

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

Injury No.: 00-176543

Employee: Dallas Robertson
Employer: Dallas Robertson d/b/a D & S Enterprises (Settled)
Insurer: SAFECO (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, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing 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

At the outset, we note that the Second Injury Fund filed a timely Application for Review in this matter, but via correspondence received by the Commission on December 26, 2013, the Second Injury Fund requested that its appeal be dismissed. We hereby grant the Second Injury Fund's request to withdraw its Application for Review.

The administrative law judge awarded permanent partial disability benefits from the Second Injury Fund. Employee appeals, arguing the evidence supports a conclusion that the Second Injury Fund is liable for permanent total disability benefits. We agree with the result reached by the administrative law judge for the following reasons.

We are not persuaded that employee's part-time job with the water district or failed campaign for a part-time elected position constitute evidence that employee is employable. We believe that all of the expert testimony on record, and the credible testimony of employee, establish that he is permanently and totally disabled.

Employee's post-injury work activities, however, including the continued conduct of his own regular business (scaled back in March 2000 prior to the May 8, 2000, work injury), together with histories of subsequent injury (including a 2005 left index finger injury and a January 2011 slip on ice and twisted knee), illnesses (a January 2005 diagnosis of diabetes with ulnar neuropathy), and apparent worsening of his preexisting conditions not demonstrated to have been caused by the work injury (such as the worsening condition of employee's left shoulder) make it impossible to determine that employee's total disability is the result of a combination of his work-related and preexisting injuries and disabilities.

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Accordingly, we agree with the administrative law judge's conclusion that employee failed to meet his burden of proving Second Injury Fund liability for permanent total disability benefits.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein. The award and decision of Administrative Law Judge Gary L. Robbins, issued September 6, 2012, is attached and incorporated by this reference.

We approve and affirm 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 23rd day of January 2014.

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

Employee: Dallas Robertson

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to enter an award of permanent total disability benefits from the Second Injury Fund.

As the majority notes, all of the expert testimony in this case demonstrates that employee is permanently and totally disabled. The administrative law judge rejected this expert testimony on a finding that Drs. Poetz and Hanaway and the vocational expert Dr. Bernstein were not aware of employee's 4 or 5 months performing part-time consulting services for his local water district or engaging in a short-lived and unsuccessful run for the office of eastern district commissioner in Butler County. The majority appears to have rejected that rationale, and instead rendered a finding that employee is permanently and totally disabled but fails to meet his burden of proving Second Injury Fund liability because employee's business continued after his injury, or alternatively because employee's permanent total disability is due to a post-accident worsening of his medical condition.

With respect to employee's business, I agree that employee certainly could have better developed the evidence in this area, but it appears to me from a careful review of the transcript that employee lost the ability to perform any physical work for the business after the primary injury. Employee credibly testified he couldn't tolerate operating the business's dump trucks or the prolonged sitting it took to perform trucking jobs, and employee's brother, Earlie Robertson, provided credible testimony indicating that employee did very little after his injury, and that what little work he did perform was non-physical and in the nature of supervisory tasks. Employee also indicated that it was necessary to keep the business running beyond when the family wished to close it down, because of an ongoing contract with Allied Waste. Taking these factors into consideration, I am not convinced that the evidence regarding employee's family business continuing past the date of injury has any effect on the credible expert testimony assigning liability for employee's permanent total disability to the Second Injury Fund.

With respect to worsening of employee's medical condition after the work injury, I agree that the Second Injury Fund is not liable for permanent total disability benefits where an employee's permanent total disability results from a post-accident worsening of preexisting medical conditions or disabilities. *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 793 (Mo. App. 1992). But the Commission is not entitled to substitute its lay opinion as to the cause of an employee's permanent total disability for the opinions of the testifying experts. In *Abt v. Miss. Lime Co.*, 388 S.W.3d 571 (Mo. App. 2012), the Commission determined that an employee was permanently and totally disabled as a result of a post-accident worsening of his condition where no medical expert had so opined. *Id.* at 576. In reversing and remanding the case, the Court made the following observations:

Rather than choosing one of the medical opinions, the Commission made a finding that is not consistent with any medical opinion in the record. Because no medical expert concluded that Claimant was permanently and

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totally disabled due solely to subsequent deterioration, the Commission's finding is not supported by substantial and competent evidence.

Id. at 581 (citations omitted).

I'm convinced the majority makes the same mistake here. No expert in this case has provided testimony that would support a finding that employee is permanently and totally disabled owing to a post-accident worsening of preexisting medical conditions, or due to medical conditions or injuries arising after he reached maximum medical improvement from the effects of the work injury.

Based upon the entire record, I find that employee is permanently and totally disabled as a result of the primary injury combined with employee's preexisting conditions of ill-being. I would modify the award of the administrative law judge to award permanent total disability benefits from the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent from the decision of the Commission.

Curtis E. Chick, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Dallas E. Robertson Injury No. 00-176543
Dependents: N/A
Employer: Dallas Robertson dba D& S Enterprises
Additional Party: Second Injury Fund
Insurer: SAFECO
Appearances: Ellen E. Morgan, attorney for employee.
John J. Lintner, attorney for Second Injury Fund.
Hearing Date: June 20, 2012 Checked by: GLR/rmm

SUMMARY OF FINDINGS

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 8, 2000.
5. State location where accident occurred or occupational disease contracted: Wayne 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 happened or occupational disease contracted: The employee was working on a truck and slipped on the step, tried to break his fall with his left arm and fell to the ground as he was exiting the cab.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left shoulder, left knee and lumbar spine.
14. Nature and extent of any permanent disability: The employee settled his case with the employer-insurer for 5% permanent partial disability of the left shoulder, 22 ½% permanent partial disability of the left knee and 12 ½% permanent partial disability of the body as a whole referable to the lumbar spine.
15. Compensation paid to date for temporary total disability: \$23,689.84.
16. Value necessary medical aid paid to date by employer-insurer: \$12,536.77.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$500.00.
19. Weekly compensation rate: \$266.66 for all purposes.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ellen E. Morgan.

FINDINGS OF FACT AND RULINGS OF LAW

On June 20, 2012, the employee, Dallas E. Robertson, appeared in person and with his attorney, Ellen E. Morgan for a hearing for a final award. The employer-insurer was not represented at the hearing as they already settled their claim with the employee. Assistant Attorney General, Jonathan J. Lintner represented the Second Injury Fund. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. On May 8, 2000 the employee sustained an accident or occupational disease arising out of and in the course of his employment. (This stipulation is subject to the findings in Issues 1 and 2).
2. The employer had notice of the employee's accident.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage is \$500.00 per week. His rate for all purposes is \$266.66 per week.
5. The employee's injury was medically causally related to the accident or occupational disease.
6. The employer-insurer paid \$12,536.77 in medical aid.
7. The employer-insurer paid \$23,689.84 in temporary disability benefits.
8. The employee had no claim for previously incurred medical bills.
9. The employee had no claim for mileage or future medical care.
10. The employee had no claim for any temporary disability benefits.
11. The employee had no claim for permanent partial or permanent total disability as to the employer-insurer.
12. The parties agree that February 20, 2003 is the date of maximum medical improvement.

ISSUE:

Liability of the Second Injury Fund for permanent partial or permanent total disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Deposition of Joseph Hanaway, M.D.
- B. Deposition of Robert P. Poetz, D.O.
- C. Deposition of Samuel Bernstein, Ph. D.
- D. Medical records from SSM/St. Joseph Health Center.
- E. Registration of Fictitious Name.

- F. Medical records of Joseph Hanaway, M.D.
- G. Medical records from Poplar Bluff Regional Medical Center North.
- H. Medical records from Barnes-Jewish St. Peters Hospital.
- I. Medical records of William G. Sedgwick, M.D.
- J. Medical records of C. M. Linsenmeyer, M.D.
- K. Medical records from Orthopaedic Associates of Southeast Missouri, P.C.
- L. Medical records from Cape Radiology Group, Inc.
- M. Medical records from Lester E. Cox Medical Centers.
- N. Medical records from St. Francis Medical Center.
- O. Medical records from St. Francis Medical Center.
- P. Medical records from Lakeside Family Clinic.
- Q. Form 1 – Report of Injury.
- R. Medical records from Orthopaedic Associates, P.C.
- S. Medical records from Cross Trails Medical Center.
- T. Affidavit from St. John’s Regional Health Center.
- U. Medical records from M.B. Moore, M.D.
- V. Stipulations for Compromise Settlement, Injury No. 82-59297.
- W. Final Award, Injury No. AS-23977.
- X. Stipulation for Compromise Settlement, Injury No. 91-039864.
- Y. Stipulation for Compromise Settlement, Injury No. 00-176543.

The Second Injury Fund Exhibits:

None.

The employee maintains that the Second Injury Fund offered a Missouri Division of Employment Security record. The employee is in error. Oral testimony was presented regarding the document, however, it was not offered into evidence.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee, Dallas E. Robertson, his wife Marie “Sue” Robertson, and his brother Earlie Robertson all personally testified at the hearing. All other evidence was presented in the form of written records, medical records or deposition testimony.

Dallas Robertson:

The employee was sixty-seven years old at the time of the trial; however, he was fifty-five years old when he was injured on May 8, 2000. He is married to Marie Sue Robertson and has a brother named Earlie Robertson. Mr. Robertson graduated from high school but has no formal education beyond high school. His prior work experience involves working in factories, driving a truck, selling used cars and he owned an automobile dealership before stating D&S Enterprises.

He testified that he and his wife are the owners and employees of D&S Enterprises. D&S is a company that was involved in construction, demolition, trucking and dirt work. The employee ran the physical aspects of the company and his wife ran the business side of the company. The employee testified that he worked as many as sixty-five hours a week and was a hands-on owner as he drove the trucks, and operated heavy equipment including bulldozers. He testified that prior to the 2000 accident no doctor had placed any permanent restrictions on him. Over the years the number of employees varied depending on the jobs that were being done, but Dallas Robertson, Earlie Robertson and Sue Robertson were always employees of the company.

The employee testified that in about 2000 he and his wife were in the process of winding down the company. He indicated that they sold off some equipment not being used but D&S continued to operate and conduct business but on a smaller scale. The employee indicated that D&S has workers' compensation insurance when he was injured. Employee's Exhibit Y is a Stipulation for Compromise Settlement indicating that the employee settled his primary claim with SAFECO on August 8, 2011. Despite a Missouri Division of Employment Security form, the employee testified that D&S was in business in 2000 and remained so until they closed the business in 2003.

Mr. Robertson has injuries that pre-existed his May 8, 2000 accident:

- In Injury Number AS-23977 the employee was awarded benefits in an April 13, 1977 injury where he slipped on something on the floor and fell and injured his left knee and head/neck. He was awarded for 5% permanent partial disability of the left knee and 10% permanent partial disability of the body as a whole referable to the head and neck.
- In Injury Number 82-59297 the employee settled his December 10, 1982 injury where he was involved in a truck wreck. He settled this case for 17½% permanent partial disability of the body as a whole referable to the head and neck. The employee indicated that this injury affected his job as he was off for several months. He indicated that he has had headaches all of his life and he still has them. He indicated that he could not work under vehicles as he got headaches and that in 1984 he had to give up trucking. He testified that he could not drive a truck.
- In Injury Number 91-39864 the employee settled his March 11, 1991 injury where he fell off the back of a trailer. He settled the case for 17½% permanent partial disability of the body as a whole referable to the low back and 5% permanent partial disability of the left shoulder. There was also a settlement with the Second Injury Fund.
- The employee also testified that he injured his right shoulder and had rotator cuff surgery in 1989.

The employee testified that he was injured on May 8, 2000 when he was working on a D&S truck. He indicated that D&S was involved in the demolition of a church about this time. He testified that he was servicing a truck on that date; he said he did a lot of this. He indicated that he slipped on the step as he was getting out of the truck. He grabbed a bar for support and could not hold his weight and fell four feet to the concrete floor. He testified that he hurt his back, his left knee and his arm. The employee eventually settled this case with SAFECO on August 8, 2011 for 5% permanent partial disability of the left shoulder, 22½% permanent partial disability

of the left knee and 12½% permanent partial disability of the body as a whole referable to the lumbar spine.

During the trial the employee indicated that he was sitting forward as his back hurt. He indicated that in the past he sold used cars to avoid any labor including heavy lifting. He owned a new car dealership for awhile but got out of it as he was not making any money. He testified that he then bought two used dump trucks but did little driving as he hired drivers. He indicated that he has problems with his left hand that has limited him. He says this hand hurts if he uses tools. The employee also testified that overhead work is painful. After the 2000 accident, the employee testified that he has to keep his leg stretched and if he leaves his leg in one position for twenty minutes he has to move it due to pain. At this point in the testimony the Court noticed that the employee crossed his right leg with little effort and no indications of pain.

The employee indicated that after the 2000 accident he could not drive the trucks anymore as he could not work the clutch. He indicated that they wound up D&S in 2003 “as he could not be on the job and do what he wanted”. He testified that he wanted to change and do something different.

The employee testified that he could not do his old job anymore. He indicated that if he tried to drive a dump truck he would be in bed for two to three days. He indicated that after the accident he determined that he had had enough as he could not do his old job.

The employee testified that about 2004 and 2005 he took a part time job with a water district as an advisor and consultant. He testified that he was in the office about one day a week and at times he would ride with a water worker as a situation where someone was stealing water.

The employee testified that he ran for Butler County Commissioner in 2004 as he wanted to be involved with the roads and bridges. He actively campaigned for the office. He went and talked to people, campaigned door to door, went from one get-together to another such as parades, rallies and picnics. He said he put up a booth as part of his campaign. He testified at these events he would walk around, hand out literature and talk to everyone he could. He testified that had he won the election he was willing to serve for four years.

The employee testified that he was actively involved in civic organizations until about 2011.

Other than the employee stating that he was sitting forward as his back hurts all the time, in the Court’s opinion, the employee gave no indications that he was in any discomfort or pain during the trial.

Marie “Sue” Robertson:

Sue Robertson is the employee’s wife and business partner. She testified that as of May 8, 2000, D&S Enterprises was a going concern and was still in business. Both she and her husband were not only the “owners”, as the partners in D&S Enterprises, but employees of D&S Enterprises on May 8, 2000 and through the winding down of the business in 2003. She testified that they did

not sell the business in 2000 and any such records are in error. She testified that while D&S was smaller in 2000, they worked as business in 2000, 2001 and 2002. As of May 2000, although the employer's biggest contract had wound down, D&S was still open for business involved in the demolition of churches, digging ditches, clearing land, hauling rock, and doing any other like work that they were contracted to do.

Ms. Robertson did not do any of the work in the shop, maintaining, servicing or working on the various equipment and vehicles, or field work. She did all of the "paperwork" for D&S and worked in the office, a separate area from the shop on D&S premises.

On May 8, 2000 Ms. Robertson was working in the office. She did not hear her husband fall in the shop, although she knew he was working on one of the company trucks in the shop. She heard her brother-in-law, Earlie Robertson, calling her name, and saw him helping her husband into the office area and guiding him into an old chair they kept in the office area. Both her husband and Earlie Robertson told her that her husband had fallen while trying to exit one of the company trucks in the shop.

She testified that after 2002 her husband was not physically able to do his job as his back was killing him.

Earlie Robertson:

Earlie Robertson is the brother of the employee. He testified that throughout the years that D&S was in business, various members of the Robertson family, including Earlie, worked for D&S Enterprises as employees when work was available. He testified that in March 2000 and the spring and early summer he was working for D&S demolishing churches and doing other projects.

Earlie testified that he was in the shop on May 8, 2000 when the employee was injured. He indicated that he was working on his own vehicle and his brother was working on a D&S dump truck. He testified that he heard something and went and found his brother lying on the floor next to the dump truck. He indicated that although he did not see his brother fall out of the truck, he heard the fall and heard his brother cry out. He testified that he helped his brother up off the shop floor and helped him into the office area.

Earlie testified consistently with his brother and sister-in-law, that D&S Enterprises was still a going concern in May of 2001, and that D&S was still doing the kind of jobs that they had always done. He testified that D&S finally wound up the business in 2003.

He testified that after the accident his brother did little work. He indicated that he ran the equipment and his brother was mainly a supervisor.

Samuel Bernstein, Ph.D.:

Samuel Bernstein is a vocational rehabilitation counselor. He interviewed the employee on September 8, 2005, approximately five years after the accident. He reviewed medical records prior to the interview including the reports of Dr. Poetz, Dr. Hanaway and Dr. Kennedy. He noted that the employee was diagnosed with diabetes in December 2004.

Dr. Bernstein testified that employee was a fifty-five year old man as of the 2000 injury, placing him in the advanced age category under the U.S. Department of Labor guidelines. By the time employee was at maximum medical improvement he was fifty-eight years old.

He indicated that the employee has a 1979 head injury with subsequent surgery. He indicated that the employee continued to suffer from headaches that interfered with his work. He said that the headaches were sometimes so intense that the employee was unable to work at all.

Dr. Bernstein ultimately concluded that the employee was unemployable in the open labor market given the combination of factors including his “advanced age and the combination of all of his medical impairments ...”. He reported that his assessment was based as of September 8, 2005. He further indicated that taking into consideration his age, his education, which was limited to a high school education and on-the-job training, the combination of employee’s injury and pre-existing conditions, his obvious impairments and inability to return to what he was doing in the past, Dr. Bernstein concluded that employee was totally and permanently disabled from a vocational standpoint. Dr. Bernstein testified that his opinion would not be changed by any post-2000 injuries or medical conditions, but that the employee was already permanently and totally disabled.

Robert Poetz, D.O.:

Dr. Poetz testified that he saw employee on one occasion on March 4, 2005, again several after the accident. He prepared a report dated August 3, 2005. He testified by deposition on April 14, 2008. Dr. Poetz does not do assessments to determine whether there are jobs in the open labor market to determine if someone is capable of doing jobs, but does make medical determinations as to whether or not an employee can work in the open labor market.

The employee reported his physical complaints to Dr. Poetz:

- Constant, severe lower back pain.
- Left leg that constantly aches and that occasionally gave out and occasionally turned red and swelled.
- He had trouble walking very far, and the back pain increased after the employee sat too long, and when the employee stood up after sitting.
- He had pain shooting down both legs and pain so severe that sometimes the employee had trouble walking.
- Walking up and down stairs can be difficult.
- He also had tingling down the top side of his left arm and into the pinky and ring fingers of the left hand.

Dr. Poetz found that Mr. Robertson was permanently and totally disabled due to the May 2000 injury in combination with prior injuries and disabilities.

Dr. Poetz gave the following ratings for the employee's pre-existing injuries:

- 5% permanent partial disability of the left knee.
- 35% permanent partial disability of the left shoulder.
- 35% permanent partial disability of the right shoulder.
- 30% permanent partial disability of the left hand.
- 25% permanent partial disability to the body as a whole due to diabetes and morbid obesity.

Dr. Poetz also gave the following ratings due to the employee's May 8, 2000 accident:

- 45% permanent partial disability of the left knee.
- 20% permanent partial disability of the body as a whole at the lumbar spine.
- 20% permanent partial disability of the left shoulder.

Joseph Hanaway, M.D.:

Dr. Joseph Hanaway, a board-certified neurologist saw Mr. Robertson on several occasions for treatment beginning in February 2004 and continuing through July 2006. As February 2004, Dr. Hanaway believed the employee to be totally disabled and that he continued to be totally disabled through the next visit with Dr. Hanaway in June 2006, when Dr. Hanaway noted since the May, 2000 accident employee had increased neck and shoulder pain and renewed back pain.

RULINGS OF LAW:

Whether the employer was a covered employer under the Workers' Compensation Act on May 8, 2000, and whether the employee was a covered employee under the Workers' Compensation Act on May 8, 2000?

Both the employee and his wife testified that they are the owners and the employee's of D&S Enterprises. The employee maintains that he was injured on May 8, 2000 when he was working for D&S Enterprises. Employee's Exhibit Y is a Stipulation for Compromise Settlement that shows that SAFECO settled with the employee for an accident of May 8, 2000.

While the Second Injury Fund did not offer any exhibits it did orally question the employee about a Missouri Division of Employment Security record. The employee agreed that he signed a document that stated that the business was sold in March 2000, however, he disagreed that the company was actually sold in 2000 and indicated that the business was actually closed as of December 2003. He stated that in 2000 equipment was being sold off and the company was smaller, but it was still operating. He testified that in May 2000 D&S was still in business and involved with the demolition of churches, hauling materials and reworking parking lots. He

testified that up to the accident and after he owned and was working for D&S for more than forty hours a week.

Ms. Robertson testified that she was an owner and an employee of D&S Enterprises. She indicated that she did the business side of the company and her husband did the outside work. She testified that in March of 2000 equipment that was not in use was being sold, but not the company. She said that D&S operated as a company in 2000, 2001 and 2002. She also testified that the number of employees that were employed depended on the amount of work they had, but that her husband, her husband's brother, Earlie and herself always remained as employees of D&S until the company was finally closed.

Earlie Robertson is Dallas Robertson's brother. He testified that he was working for D&S in 2000. He stated that in March 2000 they wound up a big job and some equipment was sold, but he was an employee of D&S as of May 2000.

The Court finds the Stipulation for Compromise Settlement to be more persuasive than the document from the Division of Employment Security as to whether D&S had coverage on May 8, 2000. Based on a consideration of all of the evidence in the case, the Court finds that D&S was a covered employer as of March and May 2000 and that the employee was an employee of D&S as of March and May 2000.

Liability of the Second Injury Fund for permanent partial or permanent total disability?

Permanent Total Disability:

The employee claims that he is permanently and totally disabled due to a combination of his disabilities from his May 8, 2000 accident and his pre-existing disabilities. In support of his position he offers his testimony, the testimony of Marie Sue Robertson, the testimony of Earlie Robertson along with the expert opinions of Dr. Hanaway, Dr. Robert Poetz and Dr. Bernstein.

While the employee cites the opinions of the doctors as supporting the issue of permanent total disability, the Court finds that the doctors' opinions lack substance and credibility as:

- They were provided incorrect medical histories.
- Prior disabilities were not properly reported.
- Some doctors had no records to review regarding prior medical problems and relied on the oral history given by the employee concerning his prior disabilities.
- The doctors were not provided information regarding the employee's activities that occurred after 2000 such as part-time employment and political campaigns.
- The doctors were assessing the employee approximately five years after the accident.

In his deposition, Dr. Hanaway reported that:

- He never had medical records to review documenting the employee's prior disabilities and he relied on the oral history given by the employee for this information.
- The employee never advised the doctor that he had prior back problems. The doctor testified that the employee specifically advised him that he did not have any back

problems prior to his May 8, 2008 accident. Medical records show otherwise. The doctor agreed this could alter his opinions.

- The employee advised the doctor that he did not work after the accident, yet records show that the employee worked up to February 2001 and had part time employment.
- The employee did not report that he had left shoulder problems prior to his 2000 accident.
- The employee did not advise the doctor that he injured his back in a slip and fall incident in August 2004 which is after the 2000 accident.

Dr. Hanaway testified that his opinions could be altered if the information he relied on was incorrect. He specifically mentioned that not knowing of the employee's prior back and shoulder problems could alter his opinions. Dr. Hanaway testified that his opinions are limited to the employee's left shoulder, back and left knee. He has no opinion regarding the employee's neck or carpal tunnel syndrome.

In reviewing the doctor's deposition, the Court finds that there is no discussion of all of the activities that the employee engaged in since 2000 such as his part time employment or his political campaign for commissioner in 2004. The employee testified about his 2004 campaign for county commissioner. He reported that he ran an active campaign which included such activities as door to door campaigning, attending parades, attending picnics, attending rallies, putting up a booth and walking and handing out literature. He testified that at the picnics he walked around and talked to everyone he could. The employee testified that had he won the election he would have served his four year term. The activities that the employee engaged in since 2000 as typified by his political campaign are not consistent with his listing of complaints that he reported to the doctors as a basis for his claim that he is permanently and totally disabled.

After considering all of this information, the Court finds that the opinions and testimony of Dr. Hanaway lacks credibility.

Dr. Poetz opined that the employee was permanently and totally disabled due to a combination of injuries. In his report of August 3, 2005 the doctor elicited physical complaints from the employee as follows:

"I have pain in my left leg that at times can become excruciating. I am unable to walk on the leg and it will give out on me and cause me to fall if I push too hard. I also occasionally get redness and swelling in my left knee. On one occasion I jammed my hand, broke my left index finger, and reinjured my left shoulder during a fall due to my knee going out on me. I also have severe back pain and I am unable to walk very far. My back pain increases if I sit too long and I get a shooting pain down the back of both legs when I get up. This pain can become so severe that I am unable to walk. Walking up an incline and climbing stairs is difficult. I also have tingling down the top side of my left arm and into the pinky fingers of my left hand".

In reviewing the doctors deposition and his report, there is no indication that he was ever advised of the activities that the employee engaged in after his 2000 accident. By history the employee reported serious disabilities to the doctor and the doctor obviously utilized this information in

formulating his opinions. Despite the disabilities that the employee claims, he was able to have a part time job in 2004. Despite the disabilities the employee claims he was still active in civic organizations into 2011. And most importantly the employee was able to conduct a full blown political campaign in 2004 for commissioner. There is no way that a person who has the pain and disabilities that the employee claims could engage in an active political campaign that he described. In the Court's opinion there is no way that the employee can have the physical problems that he complains and conduct a campaign involving going door to door, attending picnics, etc. and be willing to serve as commissioner for four years if his physical disabilities are as bad as he claims. This evidence causes the Court to question the credibility and veracity of the employee's position regarding permanent total disability. This information alone also brings the credibility of Dr. Poetz's opinions regarding permanent total disability into doubt. After considering all the evidence relative to the opinions of Dr. Poetz, the Court rejects Dr. Poetz's opinions as lacking foundation and therefore lacking credibility.

Dr. Bernstein also testified that the employee is permanently and totally disabled due to a combination of his disabilities from the May 8, 2000 accident in combination with his pre-existing disabilities. The employee described his problems as being so bad that he reported that he spends one-half of each day in a recliner due to pain. As with the other experts, there is no mention of the part-time job that the employee had after the 2000 accident and there is no mention of the 2004 political campaign.

After considering all of the evidence in this case the Court finds that the employee was not rendered permanently and totally disabled as a result of his May 8, 2000 accident standing alone. In addition the Court finds that the employee is not permanently and totally disabled due to a combination of his disabilities from his May 8, 2000 accident and his pre-existing disabilities. The Court finds that the employee has not presented consistent and credible evidence on the issue of permanent total disability and certainly has not met his burden of proof on the issue. The Court finds that the Second Injury Fund has no liability for permanent total disability.

Permanent Partial Disability:

While the Court has ruled that the Second Injury Fund has no liability in this case for permanent total disability, the employee has certainly offered sufficient evidence to meet his burden of proof that he is entitled to permanent partial disability benefits from the Second Injury Fund.

Based on a consideration of all of the evidence the Court finds:

The employee settled his primary claim with the employer-insurer for 5% permanent partial disability of the left shoulder, 22½% permanent partial disability of the left knee and 12½% permanent partial disability of the body as a whole referable to the lumbar spine.

The Court concurs with the settlement and finds that the employee does have a 5% permanent partial disability of the left shoulder, 22½% permanent partial disability of the left knee and 12½% permanent partial disability of the body as a whole referable to the lumbar spine.

The employee had pre-existing injuries and disabilities that predated his May 8, 2000 accident that were settled by stipulations or awards.

The Court concurs with the prior settlements and further finds that the employee has the following pre-existing disabilities: 5% permanent partial disability of the left knee, 35% permanent partial disability of the left shoulder, 35% permanent partial disability of the right shoulder, 30% permanent partial disability of the left hand and 25% permanent partial disability of the body as a whole.

The Court finds that the disabilities from his May 8, 2000 accident synergistically combine with his pre-existing disabilities and are a hindrance or obstacle to employment or re-employment.

The Court imposes a 10% load in this case.

Based on the Court's findings, the Court orders the Second Injury Fund to pay \$11,213.05 to the employee.

ATTORNEY'S FEE:

Ellen E. Morgan, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation