

FINAL AWARD ALLOWING COMPENSATION

(After Mandate from the Missouri Court of Appeals, Western District)

Injury No.: 95-410846

Employee: Daniel Small

Employer: Red Simpson, Inc.

Insurer: Insurance Company of the State of Pennsylvania

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) whether there is Missouri jurisdiction due to a contract of hire in the State of Missouri; (2) whether there is a timely claim for compensation filed with the sub-issue of any payments made under this chapter; (3) whether the employer is required to file a report of injury in this matter; (4) whether the employer is liable to the employee for underpayment of temporary total disability benefits between the Texas rate and the Missouri rate between the time periods of September 13, 1995, until April 21, 1997; (5) nature and extent of disability and employer's liability therefor; and (6) whether the employer is liable for disfigurement pursuant to Chapter 287.

The administrative law judge concluded that this claim is barred by the statute of limitations, and issued an award and decision denying compensation.

Employee filed a timely application for review with the Labor and Industrial Relations Commission (Commission) alleging the administrative law judge erred in concluding that employer's payments to employee did not operate to toll the Missouri statute of limitations.

On December 30, 2014, the Commission affirmed and adopted as its own the award and decision of the administrative law judge, with a supplemental opinion concluding the claim was barred by the statute of limitations on grounds other than those identified by the administrative law judge.

On November 17, 2015, the Missouri Court of Appeals, Western District, issued an opinion reversing the December 30, 2014, award and decision of the Commission (Commission). See *Small v. Red Simpson, Inc.*, 484 S.W.3d 341 (Mo. App. 2015). The Court concluded that this claim is not barred by the statute of limitations.

On April 5, 2016, the Supreme Court of Missouri issued its order denying employer's application for transfer. By mandate issued April 6, 2016, the Missouri Court of Appeals, Western District, confirmed its decision to reverse the Commission's award and remanded this matter to the Commission for further proceedings in conformity with the opinion of the Court.

Pursuant to the Court's mandate, and for the additional reasons set forth below, we reverse the award and decision of the administrative law judge.

Employee: Daniel Small

- 2 -

Findings of Fact¹

Employee credibly testified that he accepted a job offer during a phone conversation with employer while he was in St. Ann, Missouri. After receiving and accepting the job offer in Missouri, employee began work in Beaumont, Texas, on September 5, 1995.

On September 12, 1995, employee sustained a compensable, work-related electrocution injury while working as a journeyman lineman for employer in Texas. As a result of the injury, employee underwent an amputation of his right arm at the forearm. Employee pursued a workers' compensation claim in Texas, which the parties resolved in 2000 by compromise settlement.

Shortly after his accident in Texas, employee returned to Missouri. Employer agreed that it is responsible for future medical treatment reasonably necessary to cure or relieve the effects of the injury. Employer has provided medical treatment in Kansas and temporary total disability benefits pursuant to the Texas settlement. At the time of the hearing in this matter, employer had paid \$268,436.96 in medical expenses.

The parties agreed that employee was temporarily and totally disabled from September 13, 1995, through April 21, 1997. The employer paid \$33,934.25 in temporary total disability benefits in connection with the Texas workers' compensation claim. Those benefits were paid from September 15, 1995, through April 21, 1997, at a weekly rate of \$392.00. The employer made two additional temporary total disability payments between April 21, 1997, and November 24, 1997, at the rate of \$307.12.

The employer also paid \$63,446.46 in permanent partial disability benefits in connection with the Texas workers' compensation claim. Those benefits were paid at three different compensation rates: \$327.69, \$285.51, and \$285.57.

There is no evidence on this record that employer has paid any compensation to employee specifically for the disfigurement he suffered with regard to the amputation of his right upper extremity at the forearm.

The parties agreed that employee's Missouri average weekly wage would have been \$753.42, and would yield compensation rates of \$490.28 for temporary total disability benefits and \$257.29 for permanent partial disability benefits.

Nature and extent of disability

As we have noted, employee's 1995 electrocution injury resulted in amputation of his (dominant) right hand. The injury also left employee with a chronic pain condition in his abdomen, where 7200 volts of electricity exited his body. Employee provided unanimous ratings from Drs. Koprivica and Stuckmeyer of 100% permanent partial

¹ In its decision of November 17, 2015, the Court did not disturb any of the factual findings that were rendered by the administrative law judge and that were subsequently affirmed and adopted by the Commission; instead, the Court reached its decision on a purely legal question. Accordingly, the previous findings of the Commission, along with the parties' stipulations, are reproduced and set forth herein for the benefit and convenience of the parties. We have also rendered new findings of fact, as our prior decision stopped short at the minimum findings necessary to resolve what was then deemed the dispositive issue of the statute of limitations.

Employee: Daniel Small

- 3 -

disability of the right upper extremity at the 210-week level for the amputation, as well as a 15% permanent partial disability of the body as a whole from Dr. Stuckmeyer for the abdominal pain. Employer does not advance any contrary rating.

Instead, employer's post-remand brief argues that because employee subsequently received a permanent total disability award from the Second Injury Fund based on a combination of the 1995 injury with a 2008 low back/bilateral shoulder injury, he has already been compensated for any permanent partial disability resulting from the 1995 injury. But, obviously, compensation for a condition of permanent total disability arising after a subsequent injury does not preclude compensation in a claim for permanent partial disability referable to a prior injury.

This is employer's sole argument. Employer does not identify any stipulated impairment rating to which the parties may have agreed in the Texas settlement, or argue that employee should be bound by such in this Missouri proceeding. We have no evidence of any agreement by employee to a specific percentage of impairment in the Texas settlement that could in any way bind him to any particular percentage of permanent partial disability pursuant to the schedule of losses under Chapter 287.

In the absence of employer advancing any contrary rating, or a colorable argument why we should reject or discount the ratings from Drs. Koprivica and Stuckmeyer, we hereby adopt their ratings. We find that employee suffered, as a result of the work injury, a 100% permanent partial disability of the right upper extremity at the 210-week level referable to the amputation, plus a 15% permanent partial disability of the body as a whole referable to chronic abdominal pain.

Conclusions of Law

Missouri jurisdiction

The Commission previously concluded there is Missouri jurisdiction in this case by adopting the administrative law judge's finding, which in turn credited employee's testimony that he entered the contract of hire, via telephone, while in Missouri. On appeal, the Court explicitly affirmed that conclusion. *Small v. Red Simpson, Inc.*, 484 S.W.3d 341, 346 (Mo. App. 2015). Thus, the existence of Missouri jurisdiction has effectively become the law of the case. See *Smith v. Capital Region Med. Ctr.*, 458 S.W.3d 406, 414 (Mo. App. 2014). Accordingly, we conclude that there is Missouri jurisdiction over this claim.

Temporary total disability benefits

Section 287.170 RSMo provides for the payment of temporary total disability benefits while an employee is engaged in the rehabilitative process following a compensable work injury. *Greer v. Sysco Food Servs.*, 475 S.W.3d 655 (Mo. 2015). As noted above, the parties stipulated employee was temporarily and totally disabled from September 13, 1995, through April 21, 1997. They also stipulated that employee's weekly rate for temporary total disability benefits is higher in Missouri than the rate employer paid on the Texas claim by \$98.28.

Employer's brief argues the Commission should deny temporary total disability benefits because employee didn't file his Missouri claim until after the period of temporary total

Employee: Daniel Small

- 4 -

disability ended. We are not persuaded. Employer cannot cite any statutory or case law basis for its argument, as none exists. Practically speaking, except in cases of hardship pursuant to § 287.203 RSMo, or where a temporary or partial award is sought pursuant to § 287.510 RSMo, a period of temporary total disability will often have ended at the time an employee files a claim for compensation. Simply stated, nothing within Chapter 287 requires an employee to file a claim for compensation before a period of temporary total disability has ended.

We conclude employee is entitled to temporary total disability benefits at the Missouri rate of \$490.28 during the stipulated period of temporary total disability, less a credit to employer for its prior payment of \$33,934.25 in connection with the Texas claim, for a total of \$7,179.23.

Nature and extent of permanent disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee's 1995 electrocution injury resulted in amputation of his (dominant) right hand, and a chronic pain condition in his abdomen where 7200 volts of electricity exited his body. We have also adopted the ratings from Drs. Koprivica and Stuckmeyer of 100% permanent partial disability of the right upper extremity at the 210-week level for the amputation, plus a 15% permanent partial disability of the body as a whole from Dr. Stuckmeyer for the abdominal pain.

When we add the 10% statutory enhancement for complete loss of a member pursuant to § 287.190.2 RSMo, we conclude that employee suffered a total of 291 weeks of permanent partial disability referable to the 1995 electrocution injury. At the stipulated Missouri weekly benefit rate of \$257.29, employee is entitled to \$74,871.39, less a credit for the amounts employer paid for disability/impairment in connection with the Texas claim of \$63,446.46, for a total of \$11,424.93.

Disfigurement

Section 287.190.4 RSMo governs the compensation that may be paid in cases of disfigurement and provides, in pertinent part, as follows:

If an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation on account thereof as it may deem just, but the sum shall not exceed forty weeks of compensation.

Again, we have found that employee's 1995 electrocution injury left him with an amputated right (dominant) upper extremity at the forearm. He is entitled to compensation pursuant to the foregoing statute for this disfigurement. Employer's post-remand brief argues, however, that employee should not get any award for disfigurement because he is able to wear a prosthesis in place of his amputated right arm. We are not persuaded. Employer fails to cite any statutory or case law basis for denying an award of disfigurement solely because employee has the good fortune to be able to use a prosthesis; our research revealed none. In our view, the very fact

Employee: Daniel Small

- 5 -

employee now wears a device where he once had a human hand strikes us as compelling evidence of disfigurement.

In the absence of a colorable argument from employer, we hereby award the statutory maximum of 40 weeks disfigurement for the amputated right forearm, for a total of \$10,291.60. See, e.g., *Larry Galkowski v. Bi-State Development Agency*, Injury No. 01-071471 (LIRC, August 9, 2006), awarding 35 weeks disfigurement where the employee suffered amputation of the right index, middle, and ring fingers, along with two-thirds of his small finger.

Conclusion

We reverse the award of the administrative law judge.

The employer is liable to employee for temporary total disability benefits in the amount of \$7,179.23.

The employer is liable to employee for permanent partial disability benefits in the amount of \$11,424.93.

The employer is liable to employee for disfigurement in the amount of \$10,291.60.

The award and decision of Administrative Law Judge Lisa Meiners, issued May 6, 2014, is attached solely for reference.

This award is subject to a lien in favor of Mark E. Kelly, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

Given at Jefferson City, State of Missouri, this 10th day of November 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Daniel Small Injury No: 95-410846
Employer: Red Simpson, Inc.
Insurer: Insurance Company of the State of Pennsylvania
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: February 26, 2014 Checked by: LM/drl

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: September 12, 1995
5. Location where accident occurred or occupational disease was contracted: Beaumont, Texas, contract of hire in Missouri.
6. Was the above employee in the employ of the above employer at time of alleged accident or occupational disease? Yes
7. Did the employer receive proper notice? Yes
8. Did the accident or occupational disease arise out of and in the course of employment? Yes
9. Was the claim for compensation filed within time required by Law? No
10. Was the employer insured by the above insurer? Yes
11. Describe the work employee was doing and how the accident occurred or the occupational disease contracted: Employee suffered an electrical shock while working with electrical wires.
12. Did the accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right arm amputation and abdomen

14. Nature and extent of any permanent disability: Settled in Texas for \$63,446.46 on August 3, 2000.
15. Compensation paid to-date for temporary disability: \$33,934.25 for temporary disability at the Texas rate of \$392.00.
16. Value of necessary medical aid paid to date by employer? \$268,436.96
17. Value of necessary medical aid not furnished by employer? N/A
18. Employee's average weekly wages: \$735.42
19. Weekly compensation rate: \$490.28 for TTD and PTD; \$257.29 for PPD
20. Method of wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of Compensation payable from the Employer: No additional benefits are awarded. Claim is time barred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Employee: Daniel Small Injury No: 95-410846

Employer: Red Simpson, Inc.

Insurer: Insurance Company of the State of Pennsylvania

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

Hearing Date: February 26, 2014 Checked by: LM/drl

The parties appeared for hearing on February 26, 2014. The Employee Daniel Small was present and represented by Mark Kelly. The Employer Red Simpson, Inc., through its Insurer, the Insurance Company of State of Pennsylvania, was represented by Brent Johnston. Regarding the stipulations of facts, the parties stipulated to the following and that as contained in Employer/Insurer's Exhibit 2:

STIPULATION OF FACTS

1. Daniel Small sustained a compensable, work-related injury while working in Texas for the Employer on September 12, 1995.
2. Daniel Small pursued a workers' compensation claim in the State of Texas in connection with his September 12, 1995 work accident.
3. Mr. Small's average weekly wage would be \$735.42, which would yield compensation rates of \$490.28 for temporary total disability and \$257.29 for permanent partial disability.
4. The Employer / Insurance Carrier have paid \$268,436.96 in medical expenses and \$97,380.71 in indemnity benefits.
5. The Employer / Insurance Carrier paid \$33,934.25 in temporary total disability benefits in connection with the Texas workers' compensation claim. Those benefits were paid from September 15, 1995, through April 21, 1997, at a weekly rate of \$392.00. The Employer / Insurance Carrier made two additional TTD payments between April 21, 1997, and November 24, 1997, at the rate of \$307.12.
6. Daniel Small was temporarily and totally disabled from September 13, 1995, through April 21, 1997.
7. The Employer / Insurance Carrier paid \$63,446.46 in permanent partial disability benefits in connection with the Texas workers compensation claim. Those benefits were paid at three different compensation rates: \$327.69, \$285.51, and \$285.57.

8. The Employer / Insurance Carrier have not paid any indemnity benefits to Mr. Small in connection with his 1995 injury since August 3, 2000.
9. No payments of any kind were paid by the Employer / Insurance Carrier in connection with Mr. Small's claim from October 31, 2003, through August 7, 2006.
10. Employer / Insurance is responsible for future medical treatment reasonably necessary to cure and relieve the effects of the injury.

ISSUES

The issues to be resolved by this hearing are:

1. Whether there is Missouri jurisdiction due to contract of hire;
2. Whether a claimant's claim for Missouri compensation is timely;
3. Whether the employer was required to file a report of injury;
4. Whether the employer is liable to the employee for underpayment of temporary total disability from September 13, 1995 until April 21, 1997 at a rate of \$490.28 since claimant was paid at the Texas rate of \$392;
5. Whether claimant sustained any disability and, if so, the nature and extent of that disability;
and
6. Whether the employer is liable to the employee for disfigurement.

Claimant credibly testified he accepted a job offer during a phone conversation with Red Simpson, Inc., while he was in St. Ann, Missouri. The claimant then, after receiving and accepting the job offer in Missouri, began work in Texas on September 5, 1995.

Claimant sustained a serious electrocution injury while working as a journeyman lineman for Red Simpson in Beaumont, Texas. As a result of the injury, claimant's right arm was amputated at the forearm. He now receives future medical care pursuant to a compromise settlement made in Texas in 2000.

Shortly after his 1995 accident in Texas, claimant returned to Missouri. The employer and insurer provided medical treatment in Kansas and temporary total disability benefits pursuant to Texas law. No total temporary disability benefits or medical treatments were provided pursuant to the Missouri Workers' Compensation statute.

The parties stipulated that the last temporary total disability payment made pursuant to Texas law was on November 21, 1997. The parties also admitted the claimant and the employer

reached a compromise settlement of \$63,446.46 on August 3, 2000, and that the employer was responsible for future medical care reasonably necessary to cure and relieve the effects of the injury that occurred in 1995. The compromise settlement reached in 2000 was made pursuant to Texas law. Claimant at the time he settled his case in 2000 was represented by a Texas lawyer even though he lived in Missouri. All benefits were paid under Texas law and future medical care received since 2000 have been provided for in Kansas pursuant to the Texas contract entered between the employer and the claimant. The parties also stipulated that the employer / insurer have not paid any indemnity benefits since August 3, 2000.

Claimant filed a claim for compensation in Missouri on September 17, 2009. Claimant argues the future medical care provided in Kansas by the Texas agreement made in 2000 allows him to file a claim for compensation in Missouri nine years after reaching an agreement in Texas. Claimant argues he is not time barred because the employer and insurer are providing ongoing medical treatment or ongoing medical payment pursuant to the compromise settlement in 2000 and that those benefits should be considered benefits being paid under the Missouri Workers' Compensation Act even though the benefits are being paid under Texas law. Claimant believes his claim for compensation filed on September 17, 2009, is timely because the employer/insurer failed to file a report of injury and that no more than three years have ever passed between future medical care provided in Kansas and payment made by the Texas employer to those Kansas providers.

The applicable section to this case, §287.430 R.S.Mo. states:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. The filing of any form, report, receipt, or agreement, other than a claim for compensation, shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing reactivate or revive the period of time in which a claim may be filed. A claim against the second injury fund shall be filed within two years after the date of the injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later. In all other respects the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a conservator shall be deemed the termination of the legal disability from minority or disability as defined in chapter 475. The statute of limitations contained in this section is one of extinction and not of repose.

The claimant argues his claim is timely filed in Missouri nine years after he reached a compromise settlement in Texas because the employer / insurer are providing medical benefits pursuant to an injury and that those payments constitute as paid under this chapter. In the Missouri

Workers' Compensation case of in Brown v. Ozark Christian Schools of Neosho, 847 S.W.2d 888 (Mo. App. 1993), a widow filed a claim against the employer after her husband died in an accident on September 13, 1985. The sole issue of this case was whether the claim was barred pursuant to §287.430, R.S.Mo. 1983. The employee's wife filed a workers' compensation claim on July 25, 1990, arguing that the employer made direct payments to the funeral home on January 20, 1989, on May 11, 1989, and on January 4, 1990. In this case the payments made were more than three years after Brown's death. The Court found that the employer, regardless of his intention, was required to pay the reasonable expense of employee's burial, not exceeding \$2,000 under Missouri Workers' Compensation law, therefore, when the employer made that payment, it was deemed made under this chapter. The court decided the claim was timely.

However, in this matter, no payments have been made in the State of Missouri or pursuant to §287. All payments made were pursuant to Texas law, all medical treatment has been provided for in the State of Kansas. While there is Missouri jurisdiction, claimant had an opportunity to file this claim in Missouri before reaching the compromise settlement on August 3, 2000. Any payments for future medical treatment are pursuant to a compromise settlement or a contract made in the State of Texas and, therefore, I find claimant's claim for compensation in the State of Missouri time barred.

The case in Brown v. Ozark Christian Schools of Neosho is distinguishable since the payments made to the funeral home were made by a Missouri employer to a Missouri funeral home. Therefore, clearly those payments were made pursuant to, despite whatever the intention of the employer, under Missouri Workers' Compensation law. However, in this matter and with these particular set of facts, all payments were pursuant to the Texas compromise settlement to providers in Kansas, not Missouri.

Assuming arguendo the employer had to file a report of injury in Missouri, claimant had the opportunity to file a claim in Missouri either three years after the 1995 injury or the last payment made under this chapter. I find the last payment made pursuant to ANY Workers' Compensation statute was on August 3, 2000, when permanent partial disability benefits were paid. After August 3, 2000, the benefits being provided were pursuant to the Texas compromise settlement and claimant filed an untimely claim by filing his claim for compensation nine years after reaching a compromise settlement in Texas.

Since I find the claim for compensation time barred, all other issues are moot.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation