

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

Injury No.: 03-089914

Employee: James Rybak
Employer: Famous Barr (Settled)
Insurer: Federated Retail Holdings (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 26, 2003
Place and County of Accident: St. Louis, 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 dated July 20, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued July 20, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Rybak

Injury No.: 03-089914

Dependents: N/A
Employer: Famous Barr (Settled)
Additional Party: Second Injury Fund (Only)
Insurer: Federated Retail Holdings (Settled)
Hearing Date: May 12, 2006

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: MDL:tr

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: July 26, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
Employee was chasing a shoplifter when he fell through a glass door.
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
14. Nature and extent of any permanent disability: 37 ½% of the left arm at the level of the wrist
15. Compensation paid to-date for temporary disability: \$662.15
16. Value necessary medical aid paid to date by employer/insurer? \$3,097.26

Employee: James Rybak Injury No.: 03-089914

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$246.66/\$246.66
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: (Settled)

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin N/A and to be payable and 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Rybak	Injury No.: 03-089914
Dependents:	N/A	Before the
Employer:	Famous Barr (Settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Federated Retail Holdings (Settled)	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: MDL:tr

PRELIMINARIES

A hearing was held on May 12, 2006, at the Division of Workers' Compensation in the City of St. Louis. James Rybak (Claimant) was represented by Mr. Ray Gerritzen. Famous Barr (Employer), its Insurer, Federated Retail Holdings, and Claimant previously settled, and the case proceeded to hearing against the Second Injury Fund only. The Second Injury Fund was represented by Assistant Attorney General Kristin Frazier. Mr. Gerritzen requested a fee of 25% of Claimant's award.

The parties stipulated that on or about July 26, 2003, Claimant sustained an accidental injury arising out of and in the course of his employment; at that time Claimant was an employee of Employer; venue is proper in the

City of St. Louis; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated that Claimant's rate of compensation for temporary total disability benefits and permanent partial disability benefits is \$246.66. The issues for determination by hearing are: what is the nature and extent of permanent partial disability sustained by Claimant; and what is the liability of the Second Injury Fund.

SUMMARY OF EVIDENCE

Claimant's Testimony

Claimant is a 26-year-old high school graduate. After graduating from high school, Claimant worked for Schnucks for a couple of years as a cashier. Claimant enrolled in the Missouri College of Massage Therapy, which is an eight-month program, but dropped out of the program one month prior to the completion of the course due to family reasons. Following his study of massage therapy, Claimant went to work for Sears Automotive, and then worked for Employer for one year in loss prevention.

The primary injury occurred on July 26, 2003, while Claimant was working for Employer in loss prevention. While attempting to apprehend a shoplifter, Claimant fell through a glass door landing on concrete. Claimant injured his left hand and elbow on the glass and was taken to the hospital where he received stitches, was x-rayed, and released. Eventually Claimant was referred to Dr. Stregge who performed surgery on December 22, 2003. Dr. Stregge did not fix the nerve in his hand because it could have made the problem worse. Currently, Claimant has difficulty with his ring finger and pinky, which are clawed. He is unable to close his hand all the way. He experiences discomfort, swelling, discoloration, and bruising around his thumb. He has decreased strength and grip, and his hand wakes him up and locks on him. Claimant has difficulty using his left hand, and must use his right hand. When he goes to grab a glass, he is unable to use his ring and pinky finger. He is unable to maneuver his left hand very well. Claimant testified that when he did construction work he had trouble holding a nail because his hand locked up, although it is not clear when he did construction work. Claimant testified that the last job he had was doing home security, but he was recently laid off due to downsizing, and Claimant is currently unemployed.

Claimant testified that he has memory problems, which he attributes to seizures. According to Claimant, he had his first seizure when he was 15 years old, which he believes resulted from taking Zoloft for depression which began when he was 13 or 14 years old. Claimant testified his first seizure occurred when he was hit by a bus outside of the art museum. He testified that when he went outside, he walked across the street and stopped in the middle of the street, fell back and hit his head, and had a seizure. Claimant testified that as a result, he was in a coma and woke up in a hospital one week later.

According to Claimant, he had a seizure while at a friend's house watching television; while on a bus; and while at Soccer Park. Claimant testified that he also had a seizure in 2004 after he broke up with his girlfriend, but he did not go to the hospital at that time.

Claimant does not remember when he first went on seizure medication, but he believes it was when he was a teenager. Claimant testified that he still has seizures, but they are more like blackouts where he has blank stares and his eyes flutter really fast.

Claimant testified that at one point in his life he was on drugs. At the time he was hit by the bus he was on acid. Claimant testified in the last couple of years he has experienced a loss of his short-term memory. Claimant testified that he does not remember his childhood at all. Claimant also testified that there are times when he is driving, and for a split second he goes blank.

Claimant takes Tegretol three times a day. The Tegretol was prescribed by Dr. Temple who has been treating him for his seizures. Things such as strobe lights and certain video games can trigger a seizure. Claimant must get plenty of rest and take plenty of breaks as a result of his seizure problem.

Claimant received both inpatient and outpatient treatment for depression but is not currently being treated for depression, and is not making a claim for preexisting disability due to depression.

Medical Evidence

Emergency room records from DePaul Health Center dated July 26, 2003, reflect that Claimant reported to the emergency room with multiple lacerations from falling through a plate glass door. The past medical history indicates Claimant is an epileptic and is on Tegretol. Claimant received stitches and was x-rayed. Claimant had multiple deep lacerations to his head, right elbow, right hand, right ring finger, and left hand. Claimant was discharged with instructions to follow up with his workers' compensation doctor.

Records from SSM Corporate Health Services indicate that Claimant was seen on July 28, 2003. His past medical history was significant for a seizure history and indicated Claimant was on Tegretol XR 200 milligrams daily. Claimant indicated that he was under the care of a neurologist who follows him on a regular basis, which keeps his seizures from reoccurring.

Claimant was seen by Dr. David Stregge, an orthopedic surgeon, on August 27, 2003. Dr. Stregge examined Claimant and thought he had a rather significant left ulnar neuropathy involving primarily the motor component. He suspected Claimant sustained a laceration to the motor branch of the ulnar nerve in the region of the Guyon's canal. Dr. Stregge ordered an EMG and nerve conduction study. Following an EMG and nerve conduction study, Dr. Stregge performed an external neurolysis, ulnar nerve left hand on December 22, 2003. The post-operative diagnosis was partial ulnar nerve laceration, left hand. In his procedural admission form on November 4, 2003, Claimant gave a history of having his last seizure two years ago.

Claimant was seen on December 2, 1998, in the St. John's Mercy Medical Center emergency room. Claimant gave a history of seizures. According to Claimant's father, Claimant had been tapering himself off his anti-seizure medicine, Depakote. According to the history given two to three weeks prior to admission, Claimant had a self-terminating seizure and was seen in the emergency department. Claimant was told he needed to be back on his medications, but he refused to take them. Claimant stated he does not like the Depakote because it makes him drowsy. Claimant reported that he had been playing soccer and again had a seizure.

In an admission note from St. John's Mercy Medical Center of April 14, 1999, Claimant had a past medical history remarkable for seizure disorder. The history indicated that the seizures occurred within the last two years but are controlled with Depakote.

Emergency room records from St. John's Mercy Medical Center indicate that Claimant was seen in the emergency room on July 28, 1999. The history given was of a 19 year old white male who arrived via ambulance after experiencing seizure activity while at a friend's house. Claimant stated he had not taken his Depakote for two weeks because it made him sleepy. Claimant was prescribed Tegretol XR 200 mg. Claimant's drug screen revealed a presumptive positive for cannabinoids.

The records of Dr. Temple, a neurologist, were admitted into evidence. In an initial office visit on October 26, 1999, Claimant presented for evaluation and ongoing management of a seizure disorder. Dr. Temple noted that unfortunately the history was given entirely by Claimant who was unaccompanied. No prior medical records were available. Claimant readily admitted doing recreational drugs. According to Claimant, around Christmas of 1996, he was on an acid trip in front of the art museum. Claimant walked across the street and stopped, and was hit by a bus. Claimant reported being in a coma for one week and then on rehabilitation for three weeks or so. Claimant told Dr. Temple he thought he had had a seizure at the scene. After his hospitalization, Claimant was on Depakote. Claimant told Dr. Temple that ever since then he has been on a "permanent trip", occasionally seeing bright colors fly by at the edge of his vision or actually seeing things that are not there. Claimant can tell that they are not real. Dr. Temple's records contain a history of seizures consistent with Claimant's testimony.

Claimant told Dr. Temple that he no longer uses acid. He indicated that at one time he used cocaine but does not do that either. He indicated that he still recreationally uses marijuana, smokes about one pack of cigarettes a day, and drinks about a six-pack of beer on one weekend night about three weekends out of four. Claimant admitted that he wanted to try hallucinogenic mushrooms, but was hesitant fearing that he would lose control like he did with acid. Dr. Temple's impression was history of closed head trauma, details unknown.

Apparently a complex partial seizure disorder with secondary generalization, and ongoing but decreased recreational drug use.

Dr. Temple indicated that he did not really know what happened back around Christmas of 1996. Dr. Temple indicated, "We need to try to get a copy of those records and he will sign a release for those today". Dr. Temple indicated that Claimant might have had a seizure at onset as well as then being hit by a bus all at the same time due to an overdose situation. Dr. Temple said alternatively he might have just been standing in one spot because he was tripping, then hit by a bus and sustained a closed head injury, and then secondarily developed a complex partial seizure disorder. Dr. Temple advised Claimant to follow seizure precautions and strongly urged him not to experiment with hallucinogenic mushrooms. Dr. Temple continued Claimant on Tegretol.

Claimant returned to Dr. Temple on December 17, 2001, reporting he had a seizure, the first one since July 29, 1999. In general, Claimant reported taking his Tegretol but remembered missing Friday night and Saturday morning's dose. He had run out of medicine and forgot to refill his prescription.

Dr. Bruce Schlafly testified on behalf of Claimant. Dr. Schlafly examined Claimant on February 18, 2005. Dr. Schlafly reviewed the medical records and indicated that Dr. Stregge operated on Claimant on December 22, 2003. Dr. Stregge explored the ulnar nerve at the left wrist and found damage to the motor branch of the ulnar nerve. Dr. Stregge thought that some of the nerve fibers of the ulnar motor nerve were still intact so he elected not to perform any nerve repair or any nerve grafting because he thought that such surgery might possibly make Claimant worse rather than better. Dr. Stregge limited his surgery to a release of adhesions around the ulnar nerve. Dr. Schlafly indicated that he was not recommending any additional surgery for Claimant and he rated Claimant's disability at 42.5% permanent partial disability of the left wrist due to his work injury of July 26, 2003.

Dr. Schlafly opined that Claimant has a 17 ½% permanent partial disability of the body as a whole on the basis of his seizure disorder since 1996, which requires ongoing treatment with Tegretol. Dr. Schlafly recommended Claimant continue with his medication for his seizures. Dr. Schlafly testified that Claimant has a combination of disabilities that creates a synergistic effect between the prior disability due to the seizures, and the disability of the left hand and wrist giving a combined effect greater than the simple sum of the components. Dr. Schlafly opined that these disabilities create an obstacle or hindrance to employment. Dr. Schlafly testified that there was no evidence to confirm a seizure when Claimant's Tegretol level was appropriate, and that Claimant was under no medical restrictions due to seizures at the time of the primary injury. He further testified he saw no evidence that Claimant's seizures were impairing his employment with Employer at the time of the primary injury.

On September 19, 2005, Claimant settled his claim for the primary injury against Employer for 37 ½% of the left arm at the level of the wrist and 1.25 weeks for the loss of a tooth.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon my observations of Claimant at hearing, my review of the medical records, and the application of Missouri law, I find:

Claimant has failed to meet his burden of proving that he is entitled to compensation from the Second Injury Fund.

I find that Claimant did sustain a 37 ½% permanent partial disability of the left arm at the level of the wrist as a result of the primary injury. Claimant settled his claim against Employer for 37 ½% of the wrist, and the evidence certainly substantiates that degree of disability. However, to recover compensation from the Second Injury Fund, a claimant must prove the existence of a permanent partial disability preexisting the primary work related injury of at least 12 ½% of the body as a whole or 15% of a major extremity. Section 287.220 RSMo (2000).

Claimant failed to meet his burden of proving that his preexisting disability with regard to his seizure disorder reaches the threshold level of 12 ½% of the body as a whole. The evidence indicates that when Claimant is compliant with his medication he is seizure free. Dr. Schlafly admitted that there was no evidence in the record that Claimant had ever had a seizure when his level of seizure medication was appropriate. The documented

evidence of seizures in the medical records indicates that with each seizure, Claimant had stopped or was being noncompliant with his medication. Dr. Schlafly testified that Claimant's seizure condition did not impair his employment at the time of the primary injury, and that Claimant was under no medical restrictions at the time of the primary injury. While I believe Claimant does have some permanent partial disability with respect to his seizure disorder, I do not believe it rises to the level of 12.5% but is rather 10% of the body as a whole.

Although Dr. Schlafly testified that Claimant sustained a 17 ½% permanent partial disability of the body as a whole with regard to his seizure disorder, the Court is not bound by the opinion of this expert. The Court is not bound by the percentage estimates of medical experts, but may consider all the evidence, including the testimony of the employee in arriving at the percentage of disability. *Wiedower v. ACF Industries, Inc.*, 657 S.W.2d 71, 74 (Mo.App. 1983). The Court is free to find a disability rating higher or lower than that expressed in medical testimony. *Quinlan v. Incarnate Word Hosp.*, 714 S.W.2d 237, 238 (Mo.App. 1986). This is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, "the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature". *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). Dr. Schlafly is an orthopedic surgeon, does not regularly treat patients for seizure disorders, and is not an expert in that field of medicine.

While some of Claimant's seizures have been substantiated by medical records, he gave a history of some seizures which are not documented by any medical evidence. I do not find Claimant's testimony with regard to the frequency of his seizures to be credible in light of the fact that he is admittedly a poor historian, and his memory is impaired. He told Dr. Temple he is on a "permanent trip", and I find his testimony to be unreliable. Claimant has not sought any medical treatment for a seizure since 2001. All of the evidence indicates that Claimant can control his seizures if he complies with his medication.

Based upon the competent and substantial evidence presented, I find Claimant has failed to prove the existence of a permanent partial disability preexisting the primary work injury that rises to the level of 12 ½% of the body as a whole. The claim against the Second Injury Fund is denied.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Employee: James Rybak

Injury No.:

03-089914