

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

Injury No.: 04-059926

Employee: Maria Rodriguez
Employer: Ameristar Casino (Settled)
Insurer: Hartford Insurance Company (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. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Introduction

The issues stipulated in dispute at the hearing were: (1) whether the medical conditions employee complains of are related to her injury of May 6, 2004; (2) whether employee is permanently and totally disabled; and (3) the liability of the Second Injury Fund.

The administrative law judge rendered the following findings and conclusions: (1) employee is permanently and totally disabled as a result of the effects of the primary injury, considered alone and in isolation; and (2) the Second Injury Fund has no liability.

Employee filed an Application for Review alleging the administrative law judge's award is arbitrary and capricious, not supported by the evidence of record, and not supported by applicable law.

For the reasons set forth herein, we reverse the award of the administrative law judge.

Findings of Fact

Preexisting conditions

Employee suffers from preexisting low back problems. In 1995, employee was working at a vitamin factory in Irvine, California, when she tripped over a forklift and hurt her back. Employee underwent a course of physical therapy and settled a workers' compensation claim for \$12,000.00 for her back injury resulting from that accident. As a result of her injuries, employee was unable to return to her job at the vitamin factory. Employee experienced ongoing pain in her low back. Employee had trouble finding another job with the physical restrictions from this injury.

In September 2000, employee slipped and fell while cleaning a restroom in the course of her work for employer. Employee reinjured her low back in that accident. An MRI from November 21, 2000, revealed degenerative arthritic narrowing of the lower lumbar facet joints with prominent facet hypertrophy and some posterior ligament thickening at L4-5,

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causing moderate stenosis of the spinal canal. The MRI also revealed minimal canal stenosis at L5-S1 and a small amount of posterior midline bulging of the L1-2 disc.

In June 2002, employee injured her right hand at work when a casino customer shut her hand in a door. Doctors suspected employee suffered a non-displaced navicular fracture. X-rays also revealed degenerative spurring at the distal interphalangeal joints. Doctors recommended over-the-counter medications and a follow-up with an orthopedic surgeon, and restricted her from using her right hand until cleared.

In April 2003, employee again hurt her low back at work when she threw a trash bag. Diagnostic imaging revealed mild anterior wedging at L3 and L4, anterior bone spurs at L3-4 and L4-5, and disc space narrowing at L5-S1. Doctors prescribed Tylenol #3 and Flexeril, and instructed employee not to return to work until cleared by the company physician.

On April 27, 2004, employee saw Dr. Divelbiss for complaints of right wrist and hand pain. Dr. Divelbiss diagnosed right long and ring finger trigger finger and right extensor carpi ulnaris tendinitis, and performed an injection of Aristocort mixed with lidocaine into the A-1 pulley regions of the right long and ring finger. Dr. Divelbiss recommended a wrist splint and physical therapy, and instructed employee to follow-up with him in six weeks.

Employee credibly testified (and we so find) that her low back pain affected her ability to work as quickly as employer expected and resulted in employee's needing to request assistance with certain tasks; employee's supervisors occasionally reprimanded her for not working fast enough.

Employee presented the expert medical testimony of Dr. Koprivica, who opined that, as of the date of the primary injury, employee suffered from a 15% preexisting permanent partial disability of the body as a whole referable to lumbar stenosis, and 15% preexisting permanent partial disability of the right upper extremity at the 200-week level referable to trigger fingers and extensor carpi ulnaris tendinitis. The Second Injury Fund did not present any expert medical testimony. We credit the unopposed testimony from Dr. Koprivica as to employee's preexisting conditions and adopt his ratings as our own.

Primary injury

Employee worked as a porter for employer, which involved cleaning bathrooms, mopping, sweeping, vacuuming, cleaning stairs and columns, cleaning casino machines, and cleaning the walls. On May 6, 2004, employee sustained an accident at work when she fell while cleaning casino machines. Employee hurt her low back, right arm, right knee, and neck in this accident. A June 23, 2004, MRI revealed a broad-based central disc bulge or protrusion at T11-12 and L1-2; high grade stenosis at L4-5 secondary to circumferential ligamentous thickening and facet arthropathy; mild stenosis at L5-S1 with obliteration of the foraminal fat on the left suggesting mild narrowing of the lateral process. Employee underwent a course of steroid injections to the low back during October 2004. Employer's authorized treating physician, Dr. Jackson, found that employee reached maximum medical improvement and released her from treatment on July 19, 2005. Dr. Jackson opined that employee sustained a sprain or aggravation of

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the degenerative process in her back resulting in a 7% permanent partial disability of the body as a whole.

Employee experienced some depression after the May 2004 accident. Employee believes her depression arose from her lack of a job and because she had no means to pay for rent, bills, and food. At one point, employee attempted suicide, and was briefly hospitalized. In her settlement reached with employer of her claim arising from the May 2004 accident, employer and employee stipulated that employee sustained a 29% permanent partial disability of the body as a whole.

Employee had to leave her work for employer following the May 2004 accident. Employee has been unable to return to any employment owing to her severe low back pain. Employee is unable to stand or sit more than 10 or 15 minutes. Employee is unable to do any housework. Employee doesn't use her right hand for anything anymore. Employee is unable to grasp anything with her right hand. Employee's right knee continues to cause her pain and occasional problems when she walks, but employee feels that her primary problem is her low back. Employee does not believe she can return to any type of work.

Most of employee's previous jobs consisted of unskilled, repetitive tasks such as assembly work that involved extensive use of both upper extremities. Employee was 61 years old as of the date of the hearing before the administrative law judge. Employee completed the sixth grade in Mexico, and she has not attended any high school, college, or vocational school.

Employee presents the expert medical testimony of Dr. Koprivica, who opined that the May 2004 injury caused employee to suffer an aggravating injury of her lumbar spine resulting in a 15% permanent partial disability, and also a right upper extremity injury amounting to a 20% permanent partial disability at the 232-week level. Dr. Koprivica also rated employee's injuries as resulting in a 30% permanent partial disability of the body as a whole globally. Dr. Koprivica believes that employee sustained some psychological disability attributable to the May 2004 disability, but acknowledged that such findings were outside the scope of his expertise.

Dr. Koprivica opined that employee is permanently and totally disabled owing to the combination of her primary injury and preexisting conditions. Dr. Koprivica specifically considered the physical effects of the last injury in isolation:

[I]t is my opinion that the permanent and total disability arises based on the impact of combining the permanent partial disabilities that predated the primary injury of May 6, 2004, with the additional disability attributable to the May 6, 2004, work injury. I would not consider the permanent partial disability based on the May 6, 2004, injury to result in permanent and total disability in isolation.

Transcript, page 151.

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Employee also presents the expert vocational testimony of Michael Dreiling. Mr. Dreiling opined that, based on employee's age, limited education, and vocational profile, she is not a candidate for a return to any of her past relevant work, or any other type of work in the open labor market. Mr. Dreiling opined that, absent employee improving medically, she would remain totally unable to engage in the labor market.

The Second Injury Fund did not present any expert medical or vocational evidence. We credit the unopposed testimony from Dr. Koprivica and Mr. Dreiling. We find that employee reached maximum medical improvement on July 19, 2005. We find employee will be unable to compete for jobs or sustain them in the long run owing to her preexisting and current back complaints.

Conclusions of Law

Medical causation

The version of § 287.020 RSMo applicable to this claim provides, in relevant part, as follows:

2. ... An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

We conclude that employee has met her burden on the issue of medical causation. We have credited Dr. Koprivica's testimony that the May 2004 accident caused employee to suffer a low back injury and resultant disability. Consequently, we conclude that work was a substantial factor causing employee to sustain an aggravating injury of her lumbar spine and right upper extremity injury resulting in a 30% global permanent partial disability of the body as a whole.

Second Injury Fund liability

Section 287.220 RSMo creates the Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that she suffers from "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 ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

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We have credited Dr. Koprivica's testimony that employee's preexisting low back and right arm conditions were permanently and partially disabling as of the date of the primary low back injury. When we apply the foregoing test, we are convinced that employee's preexisting low back and right arm conditions had the potential to combine with subsequent work injuries to cause greater disability than in the absence of these conditions. Accordingly, we conclude each of these conditions were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220.1 RSMo.

For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) she suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with the prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have determined that, as a result of the primary injury, employee sustained a 30% permanent partial disability of the body as a whole. It follows that the primary injury, considered in isolation, does not render employee permanently and totally disabled. We have found, based on Dr. Koprivica's credible and uncontested testimony, that employee is unable to compete in the open labor market owing to her preexisting disabling conditions in combination with her complaints referable to the primary injury.

We conclude employee met her burden of establishing Second Injury Fund liability for permanent total disability benefits under § 287.220.1. We conclude employee is entitled to and the Second Injury Fund is obligated to pay permanent total disability benefits. We have found employee reached maximum medical improvement on July 19, 2005. Because the rate for permanent partial and permanent total disability benefits is the same, and because employer's liability for the primary injury amounts to 120 weeks of permanent partial disability benefits, we conclude the Second Injury Fund is liable to pay permanent total disability benefits beginning November 6, 2007, at the stipulated rate of \$216.19 per week.

Conclusion

We reverse the award of the administrative law judge. The Second Injury Fund is liable to employee for permanent total disability benefits in the amount of \$216.19 per week beginning November 6, 2007. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Paula A. McKeon is attached solely for reference.

For necessary legal services rendered to employee, Luis Mata, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 5th day of April 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD As to the Second Injury Fund

Employee: Maria Rodriguez Injury No. 04-059926
Employer: Ameristar Casino
Insurers: Hartford Insurance Company
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: June 20, 2012 Checked by: PAM/cy

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: May 6, 2004
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Rodriguez injured her right upper extremity back and body as a whole when she fell on the side of a machine.
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: Right upper extremity, lower back and whole body.
14. Nature and extent of any permanent disability: 29% permanent partial disability body as a whole.
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$216.19
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Second Injury Fund Liability: None
22. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Maria Rodriguez Injury No. 04-059926
Employer: Ameristar Casino
Insurers: Hartford Insurance Company
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: June 20, 2012 Checked by: PAM/cy

On June 20, 2012, the employee and the Missouri Treasurer as Custodian of the Second Injury Fund appeared for final hearing. The employee, Maria Rodriguez, appeared in person and with counsel, Luis Mata. The Second Injury Fund appeared by and through Assistant Attorney General Richard Wiles. The Division had jurisdiction to hear this case pursuant to §287.110. Ms. Rodriguez testified by interpreter, Rosario Garriga.

STIPULATIONS

The parties stipulated to the following:

- 1) That Ameristar Casino was an employer operating subject to Missouri workers' compensation law;
- 2) That Maria Rodriguez was its employee working subject to the law in Missouri;
- 3) That Maria Rodriguez notified Ameristar of her alleged injury and filed her claim within the time allowed by law;
- 4) That Maria Rodriguez sustained an accident on May 6, 2004 in the course and scope of her employment;
- 5) That Maria Rodriguez had a compensation rate of \$216.19.

ISSUE

The parties requested the Division to determine:

- 1) Whether the conditions complained of were related to her May 6, 2004 injury;
- 2) Whether Maria Rodriguez is permanently and totally disabled;
- 3) Whether the Second Injury Fund is liable for permanent total disability benefit.

FINDINGS OF FACT and RULINGS of LAW

Maria Rodriguez is a 61 year-old former porter for Ameristar Casino. Rodriguez was born in Mexico where she attended school through 6th grade. She moved to the United States in the late 1980's and obtained permanent resident status in 1995. Rodriguez speaks very little English. She is unable to read or write in English.

Rodriguez' employment history included numerous unskilled packing and assembly jobs which were highly repetitive in nature, usually involving use of both upper extremities.

On May 6, 2004, Rodriguez was cleaning machines at Ameristar Casino when the chair she was leaning on was moved, causing her to fall onto the machine. Rodriguez injured her right arm, right knee, back and neck as a result of the May 6, 2004 injury.

Rodriguez received authorized medical care for her back through Dr. Jackson, which included steroid injections. Dr. Jackson released Rodriguez at maximum medical improvement in September 2005. Dr. Jackson imposed permanent restrictions of no prolonged standing, sitting, climbing, bending, stooping or lifting greater than 15 pounds. He assessed 7% permanent partial disability body as a whole to this injury. Rodriguez also underwent carpal tunnel release with Dr. George, although no medical records were supplied to substantiate the surgery. Rodriguez ultimately settled her primary claim with the employer for 29% permanent partial disability body as a whole, which included compensation for both her wrist and back injuries.

Rodriguez is an extremely poor historian and has difficulty articulating symptoms in any appropriate manner. Her limited recollection of events reduces her credibility.

Rodriguez sustained several prior injuries while working and which predate her May 6, 2004 injury, including back sprain, abdominal rib contusion, right hand fracture and tendonitis for which she received minimal medical treatment and no permanent restrictions or assessment of disability. She does report a workers' compensation injury from California where she received a settlement. No medical records or documents were offered into evidence to support her testimony.

Dr. Koprivica evaluated Rodriguez June 12, 2006. Dr. Koprivica opined that Rodriguez is permanently and totally disabled due to physical and psychological disabilities. He assigns 30% permanent partial disability for physical disability alone due to the May 6, 2004 injury.

Dr. Koprivica attributes her permanent total disability to a combination of preexisting disabilities and the primary claim. He cites the preexisting disabilities as a history of spinal stenosis (15% body as a whole) and right upper extremity tendonitis (15% at the 200 week level.) Many of Dr. Koprivica's opinions were made without any accompanying medical records or reports.

No psychiatric or psychological expert testimony or report was submitted into evidence.

Michael Dreiling, vocational expert, evaluated Rodriguez. Dreiling believes Rodriguez to be permanently and totally disabled. He does not believe she is employable in the open labor market in her present condition. Dreiling cites Rodriguez' significant complaints of pain that she experiences daily, as well as her lack of education and transferrable skills as a basis for permanent total disability. Dreiling relies heavily on Dr. Koprivica's and Dr. Jackson's restrictions which were imposed due to the primary accident. Dreiling cites no permanent work restrictions which predate her last accident, which might have hindered or become an obstacle to Rodriguez' employment.

Rodriguez claims that she is permanently totally disabled. Chatmon v. St. Charles County Ambulance District, 555 S.W. 3d 451 (Mo.App. 2001) outlines the basis for permanent total disability.

“Total disability” means inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident.” §287.020.7 (RSMo. 2000.) “The test for permanent total disability is a worker's ability to compete in the open labor market and that it measures the worker's potential for returning to employment.” Sutton v. Vee Jay Cement Contracting Company, 37 S.W 3d 803 (Mo.App. 2000.) “The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition.” Reese v. Gary and Roger Link, Inc., 5 S.W. 3d 522, 526 (Mo.App. 1999.)

The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri-State Motor Transit Co., 908 S.W. 2d 849, 853 (Mo.App. 1995) and Kowalski v. M-G Metals and Sales, Inc.

Despite the lack of medical records and Rodriguez' limited testimony, I find there is evidence to support Rodriguez' claim of permanent total disability. Dr. Koprivica finds her permanently and totally disabled. Michael Dreiling, the vocational expert, testified that no employer would reasonably be expected to hire Rodriguez in her present condition for any job as it is customarily performed in the open labor market. Rodriguez is very guarded with her right arm which she holds very close to her body. She lacks significant education and is unable to speak English.

I find Rodriguez to be permanently totally disabled.

Since I have determined Rodriguez to be permanently and totally disabled, the next question is whether she is permanently and totally disabled due to the accident in isolation, or from a combination of preexisting disabilities.

[Section 287.220.1 RSMo creates the Second Injury Fund and provides, in relevant part, as follows:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, ... the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under §287.200 out of a special fund known as the "Second Injury Fund"...

Missouri cases consistently instruct that employee's preexisting conditions are irrelevant until a determination of the extent of employer's liability for the primary injury considered alone and in isolation is made:

When determining whether the Fund has any liability, the Commission must first determine the degree of disability from the last injury considered alone. Preexisting disabilities are irrelevant until this determination is made. If the 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 all compensation.

Mihalevich Concrete Constr. V. Davidson, 233 S.W. 3d 747, 754 (Mo.App. 2007)

I find Dr. Koprivica's and Michael Dreiling's ultimate opinions as to the reason for employee's permanent total disability lacking in credibility. I reached this determination after carefully weighing and considering the testimony from both experts, including the concessions obtained by the Second Injury Fund on cross-examination. It appears that both experts failed to consider the effects of the work injury in isolation when they rendered their ultimate opinions. I have also carefully weighed and considered Rodriguez' own testimony, in which she emphasized the effects of the primary low back and right hand injury as the dominant factor in restricting her physical activities. The lack of supporting medical records significantly impacts the credibility of the Claimant and expert opinions. Virtually all of Rodriguez' complaints, restrictions, and disabilities are directly attributable to her May 6, 2004 injury.

In light of my findings as to the effects of the work injury and determination that Dr. Koprivica's and Michael Dreiling's ultimate opinions lack credibility, I conclude that the effects of the primary injury, considered alone and in isolation, render employee permanently and totally disabled.

It follows that the Second Injury Fund has no liability. ABB Power T & D Co. v. Kemper, 236 S.W. 3d 43, 50 (Mo.App. 2007.) Accordingly, I must deny employee's claim against the Second Injury Fund.

Made by: _____
Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation