

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

Injury No.: 08-058268

Employee: Gary Scott
Employer: Scott Excavating (Settled)
Insurer: Travelers Commercial Casualty (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. 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 28, 2012, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark Siedlik, issued August 28, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of May, 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 DENYING COMPENSATION
As to Second Injury Fund Only**

Employee: Gary Scott Injury No: 08-058268
Dependents: N/A
Employer: Scott Excavating (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: Travelers Commercial Casualty (Settled)
Hearing Date: March 7, 2012
Briefs Filed: April 17, 2012 Checked By: MSS/lh

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: 1/11/2008, 12/3/2009
5. State location where accident occurred or occupational disease was contracted: Urich, Henry 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? No
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:
08-058268: Working on uneven terrain performing excavation work when he felt pain in his low back
09-104877: Placing a battery into equipment injured right shoulder
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:
08-058268: back and body as a whole
09-104877: right shoulder
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? Unknown
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate:
08-058268: \$742.72/389.04
09-104877: \$807.48/422.97
20. Method wages computation: stipulation
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: N/A

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Gary Scott

Injury No: 08-058268

Dependents: N/A

Employer: Gary Scott Excavating (Settled)

Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund

Insurer: Travelers Commercial Casualty (Settled)

The above Claim was heard on March 7, 2012. The parties stipulated to the following:

08-058268

1. On 1/11/2008, Employee was employed with Gary Scott Excavating
2. On 1/11/2008, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

09-104877

1. On 12/3/2009, Employee was employed with Gary Scott Excavating
2. On 12/3/2009, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

ISSUES

The parties requested the Division to determine (for each injury number):

1. Whether claimant sustained an accident or occupational disease arising out of and in the course of his employment
2. The nature and extent of permanent disability, including the liability of the Second Injury Fund.

Gary Scott, the claimant, is a seventy year old Caucasian male. Mr. Scott dropped out of school after the ninth grade to begin working as an excavator. Mr. Scott's entire career has been as a self-employed business owner excavating with heavy equipment and bailing hay. He has

trouble reading so his now-deceased wife and employees managed the business bookkeeping tasks. Mr. Scott's work duties over his fifty year career included pulling himself into heavy equipment, working on uneven ground, and supervising employees.

Pre-existing Disabilities

Mr. Scott had an open rotator cuff repair to his right shoulder in 1998. Mr. Scott had difficulty climbing and using his right shoulder. (Report of Dr. Koprivica, 8).

On November 4, 2001, Mr. Scott fell 22 feet from a grain bin and had multiple midfoot/forefoot fractures on both the right and left side and fractured his right tibia and left fibula. Mr. Scott hired staff to operate the business for two years after this injury. In 2005 he reported to his physician that he had so much pain he was unable to walk further than 50 feet without rest. At that time Mr. Scott began wearing specialized orthotics on both of his feet.

Mr. Scott had cochlear implants placed in 2002 to address serious hearing loss that had been developing since childhood. He has a very limited ability to use the phone and also has problems hearing certain voices. Mr. Scott reported problems hearing at work and that he may have lost work because of his hearing problems.

In 2007, Mr. Scott had problems with hernias. He had four hernias and his treatment included surgery. Dr. Wetzel and/or Dr. Scott asked Mr. Scott to quit working because of her hernia problems. It affected his ability to lift and bend on the job.

1/11/2008 Injury

Mr. Scott injured his low back on January 11, 2008 when he was driving a bulldozer over rough, frozen terrain. He developed spinal stenosis with noted neurogenic claudication which resulted in the development of disabling symptoms and a decompressive laminectomy at L3-L4. Mr. Scott reports severe low back pain and limitations on sitting and lifting associated with this injury.

12/3/2009 Injury

Mr. Scott was attempting to lift a 115 pound battery when he tore his right shoulder and chest. Dr. Rhoades performed an arthroscopic labral debridement and open subscapularis repair on February 23, 2010. Mr. Scott reports ongoing problems in his right shoulder. He limits his activities because he fears tearing his shoulder again.

Experts

Dr. Koprivica assigned: a 15% permanent partial disability rating to Mr. Scott's pre-existing shoulder problems at the 232 level, a 35% permanent partial disability rating to Mr. Scott's pre-existing 155 week level of the right leg, a 25% permanent partial disability rating to Mr. Scott's pre-existing left lower extremity above the ankle at the 155 week level, a 10% permanent partial disability rating to Mr. Scott's pre-existing hernia condition to the body as a whole. Dr. Koprivica declined to rate Mr. Scott's hearing loss but indicated it was a hindrance or

obstacle to employment. Dr. Koprivica assigned a 25% permanent partial disability to the body as a whole rating to Mr. Scott's 2008 back injury and a 20% permanent partial disability to the body as a whole rating to Mr. Scott's right shoulder and chest injury.

Dr. Koprivica suggested Mr. Scott should avoid any activity above the shoulder due to his right shoulder condition. He should avoid pushing or pulling with the right shoulder. He should also avoid repetitive reaching with the right arm. Mr. Scott should avoid frequent or constant bending at the waist, pushing, pulling or twisting. He should avoid sustained or awkward postures of the lumbar spine. He should avoid squatting, crawling, kneeling or climbing. He should have the ability to change postures, limiting standing and walk to fifteen minutes with flexibility of sitting when necessary. Prolonged sitting should be restricted to one hour with flexibility to get up when needed.

Mike Dreiling, a vocational expert, concluded that Mr. Scott was unemployable based on his vocational profile and his medical disability and limitations.

CONCLUSIONS AND FINDINGS

Mr. Scott was unemployable on the open labor market before either his January 11, 2008 or December 3, 2009 work injuries

For Second Injury Fund liability for permanent and total disability to exist, the previous disability and the last injury must combine together to result in permanent and total disability. V.A.M.S. § 287.2201, subd. 1. Mr. Scott is permanently and totally disabled as a result of his previous disabilities alone, and was not employable on the open labor market at the time of his 2008 and 2009 work injuries, in spite of working. His numerous disabilities pre-existing his 2008 work injury are outlined:

Mr. Scott tore his right rotator cuff in 1998. Dr. Koprivica noted disability from this injury in regard to climbing and using his right shoulder.

Mr. Scott fell 22 feet in 2001 which shattered bones in his leg and feet. He spent two years with his leg in a CAM walker. This injury significantly limited his walking and he still has considerable problems from his this injury to his lower extremities. Mr. Scott reported after this 2001 right leg injury he had a very difficult time getting on and off machinery and only maintained employment by being self employed. He was able to put the brunt of the work on his employees and participate only by overseeing the work. Mr. Scott saw Dr. Bellamy from St. Luke's Medical on March 29, 2007. Dr. Bellamy recorded at that visit that Gary reported not being able to walk even 50 feet without having to stop and rest because of the discomfort. Dr. Koprivica suggested restrictions based on Mr. Scott's lower extremity disability: limit walking and standing to 15 minutes and avoid climbing.

He also has a history of major hearing problems which require cochlear implants. The hearing problems date back as far as middle school. He dropped out of school because he could

not hear the teacher. He reads very little and cannot operate a computer making it difficult for him to do tasks related to operating an excavating business.

In 2007, Mr. Scott had several hernias. Mr. Scott (Exhibit 1, 22-24) reported that he never recovered from his hernias and that Dr. Scott, his primary care physician, told him to stop working and that he had to quit working.

Mr. Dreiling testified that Mr. Scott was “at a very distinct disadvantage” in competing for training and supervisory jobs for another company considering his hearing, communication skills and educational background. When the severe pain, and physical restrictions he faced from his lower extremity injuries, his hernias, and his first shoulder injury, it is clear that the only reason Mr. Scott was able to work was because he was majorly self-accommodating as a business owner. Until his retirement, Mr. Scott did continue to earn an income because he owned his own business, but only because he made major accommodations for himself regarding what equipment he would operate, and relying on his wives to perform more intellectually demanding tasks. Mr. Dreiling agreed that Mr. Scott would not have the availability of self-accommodation in the open labor market like he did in his own business and that no jobs exist in the open labor market that would let him simply show other employees how to operate equipment without performing some work himself. (Exhibit B, 37). The Second Injury Fund is not liable for Mr. Scott’s 2008 and 2009 work injuries as his permanent and total disability arises based on his injuries that pre-date 2008.

Angus does not apply in this case, even though there is only one expert report submitted into evidence. Angus v. Second Injury Fund, 328 S.W.3d 294 (Mo. App. W.D. 2010). Angus specifically states “that the commission may not substitute an administrative law judge’s personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert.” Id. at 300. An expert’s opinion may be contradicted by his own testimony. Carkeek v. Treasurer, 352 S.W.3d 604, 610 (Mo. App. W.D. 2011). “Extent of disability. . . is not so medically technical as to remove it from the expertise that is attributed to the Commission. The question whether a claimant is totally and permanently disabled is not exclusively a medical question.” Id. at 610, citing Crum v. Sachs Elec., 769 S.W.2d 131, 136 (Mo. App. W.D. 1989). The current case focuses on causation of disability while Angus centered on medical causation of an injury. Angus, 328 S.W.3d 294 at 300.

The Court can properly determine that the cause for permanent and total disability was Mr. Scott’s pre-existing problems. First, because nature and extent of disability is at issue, and not medical causation, the Court is free to look to the whole record and not just to the medical expert in the case. Nature and extent of disability is a separate issue from medical causation and extent of disability is not medically technical. Carkeek, 352 S.W.3d at 610. Second, according to Mr. Scott’s testimony, at least one doctor asked him to stop working when he began having hernias in 2007. Third, because the issue in this case is not medical causation of an injury, it is appropriate for the Court to make findings of fact regarding Mr. Scott’s abilities and disability before the last accident. Carkeek, 352 S.W.3d at 610. As outlined above, Mr. Scott’s hearing problems since childhood, his extremely limited ability to walk due to foot injuries, problems

from his first shoulder injury, and the pain and lifting limitations associated with his hernias, Mr. Scott was clearly permanently and totally disabled before 2008 and as such unemployable on the open labor market.

I find therefore, the Second Injury Fund has no liability to the Claimant for the injuries claimed on November 1, 2008 or December 3, 2009, and award no compensation.

Made by: _____

Mark Siedlik
Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 09-104877

Employee: Gary Scott
Employer: Scott Excavating (Settled)
Insurer: Travelers Commercial Casualty (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. 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 28, 2012, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark Siedlik, issued August 28, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of May, 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 DENYING COMPENSATION
As to Second Injury Fund Only**

Employee: Gary Scott Injury No: 09-104877
Dependents: N/A
Employer: Scott Excavating (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: Travelers Commercial Casualty (Settled)
Hearing Date: March 7, 2012
Briefs Filed: April 17, 2012 Checked By: MSS/lh

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: 1/11/2008, 12/3/2009
5. State location where accident occurred or occupational disease was contracted: Urich, Henry 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? No
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:
08-058268: Working on uneven terrain performing excavation work when he felt pain in his low back
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22. Second Injury Fund liability: None
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FINDINGS OF FACT AND RULINGS OF LAW

Employee: Gary Scott

Injury No: 09-104877

Dependents: N/A

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The above Claim was heard on March 7, 2012. The parties stipulated to the following:

08-058268

1. On 1/11/2008, Employee was employed with Gary Scott Excavating
2. On 1/11/2008, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

09-104877

1. On 12/3/2009, Employee was employed with Gary Scott Excavating
2. On 12/3/2009, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

ISSUES

The parties requested the Division to determine (for each injury number):

1. Whether claimant sustained an accident or occupational disease arising out of and in the course of his employment
2. The nature and extent of permanent disability, including the liability of the Second Injury Fund.

Gary Scott, the claimant, is a seventy year old Caucasian male. Mr. Scott dropped out of school after the ninth grade to begin working as an excavator. Mr. Scott's entire career has been as a self-employed business owner excavating with heavy equipment and bailing hay. He has

trouble reading so his now-deceased wife and employees managed the business bookkeeping tasks. Mr. Scott's work duties over his fifty year career included pulling himself into heavy equipment, working on uneven ground, and supervising employees.

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On November 4, 2001, Mr. Scott fell 22 feet from a grain bin and had multiple midfoot/forefoot fractures on both the right and left side and fractured his right tibia and left fibula. Mr. Scott hired staff to operate the business for two years after this injury. In 2005 he reported to his physician that he had so much pain he was unable to walk further than 50 feet without rest. At that time Mr. Scott began wearing specialized orthotics on both of his feet.

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obstacle to employment. Dr. Koprivica assigned a 25% permanent partial disability to the body as a whole rating to Mr. Scott's 2008 back injury and a 20% permanent partial disability to the body as a whole rating to Mr. Scott's right shoulder and chest injury.

Dr. Koprivica suggested Mr. Scott should avoid any activity above the shoulder due to his right shoulder condition. He should avoid pushing or pulling with the right shoulder. He should also avoid repetitive reaching with the right arm. Mr. Scott should avoid frequent or constant bending at the waist, pushing, pulling or twisting. He should avoid sustained or awkward postures of the lumbar spine. He should avoid squatting, crawling, kneeling or climbing. He should have the ability to change postures, limiting standing and walk to fifteen minutes with flexibility of sitting when necessary. Prolonged sitting should be restricted to one hour with flexibility to get up when needed.

Mike Dreiling, a vocational expert, concluded that Mr. Scott was unemployable based on his vocational profile and his medical disability and limitations.

CONCLUSIONS AND FINDINGS

Mr. Scott was unemployable on the open labor market before either his January 11, 2008 or December 3, 2009 work injuries

For Second Injury Fund liability for permanent and total disability to exist, the previous disability and the last injury must combine together to result in permanent and total disability. V.A.M.S. § 287.2201, subd. 1. Mr. Scott is permanently and totally disabled as a result of his previous disabilities alone, and was not employable on the open labor market at the time of his 2008 and 2009 work injuries, in spite of working. His numerous disabilities pre-existing his 2008 work injury are outlined:

Mr. Scott tore his right rotator cuff in 1998. Dr. Koprivica noted disability from this injury in regard to climbing and using his right shoulder.

Mr. Scott fell 22 feet in 2001 which shattered bones in his leg and feet. He spent two years with his leg in a CAM walker. This injury significantly limited his walking and he still has considerable problems from his this injury to his lower extremities. Mr. Scott reported after this 2001 right leg injury he had a very difficult time getting on and off machinery and only maintained employment by being self employed. He was able to put the brunt of the work on his employees and participate only by overseeing the work. Mr. Scott saw Dr. Bellamy from St. Luke's Medical on March 29, 2007. Dr. Bellamy recorded at that visit that Gary reported not being able to walk even 50 feet without having to stop and rest because of the discomfort. Dr. Koprivica suggested restrictions based on Mr. Scott's lower extremity disability: limit walking and standing to 15 minutes and avoid climbing.

He also has a history of major hearing problems which require cochlear implants. The hearing problems date back as far as middle school. He dropped out of school because he could

not hear the teacher. He reads very little and cannot operate a computer making it difficult for him to do tasks related to operating an excavating business.

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Mr. Dreiling testified that Mr. Scott was “at a very distinct disadvantage” in competing for training and supervisory jobs for another company considering his hearing, communication skills and educational background. When the severe pain, and physical restrictions he faced from his lower extremity injuries, his hernias, and his first shoulder injury, it is clear that the only reason Mr. Scott was able to work was because he was majorly self-accommodating as a business owner. Until his retirement, Mr. Scott did continue to earn an income because he owned his own business, but only because he made major accommodations for himself regarding what equipment he would operate, and relying on his wives to perform more intellectually demanding tasks. Mr. Dreiling agreed that Mr. Scott would not have the availability of self-accommodation in the open labor market like he did in his own business and that no jobs exist in the open labor market that would let him simply show other employees how to operate equipment without performing some work himself. (Exhibit B, 37). The Second Injury Fund is not liable for Mr. Scott’s 2008 and 2009 work injuries as his permanent and total disability arises based on his injuries that pre-date 2008.

Angus does not apply in this case, even though there is only one expert report submitted into evidence. Angus v. Second Injury Fund, 328 S.W.3d 294 (Mo. App. W.D. 2010). Angus specifically states “that the commission may not substitute an administrative law judge’s personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert.” Id. at 300. An expert’s opinion may be contradicted by his own testimony. Carkeek v. Treasurer, 352 S.W.3d 604, 610 (Mo. App. W.D. 2011). “Extent of disability. . . is not so medically technical as to remove it from the expertise that is attributed to the Commission. The question whether a claimant is totally and permanently disabled is not exclusively a medical question.” Id. at 610, citing Crum v. Sachs Elec., 769 S.W.2d 131, 136 (Mo. App. W.D. 1989). The current case focuses on causation of disability while Angus centered on medical causation of an injury. Angus, 328 S.W.3d 294 at 300.

The Court can properly determine that the cause for permanent and total disability was Mr. Scott’s pre-existing problems. First, because nature and extent of disability is at issue, and not medical causation, the Court is free to look to the whole record and not just to the medical expert in the case. Nature and extent of disability is a separate issue from medical causation and extent of disability is not medically technical. Carkeek, 352 S.W.3d at 610. Second, according to Mr. Scott’s testimony, at least one doctor asked him to stop working when he began having hernias in 2007. Third, because the issue in this case is not medical causation of an injury, it is appropriate for the Court to make findings of fact regarding Mr. Scott’s abilities and disability before the last accident. Carkeek, 352 S.W.3d at 610. As outlined above, Mr. Scott’s hearing problems since childhood, his extremely limited ability to walk due to foot injuries, problems

from his first shoulder injury, and the pain and lifting limitations associated with his hernias, Mr. Scott was clearly permanently and totally disabled before 2008 and as such unemployable on the open labor market.

I find therefore, the Second Injury Fund has no liability to the Claimant for the injuries claimed on November 1, 2008 or December 3, 2009, and award no compensation.

Made by: _____

Mark Siedlik

Administrative Law Judge

Division of Workers' Compensation