injury of 2001 when combined with the 2001 right shoulder injury have resulted in permanent partial disability greater than the sum of the injuries so as to implicate the Second Injury Fund.

Claimant's treatment for preexisting carpal tunnel consisted only of anti-inflammatory medication and splints. Claimant did not undergo release surgery, receive steroid injections or physical therapy prior to his primary shoulder injury. At hearing, Claimant even testified that it was only after his shoulder injury that his carpal tunnel syndrome became much worse. Considering these facts, Claimant's preexisting carpal tunnel does not meet threshold, and therefore there is no Second Injury Fund liability. Further, the Second Injury Fund is not liable for any deterioration of the Claimant's carpal tunnel syndrome subsequent to his primary shoulder injury. In conclusion, Claimant does not have preexisting injury that meets threshold and therefore there is no Fund liability in this case.

Date: October 27, 2004

Made by: /s/Hannelore D. Fischer

HANNELORE D. FISCHER

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

/s/Gary J. Estenson

Gary J. Estenson

Acting Director

Division of Workers' Compensation