

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

Injury No. 10-017935

Employee: Arkeather Spratt
Employer: U S Airways, Incorporated (Settled)
Insurer: New Hampshire 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. Having reviewed the evidence and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Nature and extent of preexisting permanent partial disability

Employee pursues a claim against the Second Injury Fund for enhanced permanent partial disability benefits, alleging that a preexisting low back injury combines with her 2010 left shoulder injury to result in greater disability than the simple sum of disability referable to the two conditions. The administrative law judge denied the claim on a finding that employee failed to show that her preexisting low back disability was a hindrance or obstacle to employment or reemployment, or that the two conditions combine synergistically. The administrative law judge also found that the opinions from employee's evaluating expert, Dr. Musich, were less than credible, including his rating of a preexisting 20% permanent partial disability of the body as a whole referable to the low back. Employee appeals.

Turning to Dr. Musich's report, we note that he provided his rating with respect to the preexisting low back injury in the following manner:

It is my medical opinion that the preexisting work related trauma of late May 2007 is the substantial and prevailing factor in the development of acute and now chronic low back pain, which in my medical opinion *has resulted* in a permanent partial disability of 20% of the person as a whole secondary to chronic myofascial pain of the lumbar spine and associated soft tissue.

Transcript, page 98 (emphasis added).

It appears to us from Dr. Musich's terminology (and we so find) that he was rating employee's low back disability as it existed on the date of his examination of June 3, 2014. It further appears that in opining that this level of disability was "preexisting," he relied

Employee: Arkeather Spratt

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wholly on employee's subjective report to him that her low back condition was unchanged from June 2007 to the present. Consequently, the persuasive value of Dr. Musich's rating of "preexisting" low back disability turns to a considerable degree upon an evaluation of employee's own credibility in describing her complaints. We note that the administrative law judge expressly found employee's testimony lacking credibility as to this issue.

After careful consideration, we discern no reason to question Dr. Musich's findings on examination, or his opinion with respect to the level of low back permanent partial disability from which employee was suffering at the time he evaluated her—but again, this evaluation occurred more than four years after the work injury. It was employee's burden to demonstrate that she suffered from a level of permanent partial disability referable to her low back that met the statutory thresholds *as of the date of injury* on March 13, 2010. *Lammert v. Vess Bevs., Inc.*, 968 S.W.2d 720, 725 (Mo. App. 1998). In the absence of additional medical records referable to employee's low back condition, and because we discern no compelling reason to disturb the administrative law judge's findings with regard to employee's credibility, we find employee failed to meet that burden.

Decision

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Suzette Carlisle, issued February 18, 2016, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 15th day of April 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Arkeather Spratt

Injury No.: 10-017935

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: US Airways, Incorporated (Settled)

Additional Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: New Hampshire Insurance Company
(Settled)

Hearing Date: December 1, 2015

Checked by: SC

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: March 13, 2010
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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:
For the primary injury, Claimant injured her left shoulder when she lifted heavy luggage at work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left shoulder
14. Nature and extent of any permanent disability: 20% of the left shoulder (Settled)
15. Compensation paid to-date for temporary disability: \$10,186.06
16. Value necessary medical aid paid to date by employer/insurer? \$20,479.82

Employee: Arkeather Spratt

Injury No.: 10-017935

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$469.10
- 19. Weekly compensation rate: \$312.73
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: (Settled prior to hearing)

22. Second Injury Fund liability: No

TOTAL: NONE

23. Future requirements awarded: N/A

Said payments to begin 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: Louise Ryterski

Employee: Arkeather Spratt

Injury No.: 10-017935

Dependents: N/A

Employer: US Airways Group, Inc. (Settled)

Additional Second Injury Fund

Insurer: New Hampshire Insurance Company
(Settled)

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

STATEMENT OF THE CASE

On December 1, 2015, the parties appeared for a hearing at the Missouri Division of Workers' Compensation Office in St. Louis at the request of Arkeather Spratt ("Claimant"), to decide whether the Second Injury Fund ("SIF") should pay Claimant permanent partial disability ("PPD") benefits. Prior to the hearing, US Airways ("Employer") and New Hampshire Insurance Company ("Insurer"), settled their claim with Claimant for 20% PPD of the left shoulder and did not participate in the proceeding.

Attorney Louise Ryterski appeared for Claimant. Assistant Attorney General Joye Hudson appeared for the Second Injury Fund ("SIF").

Court Reporter Jennifer Jett transcribed the proceedings. The record closed after presentation of the evidence. The parties submitted proposed awards.

STIPULATIONS

The parties stipulated that on March 13, 2010:

1. Claimant was employed by Employer;
2. Claimant sustained an accident that arose out of and in the course of employment in St. Louis City;
3. Employer and Claimant operated under the Missouri Workers' Compensation Law;
4. Employer's liability was fully insured by New Hampshire Insurance Company;
5. Employer had notice of the injury;

6. A claim for compensation was filed in a timely manner;
7. Claimant's average weekly wage was \$469.10 with a rate of \$312.73 for temporary total disability benefits ("TTD"), and permanent partial disability benefits ("PPD");
8. Employer paid \$10,186.06 in temporary total disability benefits for 32 weeks; and
9. Employer paid medical benefits totaling \$20,479.82.

ISSUE

The parties identified one issue for disposition: The nature and extent of SIF liability for PPD benefits, if any.

EXHIBITS

Claimant's Exhibits 1 through 7 were offered and received into evidence without objection. SIF offered no exhibits. Any objections made during the hearing or contained in the depositions, but not ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, they were made prior to becoming a part of this record and were not placed there by the undersigned administrative law judge.

SUMMARY OF EVIDENCE

All evidence was reviewed but only evidence that supports this award is discussed below.

Injuries before March 2010

On May 22, 2007, Claimant lifted a bag from a conveyor belt at work and felt a pop in her low back. Initial treated occurred at Barnes-Jewish Hospital West. Three follow-up visits took place at Concentra where medication, five physical therapy visits, and medication were prescribed for a low-back strain. Claimant was placed on restricted duty, but missed work because Employer did not have a limited duty assignment. Claimant did not report the injury to her employer.

Medical records dated June 13, 2007, show Claimant reported improvement and requested an early release to return to full duty. At the hearing, Claimant testified she asked to return to full duty to restore her income. Claimant received no further treatment for her low back. In 2009, Claimant transferred to a desk job, and sitting increased pain and stiffness in her back.

Leading up to March 2010, Claimant continued to have back pain with cleaning, bending and moving about the airplane. Co-employees permitted Claimant to lift carryon baggage, clean the plane and get ice while they handled heavier items. Claimant missed two days from work every other week because of back pain. Claimant had no physician-imposed restrictions. To relieve back and shoulder pain, Claimant takes ibuprofen.

In October 2006, Employer hired Claimant as a full-time ramp agent. Initially, Claimant worked frequent overtime. For each flight, a minimum of 100 bags were handled by two employees, one at the bottom of the bag area, the other in the belly of the plane. Claimant was assigned to the baggage area, and was required to lift 50 pounds or more. Claimant took two to three breaks per day, including lunch. The length of breaks varied depending on air traffic and weather.

The March 13, 2010 work injury

On March 13, 2010, Claimant lifted a bag that weighed over 50 pounds, but it was not marked "heavy" as required. Claimant dropped the bag and it jerked her left shoulder. Her left shoulder popped and she immediately knew something was wrong. She reported the incident to her manager.

Claimant treated at St. John's Emergency Department and was diagnosed with a sprain/strain of the left shoulder. Concentra placed Claimant on restricted duty and prescribed

medication. An MRI revealed partial tears of the supraspinatus, infraspinatus, and subscapularis tendons, and subacromial subdeltoid bursitis, and dependent bicipital tendinopathy.

Dr. Kostman unsuccessfully injected the shoulder twice. In March 2011, Dr. Kostman surgically repaired a left labral tear and prescribed more physical therapy. On June 22, 2011, Dr. Kostman concluded Claimant had reached maximum medical improvement, transferred her to a home exercise program, returned her to full activities and rated 3% PPD of the left shoulder.

Claimant did not return to work for the airline after her left shoulder injury. Claimant declined Employer's offer to relocate in Charlotte. In 2011, Claimant moved to Charlotte and started a home day care center, where she continues to work.

Current complaints include the following: Claimant has to push her left shoulder down and "lock" it into position before she can lift. Claimant's shoulder locks up overnight. In the morning, Claimant performs stretching exercises to loosen the shoulder. Claimant has shoulder pain in the morning, and with damp or cold weather. By mid week Claimant uses bands to reduce stiffness. Sporadically during the day Claimant has numbness, stiffness and shooting pain. Claimant's grandmother assists as needed with lifting and caring for children in the home day care. Ms. Hooper, Claimant's day care assistant, performs a lot of the physical work.

Thomas F. Musich, M.D., examined Claimant and obtained a history on June 3, 2014, reviewed medical records, and wrote an independent medical report at the request of Claimant's attorney.

For the primary injury, Dr. Musich diagnosed a work-related left shoulder injury on March 13, 2010, concluded she had reached maximum medical improvement ("MMI"), and rated 35% PPD of the left upper extremity at the shoulder for residual complaints. Dr. Musich recommended more physical therapy and avoidance of any activities that impact Claimant's left shoulder symptoms.

For the preexisting low-back condition, Dr. Musich diagnosed “acute, turned chronic” low-back pain related to trauma from the May 2007 injury. Dr. Musich testified it was “painful” for him to watch Claimant stand from a seated position and begin to walk. Low-back examination revealed decreased flexion, extension, and lateral flexion with pain at the end ranges. Dr. Musich concluded Claimant had reached MMI for the low-back injury and rated 20% PPD of the low back for the 2007 injury. Dr. Musich did not impose permanent low-back restrictions.

Dr. Musich further opined Claimant’s past and present disabilities are greater than their simple sum and will remain a hindrance to her activities personally and professionally. In addition, Dr. Musich recommended a home exercise program, aquatic therapy and weight loss.

FINDINGS OF FACT and RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, Claimant’s demeanor during the hearing, and the applicable law of the State of Missouri, I find she did not meet her burden to prove SIF liability for the reasons stated below.

SIF is not liable for PPD benefits

Section 287.220.2. states: All cases of permanent disability where there has been previous disability due to injuries occurring prior to January 1, 2014 shall be compensated as provided in this subsection. . . . If any employee who has 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, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity

injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, 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.

In *Treasurer of State of Missouri as Custodian of Second Injury Fund v. Witte, et al*, 414 S.W.3d 455, 467-468 (Mo.2013), the Court found there must be a single preexisting permanent partial disability that meets the thresholds to trigger SIF's liability and there is no threshold requirement for the last injury. SIF is only liable when there is a preexisting permanent partial disability that meets either the 50-week threshold for a body as a whole injury or the 15 percent threshold for a major extremity injury. *Id.* at 468. Additionally, all preexisting injuries must be considered in calculating the amount of compensation for SIF liability. These holdings must be applied to SIF claims in each case. *Id.* at 466. The Court overruled any case to the extent that it states disabilities from the last injury must meet the thresholds. *Hutson v. Treasurer of Missouri as Custodian of Second Injury Fund*, 365 S.W.3d 269 (Mo.App.2012).

Claimant asserts SIF is liable for PPD benefits because of the combined effect of her left shoulder injury in March 2010 and her low back injury in May 2007. SIF denied liability. A claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer*, 249 W.W.3d 902, 911 (Mo.App. 2008). I find Claimant did not meet her burden to prove SIF liability.

I find Claimant's testimony is not credible that she requested an early release from the doctor because she could not afford the co-pays, so she continued to receive help from co-employees for nearly three years with a pain level of seven or eight out of ten, and missed four days' work per month, for an injury she testified occurred on the job.

The evidence contained in the record shows Claimant never reported the incident to her employer, medical records show she improved with treatment, she requested an early release from the doctor, continued to perform the same duties with no physician imposed restrictions for nearly three years, and did not seek additional medical treatment for her low back at any time since June 2007.

After the March 2010 work injury, Claimant started a daycare business and continues to care for infants and young children with only part-time assistants. I find Claimant did not show the low back injury was a hindrance or obstacle to her employment or reemployment and the combined disabilities created synergy.

I find Dr. Musich's conclusion is not persuasive that Claimant's low back and left shoulder injuries create more disability than their simple sum and are a hindrance or obstacle to her personal and professional life. He did not explain how synergy was established, and he was unaware of how much lifting Claimant performed in her day care business.

Also, for the 2007 low-back injury, Dr. Musich diagnosed "acute, turned chronic" low-back pain and rated 20% PPD of the low back. As discussed above, Dr. Musich did not consider the impact of lifting in the day care business, or weight gain on Claimant's level of low-back pain. However, he did recommend, among other things, that she lose weight.

The [fact finder] is not bound by the experts' exact percentages of disability and is free to find a disability rating higher or lower than that expressed in medical testimony. *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 523 (Mo.App.2011). This is because a claimant's degree of disability is not solely a medical question. *Id.* As such, the [fact finder] is not required to accept

the specific rating percentage assigned by [the testifying doctor], notwithstanding the uncontradicted nature of his testimony. *Id.* at 524.

Furthermore, Dr. Musich testified a 25-pound weight gain may affect Claimant's level of back pain. In 2007, BJC records show Claimant weighed 175 pounds when she received treatment for low-back pain. On March 15, 2010, St. John's records show Claimant weighed 90.719 kg (200 pounds) when she sought treatment for her left shoulder. Medical records dated April 15, 2010 show Claimant weighed 204 pounds. During Dr. Musich's evaluation on June 3, 2014, Claimant weighed 218 pounds. Therefore, based on Dr. Musich's testimony, Claimant's 43-pound weight gain may have impacted her level of back pain between the 2007 injury, the March 10, 2010 work injury, and Dr. Musich's 2014 evaluation.

Based upon medical records and less than credible testimony by Claimant and Dr. Musich, I find Claimant did not meet her burden to show the 2007 low-back injury was a hindrance or obstacle to her employment or reemployment and created synergy with the 2010 left shoulder injury. I further find Claimant sustained 5% PPD of the low back from the 2007 injury, which does not meet the required threshold to trigger SIF liability.

CONCLUSION

Claimant did not meet her burden to show the 2007 low-back injury was a hindrance or obstacle to her employment or reemployment and created synergy. Claimant sustained 5% permanent partial disability of the low back from the 2007 work injury, which does not meet the required threshold to trigger Second Injury Fund liability.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation