

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

Injury No.: 05-064617

Employee: Donna S. Sprouse
Employer: Skeeter Kell Sporting Goods (Settled)
Insurer: Travelers Insurance Company (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 November 5, 2012, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Gary L. Robbins, issued November 5, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th 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

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Donna S. Sprouse Injury No. 05-064617
Dependents: N/A
Employer: Skeeter Kell Sporting Goods
Additional Party: Second Injury Fund
Insurer: Travelers Insurance Company
Appearances: Michael A. Moroni & Inga H. Ladd, attorney for employee.
Gregg N. Johnson, attorney for Second Injury Fund.
Hearing Date: August 6, 2012 Checked by: GLR/rm

SUMMARY OF FINDINGS

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 5, 2005.
5. State location where accident occurred or occupational disease contracted: Dunklin 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? 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 happened or occupational disease contracted: The employee tripped on clothing on the floor and injured her back.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Back and body as a whole.
14. Nature and extent of any permanent disability: The employee settled her case with the employer-insurer by Stipulation for Compromise Settlement for 50% permanent partial of the body as a whole referable to the low back.
15. Compensation paid to date for temporary total disability: \$8,185.71.
16. Value necessary medical aid paid to date by employer-insurer: \$119,266.27.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$300.00.
19. Weekly compensation rate: The employee's rate for all purposes is \$200.00 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$0. See Award.
22. Second Injury Fund liability: \$0. See Award.
23. Future requirements awarded: None.

No attorney fees are ordered in this case.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On August 6, 2012, the employee, Donna S. Sprouse, appeared in person and with her attorneys, Michael A. Moroni & Inga H. Ladd for a hearing for a final award. The employer-insurer was not present at the trial as they had already settled their case with the employee. Gregg N. Johnson represented the Second Injury Fund. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Skeeter Kell Sporting Goods was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Travelers Insurance Company.
2. On July 5, 2005, Donna S. Sprouse was an employee of Skeeter Kell Sporting Goods and was working under the Workers' Compensation Act.
3. On July 5, 2005, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$300.00. Her rate for all purposes is \$200.00 per week.
7. The employee's injury was medically causally related to her accident or occupational disease.
8. The employer-insurer paid \$119,266.27 in medical aid.
9. The employer-insurer paid \$8,185.71 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee has no claim for mileage.
12. The employee has not claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee has no claim for permanent partial or permanent total disability as to the employer-insurer.
15. The parties agree that the employee reached maximum medical improvement on May 14, 2008.

ISSUE:

Liability of the Second Injury Fund for permanent partial or permanent total disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Deposition of AnnaMaria Guidos, M.D.
- B. Stipulation for Compromise Settlement in Injury Number 05-064617.
- C. Medical records of Daniel. L. Kitchens, M.D.
- D. Records from Rehab Services of Kennett.
- E. Medical records of Carl W. Huff, M.D.
- F. Medical records of Terence P. Braden III, D.O.
- G. Medical records from Occupational Health Partners/Michael Lack, M.D.
- H. Medical records form Twin Rivers Regional Medical Center.
- I. Medical records from St. Bernards Imaging Center.
- J. Records from Poplar Bluff Regional Medical Center.
- K. Medical records Terence P. Braden, III, D.O.
- L. Medical records from Twin Rivers Regional Medical Center.
- M. Medical records from Poplar Bluff Regional Medical Center.
- N. Medical records from Baptist Memorial Hospital.
- O. Medical records from SEMO Health Network.
- P. Medical records of Debbie Wade, FNP.
- Q. Medical records from Pain Management Clinic.
- R. Records from Social Security Administration.
- S. Report of Susan Shea.

Second Injury Fund Exhibits

- 1. IME report of David T. Volarich, D.O.
- 2. Report of James M. England, Jr.
- 3. Deposition of Donna S. Sprouse.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee was the only witness to personally testify at trial. All other evidence was presented in the form of written reports, medical records or deposition testimony.

At the time of trial the employee was 56 years of age. She lives in Sulphur, Louisiana. She has been married three times and has four children.

Accident of July 5, 2005 the and Medical Care from that Accident

The employee worked for Skeeter Kell Sporting Goods at the time she was injured. Her job was as a sales clerk. On July 5, 2005 the employee injured her back at work. She was stocking product when she tripped over some clothing on the floor that caused her to fall and land on her buttocks.

Twin Rivers Regional Medical Center provided care to the employee on July 5, 2005. Her discharge diagnosis was contusion of the lumbar spine with bulging disc between L5 and S1 with a history of previous disc disease. The employee received care at the SEMO Health Network on July 13, 2005, due to complaints of pain. An MRI was ordered.

Dr. Lalk examined the employee on July 20, 2005. Dr. Lalk ordered physical therapy and released the employee to work restricted duties. He saw her again on July 29, 2005, as the employee reported that her pain was getting worse. Dr. Lalk discontinued physical therapy and ordered an MRI. The August 9, 2005 MRI revealed that the evidence of prior back surgeries looked normal, chronic degenerative changes at L5-S1, and joint effusions from L2 to L5. On August 12, 2005, the employee was referred to a physiatrist as she was not getting any better.

On August 18, 2005, Dr. Braden examined the employee at the request of Dr. Lalk and ordered a bone scan. He reviewed the bone scan and MRI records on September 16, 2005, and noted pain down the employee's left leg. He could not explain the origins of the pain and referred the employee for pain injections.

The Pain Management saw the employee at the request of Dr. Braden. The doctor saw the employee on September 28, 2005, October 19, 2005, November 9, 2005, and December 5, 2005. As of January 3, 2006, the clinic recommended bilateral SI joint injections.

Dr. Kitchens first examined the employee on March 23, 2006. At that time he felt that she sustained a lumbar strain in the July 2005 accident. He recommended a CT-myelogram stating that additional treatment may be needed for her preexisting condition, but there is no surgery or treatment recommended for her specific injury. Dr. Kitchens reported that the MRI of her lumbar spine revealed degenerative changes and postoperative changes on the left side at the L5-S1 level. He said there was no disc herniation.

Dr. Kitchens saw the employee again one and one-half years later, on October 18, 2007, due to continued back pain running into her left leg. At that time, she reported that she has pain throughout the day and that her pain is making it more difficult for her to work. The employee reported that she takes Hydrocodone and Valium for her pain. Dr. Kitchens again recommended that a CT myelogram be performed. He stated that the employee has persistent radicular symptoms and the possibilities include a disc herniation or exacerbation of her preexisting degenerative disc disease.

Ultimately, Dr. Kitchens performed a fusion surgery on November 11, 2007. He saw the employee in 2008 with complaints of continued pain. As of June 18, 2008, he saw the employee again and noted she was not working as she was fired in March 2008. Dr. Kitchens gave the employee work restrictions in the medium work category.

On December 9, 2008, Dr. Kitchens reported that the fusion at L5-S1 was solid. The employee was released from Dr. Kitchens care with a rating of 15% permanent partial disability of the body as whole.

Prior Medical Problems

The employee had multiple pre-existing disabilities/problems that predated her July 5, 2005 accident. She had a history of bilateral carpal tunnel syndrome, depression, anxiety, hypertension, headaches and weight gain. The employee offered no particular testimony regarding these problems.

She had a surgical history for an ACL left knee surgery, a C-section, tubal ligation, hysterectomy and two prior back surgeries. The employee testified that she has no real pain with her left knee but once in a while it gives out. The employee had her first back surgery in 1994. It was a microdiscectomy at L5 on the left. She had her second back surgery in March 1997. At that time she had a partial hemilaminectomy on the left at L5-S1, lysis of adhesions, removal of recurrent herniated nucleus pulposus and decompression of the S1 nerve root.

At trial the employee testified that she is not able to work due to her back pain. She also testified that prior to the July 5, 2005 accident she had had back problems for years. In contrast she confirmed that she told Dr. Guidos that she had a good result from her prior back surgeries. At her deposition, when she was asked about her back problems, she also testified that she had no back problems for ten years. She testified that her deposition testimony was true to the best of her ability. She testified that she realizes now that she made a mistake in her histories.

During that trial, the Court observed the employee. She did not give any indications of pain or discomfort during that time.

Dr. Guidos

Dr. Guidos saw the employee at the request of her attorney. Dr. Guidos authored multiple reports and testified by deposition on December 16, 2010. The first is dated June 14, 2007. In that report, Dr. Guidos indicated that the employee was being seen for an Independent Medical Exam. Dr. Guidos concluded that additional treatment was needed as a result of the primary injury which occurred on July 5, 2005. She recommended a neurosurgical evaluation, repeat nerve conduction and EMG, and consideration of surgical intervention. In that report, Dr. Guidos recorded a history from that the employee had “very good results” from her previous two non-fusion back surgeries, and that the employee was “able to do all aspects of her job without limitations following these surgeries. She did not have any significant problems with her low back following these surgeries.” Dr. Guidos related a history that the employee had two previous low back surgeries, but “was relatively asymptomatic for a number of years prior to a work-related injury that was significant enough that she needed to be taken to the emergency room via ambulance and be admitted for several days for pain control.” Dr. Guidos opined, “although the patient had previous surgery, the incident that occurred while at work on 7/5/05 was felt to be a substantial factor in the patient’s current symptomatology.” On October 3, 2008, Dr. Guidos opined that the employee needed a neurosurgical evaluation.

Dr. Guidos also reported that the employee “is permanently and totally disabled from any gainful employment. She has limitations in activities of daily living because of her chronic pain,

specifically chronic neuropathic pain in the left lower extremity that prevents her from being gainfully employed. Since she was gainfully employed and essentially pain free for 10 years following her previous back surgery, *this most recent work event is felt to be the prevailing factor for her disability*. The work related events that occurred in 2005 are the prevailing factor in her need for back surgery and lumbar sacral fusion. She has permanent radicular symptomology that is felt to be responsible for her ongoing chronic pain complaints.” The disability from the primary injury was rated at 50% permanent partial disability of the body as a whole referable to the low back.

Dr. Guidos’ fourth and last report is dated October 30, 2009, and is a short note rating the employee’s pre-existing disability. On November 18, 2009, the employee settled her claim with the employer-insurer for the full 50% body as a whole rating.

Dr. Guidos testified by deposition on December 16, 2010. On that occasion, Dr. Guidos was asked by the employee’s counsel whether the last injury alone caused the employee’s total disability. Dr. Guidos testified “no”, it was a combination. On cross examination, Dr. Guidos agreed that the employee had no problems doing her job prior to July 5, 2005. She further testified that it remained her opinion that the prevailing factor in employee’s disability was the primary injury, and that it is the primary injury that was causing the employee’s debilitating pain. She testified that “the most important factor in keeping her from returning to gainful employment is the chronic neuropathic pain that she has that resulted from the 2005 work-related injury.”

Dr. Volarich

Dr. Volarich performed a records review at the request of the Second Injury Fund. He prepared an Independent Medical Examination/IME report dated February 3, 2011. He specifically reviewed the multiple reports of Dr. Guidos which reported on the accident, the employee’s complaints, the diagnostic testing that was performed, the vocational assessment of Susan Shea and the employee’s prior back surgeries.

Dr. Volarich provided diagnoses preexisting July 5, 2007:

- Disc herniation L5-S1 to the left-S/P discectomy (1994).
- Recurrent disc herniation L5-S1 to the right-S/P discectomy with lysis of adhesions (1997).

Dr. Volarich also provided a diagnosis concerning the July 5, 2005 accident stating:

- Lumbar left leg radicular syndrome secondary to L5-S1 instability-SP anterior and posterior with instrumentation.

Dr. Volarich rated the employee’s disability from the accident of July 2005 stating:

- They were a hindrance or obstacle to employment or re-employment.
- 50% permanent partial disability of the body as a whole rated at the lumbosacral spine due to the lumbar left leg radicular syndrome due to the instability L5-S1 that required anterior and posterior lumbar fusions at the L5-S1 level.

Dr. Volarich also rated the employee's pre-existing medical conditions that also were a hindrance or obstacle to employment or re-employment:

- 25% permanent partial disability of the body as a whole at the lumbosacral spine due to the disc herniation at L5-S1 to the left that required discectomy in 1994 and recurrent disc herniation at L5-S1 to the right that required discectomy with lysis of adhesions in 1997.

Dr. Volarich further opined that:

- "The combination of her disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness and a loading factor should be added."
- "Ms. Sprouse is permanently and totally disabled as a direct result of the 7/5/05 work accident standing alone. There is no question she had preexisting disability in the low back from prior discectomies but she was able to work unrestricted duty for approximately 8 years prior to the 7/5/05 event. Had it not been for the 7/5/05 accident she would most likely be working. The severity of the 7/5/05 accident and need for anterior and posterior fusions and the associated disability from this injury far outweighs any preexisting disabilities she may have."

James M. England, Jr.

Mr. England performed a records review at the request of the Second Injury Fund. Mr. England concluded that, given the employee's testimony that she had recovered from her prior problems and had no occasional restrictions or difficulties and worked full time without restriction for a number of years prior to 2005, if Mr. England assumed the findings of Drs. Guidos and Volarich, along with employee's testimony, employee is incapable of sustaining even sedentary work, but that this lack of ability seems to be as a result of the primary injury. The primary injury, in isolation, would be enough to totally disable her and prevent her from returning to the work force.

Susan Shea

On July 16, 2009, Ms. Shea met with the employee at the request of her attorney. She prepared a report dated August 2009. Ms. Shea interviewed the employee and reviewed some medical records. She reported that it would be a medical issue, rather than a vocational issue as to what degree the employee's prior back injuries affected the 2005 injury. Ms. Shea concluded that the employee was permanently and totally disabled from gainful employment, but declined to give an opinion as to what was the cause or causes. Ms. Shea identified nine factors leading to her disability conclusion.

RULINGS OF LAW:

This is a case where the credibility, consistency and accuracy of the employee's testimony is extremely critical in a determination of the liability of the Second Injury Fund for disability.

Initially, it must be determined whether you believe that the specific evidence that the employee provided is credible, consistent and accurate. Just as critical, it must be determined that the

information that was given by the employee to medical evaluators, the information that they relied on in formulating their decisions and opinions was also credible, consistent and accurate.

Based on a consideration, comparison and evaluation of all the evidence, the employee's fails in both instances. On the one hand, at trial the employee testified that she has had back problems for years. However, in the past, she told medical professionals of her good results and lack of problems since her prior back problems. She confirmed this information in her deposition testimony. The Court finds that the employee's testimony is neither credible, or consistent or accurate when it comes to a determination of liability for the Second Injury Fund. On this basis the Court finds that the employee has failed to met her burden of proof as to the specific liability of the Second Injury Fund.

The Court finds that the testimony and opinion of Dr. Volarich and Mr. England are more credible than the opinions of Dr. Guidos and Susan Shea. The Court finds that that Dr. Guidos attempted to change her medical opinion as to the causation of employee's total disability between the time of her written reports and her deposition testimony. The Court further finds that Dr. Guidos' original opinion that the primary injury of July 5, 2005 caused the employee's disability is more credible than her later opinion that the primary injury did not cause the employee's disability unless the pre-existing low back condition was included. The Court finds that the opinions of Dr. Volarich and Jim England are credible as to the primary injury causing employee's permanent and total disability.

The Court further finds that the employee has failed in her burden proof to offer credible, consistent or accurate medical opinion that her disability was caused by a combination of her primary and pre-existing conditions. The Court finds that the employee has failed to satisfy her burden of proof on the issue of Second Injury Fund liability. The Court finds that the employee is permanently and totally disabled due to the last injury alone. As a result, the Second Injury Fund has no liability in this matter.

ATTORNEY'S FEE:

No attorney fees are awarded in this case.

INTEREST:

No interest will accrue in this case.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation