

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

Injury No.: 96-441835

Employee: Asad Sharif  
Employer: Concrete Materials (Settled)  
Insurer: Employer's Insurance of Wausau (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated June 30, 2011.

**Preliminaries**

In October 1996, employee injured his back and shoulder in a work fall. Employee settled his permanent partial disability claim against employer. Employee proceeded to final hearing of his claim against the Second Injury Fund.

The ALJ denied employee's claim against the Second Injury Fund. Employee appealed to the Commission alleging the ALJ erred in denying his claim for permanent total disability benefits from the Second Injury Fund, or, in the alternative, that the ALJ erred in not awarding permanent partial disability benefits from the Second Injury Fund.

**Findings of Fact**

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

On October 29, 1996, employee was standing on a ladder on the back of his truck emptying concrete when the ladder broke. Employee fell to the ground, injuring his back and shoulder. Employee was later diagnosed with a bulging disc at L5-S1.

Prior to the October 1996 injury, employee was diagnosed with Post-Traumatic Stress Disorder (PTSD) and major depression. Employee's depression has been deemed recurrent and led employee to attempt suicide and have suicidal thoughts prior to his October 1996 work injury.

Dr. Butts, a clinical psychologist, diagnosed employee with a personality disorder. Dr. Butts opined that employee's major psychological problems inhibit his ability to maintain employment. Dr. Butts stated that employee's mental disabilities started early in his life and have had a detrimental effect on his employability throughout his lifetime. Dr. Butts opined that prior to the October 1996 injury employee was marginally able to engage in

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 1996 unless otherwise indicated.

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meaningful and gainful employment. He opined that employee suffered from 40% impairment of the whole person prior to the October 1996 injury.

Dr. Koprivica evaluated employee in 2001 and opined that as a result of the primary injury employee sustained 35% permanent partial disability of the right shoulder and 20% permanent partial disability of the body as a whole referable to his lumbar spine. Dr. Koprivica further opined that employee is permanently and totally disabled due to his physical impairments and preexisting psychological impairment.

Dr. Koprivica evaluated employee again in 2006 and opined that employee is permanently and totally disabled as a result of the combination of his physical injuries from the October 1996 work injury and his preexisting psychological disabilities.

Employee settled his claim against employer. The settlement was based upon an approximate 15% permanent partial disability of the body as a whole referable to employee's lumbar spine. We find that this approximation is fully supported by the record. Therefore, we find that as a result of the October 1996 injury, employee sustained 15% permanent partial disability of the body as a whole referable to his lumbar spine.

We further find, based upon employee's testimony, Dr. Butt's expert opinions, and the record as a whole, that employee suffered from 40% preexisting permanent partial disability of the body as a whole referable to his psychological condition.

### **Discussion**

Employee contends that he is permanently and totally disabled as a result of his October 29, 1996, injury combining with his preexisting disabilities and that the Second Injury Fund should be liable for his permanent total disability benefits.

In determining whether employee is permanently and totally disabled, we turn to § 287.020.7 RSMo, which defines "total disability" as the "inability to return to any employment...." The Court in *Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849 (Mo.App. 1995) provided a test for determining permanent total disability:

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

*Id.* at 853 (citations omitted).

Although the evidence supports a finding that employee's primary and preexisting disabilities restrict his employability, he has continued to work with an outreach program for 10 years. Employee testified that he averages 20 hours of work per week with this job and that his duties include transportation, counseling, rent collection, operation of a food

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pantry, and other tasks. Based upon employee's continued employment and the record as a whole, we find, as did the ALJ, that employee is not permanently and totally disabled as a result of his primary injury combining with his preexisting disabilities. Therefore, we find that the Second Injury Fund is not liable for permanent total disability benefits.

While we find that employee is not permanently and totally disabled due to the combination of his primary injury and preexisting disabilities, we must address employee's alternative argument that his primary injury combined with his preexisting disabilities to produce enhanced permanent partial disability, for which the Second Injury Fund is liable.

In evaluating cases involving preexisting disabilities, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

*Kizior*, 5 S.W.3d at 200.

We have previously found that as a result of the primary injury employee sustained 15% permanent partial disability of the body as a whole referable to his lumbar spine; and that he had 40% preexisting permanent partial disability of the body as a whole referable to his psychological condition. We further find, based upon the opinions of Dr. Koprivica and the record as a whole, that these disabilities combine to produce greater overall disability than the simple arithmetic sum of the separate disabilities.

While we agree with Dr. Koprivica that these disabilities combine to produce greater overall disability, we do not find his assessment that employee is permanently and totally disabled as a result of this combination credible. We find, based upon employee's testimony, the medical evidence, and the record as a whole, that a 10% permanent partial disability enhancement is a more appropriate assessment of the combined effect of his primary injury and preexisting psychological disabilities.

We further note that employee and the Second Injury Fund stipulated that employee's permanent partial disability rate is \$272.78. We find that this permanent partial disability

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rate exceeds an amount equal to 55% of the applicable state average weekly wage and, therefore, in accordance with § 287.190.5(5) RSMo, must be reduced to \$268.72.

**Award**

We reverse the ALJ's award denying employee's claim for permanent partial disability benefits against the Second Injury Fund.

We find that employee's primary injury (15% PPD of the body as a whole referable to his lumbar spine, or 60 weeks) combined with his preexisting disabilities (40% PPD of the body as a whole referable to his psychological condition, or 160 weeks) to result in a permanent partial disability enhancement of 10% above the simple arithmetic sums of the separate disabilities, or 22 weeks of benefits ( $= .10 * (60 + 160)$ ).

The Second Injury Fund is liable for employee's 22 weeks of enhanced permanent partial disability benefits, or \$5,911.84 ( $= 22 \text{ weeks} * \$268.72$ ).

The award and decision of Administrative Law Judge Mark S. Siedlik issued June 30, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

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

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary