

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

Injury No.: 08-121450

Employee: Thomas Richards
Employer: Lagasse Sweet Inc. (Settled)
Insurer: Travelers Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled 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 briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the May 5, 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.

Introduction

The administrative law judge found the Second Injury Fund liable for 20.25 weeks of permanent partial disability benefits under § 287.220.1 RSMo. Employee filed an Application for Review arguing that the administrative law judge erred in discounting certain of his preexisting conditions in determining Second Injury Fund liability. Employee argues these conditions were more serious than the administrative law judge believed and that these conditions were hindrances and obstacles to employment.

We agree that the administrative law judge improperly failed to include employee's preexisting diabetes, left shoulder, and right hand conditions in determining Second Injury Fund liability, but for somewhat different reasons than argued by employee. We are of the opinion that the administrative law judge applied an improper analysis as to the thresholds for triggering Second Injury Fund liability and in calculating the extent of Second Injury Fund liability. Because employee's Application for Review implicates that analysis, we write this opinion and modify the award and decision of the administrative law judge as follows.

Discussion

On page 5 of his award, the administrative law judge separately discussed each of employee's preexisting disabling conditions, determined that some of them did "not meet threshold," and then discounted these conditions from his calculation of Second Injury Fund liability. These comments and the resulting award suggest the administrative law judge was of the opinion that if one of a worker's preexisting disabilities, considered in isolation, fails to meet one of the thresholds in § 287.220.1, then that condition is ignored for all purposes when considering the liability of the Second Injury Fund. Such an approach has no support in the Missouri Workers' Compensation Law or in Missouri case law. We reject

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the administrative law judge's reasoning regarding the triggering of Second Injury Fund liability. Our analysis of the operation of the Second Injury Fund thresholds follows.

Purpose of the Second Injury Fund

The purpose of the Second Injury Fund is "to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury." *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004) (citation omitted). The Second Injury Fund statute encourages such employment by ensuring that an employer is only liable for the disability caused by the work injury. Any disability attributable to the combination of the work injury with preexisting disabilities is compensated, if at all, by the Second Injury Fund.

Purpose of the thresholds

Before 1993, any preexisting disability that was a hindrance to employment or reemployment could open the door to possible Second Injury Fund liability. The Second Injury Fund statute was amended in 1993 to limit permanent partial disability awards against the Second Injury Fund to those cases where both the preexisting disabilities and the disabilities from the work injury are more than de minimis. The provision defining what disabilities will trigger Second Injury Fund liability now states:

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.

The thresholds found in the quoted provision serve to protect the Second Injury Fund from enhanced permanent partial disability claims of claimants with de minimis disabilities. And that is where the service of the thresholds ends. Section 287.220.1 goes on to say:

After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or

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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...(emphasis added).

Under the plain language of the statute, once it is determined that the thresholds are met, all disabilities that exist at the time of the work injury should be considered in the calculation of Second Injury Fund liability.

Application of the thresholds

The second threshold applies when a claimant has preexisting permanent partial disability of a single major extremity ("if a major extremity injury only"). In all other circumstances, the first threshold applies.

The legislature chose two different units of measurement to describe the thresholds: "fifty weeks of compensation" for preexisting disabilities of the body as a whole; and "fifteen percent permanent partial disability" for a preexisting disability to a major extremity only. We believe the legislature rested on different units of measurement to foster arithmetic simplicity.

Where a claimant has only a preexisting disability to a major extremity, the legislature made "a simple 15% disability to a major extremity the threshold rather than attempt a more complex formula based on weeks of disability to various body parts at various levels." *Motton v. Outsource Int'l*, 77 S.W.3d 669, 675 (Mo. App. 2002).

But where there is more than one preexisting disability, the simplicity described above cannot be achieved. In that event, we need a method to combine the various disabilities to determine claimant's overall preexisting disability as of the moment of the primary injury. In order to combine the disabilities for comparison to the threshold, the disabilities must be converted to a common unit of measure. The legislature selected weeks of compensation as the common unit of measure.

This claim

In the instant case, employee had more than a single preexisting disabling condition so the first threshold applies. We must determine if employee's overall preexisting permanent partial disability – stated in weeks – meets or exceeds this amount.

We find appropriate and affirm the administrative law judge's findings that employee suffered the preexisting permanent partial disability of 25% of the right knee, 35% of the left knee, and 10% of the right wrist. We modify, however, the findings of the administrative law judge as to employee's preexisting diabetes and left shoulder conditions. We find that employee suffered a 15% permanent partial disability of the left

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shoulder and 12.5% permanent partial disability of the body as a whole referable to diabetes.

Converting employee's preexisting disabilities into weeks of compensation yields the following results: 40 weeks for the right knee, 56 weeks for the left knee, 17.5 weeks for the right wrist, 34.80 weeks for the left shoulder, and 50 weeks for diabetes. The sum of the preexisting disabilities is 198.3 weeks. Employee has easily met the 50-week threshold.

We have found that employee suffers from a total of 198.3 weeks of preexisting permanent partial disability referable to his preexisting disabling conditions, and that these conditions constituted hindrances and obstacles to employment at the time he sustained the November 2008 primary injury. As a result of the work injury, employee suffers from a permanent partial disability of the left wrist equivalent to 43.75 weeks. Under § 287.220.1, employee is entitled to compensation from the Second Injury Fund if he proved the disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself. See *Gassen v. Lienbengood*, 134 S.W.3d 75 (Mo. App. 2004).

We find that employee's preexisting disabilities combine with employee's primary injury to result in greater disability than the simple sum. We find that a 14.5% load factor is appropriate to represent this synergistic effect. We also credit Dr. Lichtenfeld's opinion (and so find) that each of employee's preexisting conditions of ill described above amounted to a hindrance or obstacle to employment at the time employee sustained the November 2008 primary injury in this matter.

Employee's preexisting conditions amount to 198.3 weeks of permanent partial disability. His primary injury resulted in 25% permanent partial disability of the left wrist, or 43.75 weeks of permanent partial disability. The sum of these two amounts is 242.05 weeks. When we multiply the sum by the 14.5% load factor, the result is 35.1 weeks.

Employee has met his burden. We conclude that the Second Injury Fund is liable for 35.1 weeks of permanent partial disability benefits.

Award

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

The stipulated rate of compensation is \$404.66 per week. The Second Injury Fund is liable to employee for \$14,203.57 in permanent partial disability benefits.

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.

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The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 5, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 8th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary