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

Injury No.: 09-024959

Employee: Jackie Taylor
Employer: W & M Welding, Inc. (Settled)
Insurer: Midwest Employers Casualty (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 read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge awarding 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 (ALJ) with this supplemental opinion.

Discussion

An application for review filed on behalf of the Second Injury Fund alleged the following reasons for error in the ALJ's award:

1. There is no credible evidence that Employee's prior knee condition synergistically combined with his primary right eye condition in that Employee's medical expert does not discuss any symptoms or complaints related to the primary injury, and Employee failed to give sufficient credible testimony.

2. Employee's right knee should not have been considered for permanent partial disability because the condition was not at maximum medical improvement in that Employee testified he underwent right knee surgery after the primary injury and this alleviated some of his symptoms.¹

The Second Injury Fund arguments relating to the conclusory nature of expert medical opinion and paucity of evidence regarding any synergy are not without merit. This is a close call but because medical opinion regarding permanent partial disability relating to synergy is precise and not rebutted, and given the employee’s credible testimony regarding the effects of visual and physical disabilities on his overall ability to perform job duties and sustain employment, we are not persuaded to disturb the ALJ's decision herein.

The Second Injury Fund argues that employee’s right knee condition had not reached maximum medical improvement because the employee admitted that a 2016 surgery

alleviated some of his symptoms.\textsuperscript{2} As employee’s brief notes, an employee’s need for future medical treatment to cure and relieve the effects of an injury, pursuant to 287.140.1, is not inconsistent with a finding that the employee has reached maximum medical improvement.\textsuperscript{3} Prior to the February 11, 2009, work injury, employee had undergone multiple surgical procedures referable to his right knee which clearly resulted in permanent changes to the pathology of the right knee and in disabling symptoms that have never entirely abated. Dr. Hopkins, in his report of November 27, 2012, credibly identifies a substantial permanent disability referable to the right knee that predates employee’s February 11, 2009, work injury. That some symptoms referable to the right knee, as of 2016, may have been alleviated by a surgical procedure does not establish that employee’s right knee had not achieved a state of stability and of maximum medical improvement approximately seven years earlier. We find the ALJ properly considered the employee’s right knee condition as a preexisting permanent partial disability for purposes of this claim.

**Award**

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

The Commission further approves and affirms the administrative law judge’s allowance of attorney’s fee herein as being fair and reasonable.

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

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued May 3, 2017, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of April 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

________________________________________

John J. Larsen, Jr., Chairman

VACANT

Member

________________________________________

Curtis E. Chick, Jr., Member

Attest:

________________________________________

Secretary

\textsuperscript{2} Specifically, the employee testified that a 2016 right knee surgery resulted in “[a] little bit more sturdiness and took some of the pain away.” Transcript, 27.

\textsuperscript{3} Poole v. City of St. Louis, 328 S.W.3d 277, 292. (Mo. App. 2010)
AWARD

Employee: Jackie Taylor           Injury No.: 09-024959
Dependents: N/A
Employer: W and M Welding, Inc. (previously settled)
Additional Party: Treasurer of the State of Missouri
                   Custodian of the Second Injury Fund
Insurer: N/A
Hearing Date: April 3, 2017

Checked by: HDF/seb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
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: February 11, 2009
5. State location where accident occurred or occupational disease was contracted: Pettis 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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted: See Award
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: Right eye
14. Nature and extent of any permanent disability: 70.2% of right eye
15. Compensation paid to-date for temporary disability: ----
16. Value necessary medical aid paid to date by employer/insurer? ----
17. Value necessary medical aid not furnished by employer/insurer? ----

18. Employee's average weekly wages: ----

19. Weekly compensation rate: $404.66

20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable: Employer previously settled

22. Second Injury Fund liability: 14.4 weeks of permanent partial disability from Second Injury Fund = $5,827.10

23. Future Requirements Awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: MS. Athena Dickson.
FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jackie Taylor                            Injury No: 09-024959
Dependents: N/A
Employer: W and M Welding, Inc. (previously settled)
Additional Party: Treasurer of the State of Missouri
                  Custodian of the Second Injury Fund
Insurer: N/A

The above-referenced workers’ compensation claim was heard before the undersigned administrative law judge on April 3, 2017. Memoranda were filed by April 24, 2017.

The parties stipulated that on or about February 11, 2009, the claimant, Jackie Taylor, was in the employment of W and M Welding, Inc. The claimant sustained an injury by accident; the accident arose out of and in the course of employment. The parties stipulated that all facts relevant to the claimant’s relationship with the employer/insurer were resolved in the claimant’s favor in his pending claim against the Second Injury Fund. The parties agreed to a weekly compensation rate of $404.66.

The issue to be resolved by hearing is the liability of the Second Injury Fund.

The parties stipulated that Mr. Taylor settled his 2009 workers’ compensation claim for the right eye injury based on a permanent disability of 70.2 percent of the eye; the parties do not stipulate that the settlement is a reflection of the actual disability sustained as the result of the 2009 work injury in the pending Second Injury Fund claim.

The parties stipulated that Mr. Taylor settled a 1993 workers’ compensation claim for a left knee injury based on a permanent disability of 15 percent of the knee; the parties do not stipulate that the settlement is a reflection of the actual disability sustained as the result of the 1993 work injury in the pending Second Injury Fund claim.

FACTS

The claimant, Jackie Taylor, testified that he was 47 years old as of the date of hearing. In 2009, Mr. Taylor was working as a welder when a boom truck operator caused a metal beam to hit him
in the face. As a result, Mr. Taylor sustained an injury to his right eye. Mr. Taylor has difficulty seeing with his right eye when he enters a brightly or dimly lit area. Mr. Taylor testified that he had headaches when he looks at something with his right eye. Currently, Mr. Taylor has learned to avoid eye strain of the right eye and no longer drives at night as the result of his right eye injury.

Prior to 2009, Mr. Taylor injured his left knee when he slipped on some stairs at work, according to Mr. Taylor’s testimony. Mr. Taylor testified to two surgeries on his left knee and one surgery on his right knee before 2009. Currently, Mr. Taylor still has pain in his knees, on the inside of the kneecaps. Mr. Taylor experiences swelling in his knees approximately every three months and elevates his knees to reduce the swelling. Mr. Taylor said that he has difficulty bending and squatting and says that he cannot run as the result of the pain in his knees.

Mr. Taylor indicated that maintenance work is difficult for him as the result of his vision difficulties. Mr. Taylor testified that he could not engage in long distance truck driving due to his right eye problems and his knee pain and stiffness.

During cross-examination Mr. Taylor indicated that he had a right knee surgery about a year and a half prior to the hearing and that the right knee surgery provided improvement in the condition of the right knee including increased sturdiness of the knee and decreased pain in the knee.

Dr. Hopkins evaluated Mr. Taylor on November 27, 2012, and prepared a report of the same date. Dr. Hopkins rated Mr. Taylor’s right knee disability as 35 percent of the knee preexisting 2009 and the left knee disability as 15 percent of the knee preexisting 2009. Dr. Hopkins opined that Mr. Taylor’s disability as the result of the right eye injury of 2009 is 70.2 percent of the right eye. Dr. Hopkins found that the eye and knee injuries combined to form a “significant enhancement” above the “simple arithmetic sum” of the disabilities. Dr. Hopkins referred to a ten percent “enhancement factor.” (Hopkins report 11.27.12)

Dr. Michael Somers evaluated Mr. Taylor for his right eye after his injury and opined to a visual loss of 78.4 percent in his report of August 23, 2011.

Dr. Kelsey Kleinsasser evaluated Mr. Taylor on February 7, 2011, and “was unable to find any irregularity of the optic nerve or retina in either eye that would explain [Mr. Taylor’s] visual complaints…. [Mr. Taylor] did demonstrate a generalized constriction of his confrontation visual fields as he has in the past…. Today’s OCTs did not reveal any retinal thickening. I don’t have a good explanation at this time for [Mr. Taylor’s] visual complaints.” (2.24.11 Silverstein Eye Centers report)

**APPLICABLE LAW**

**RSMo Section 287.220.2** 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. Compensation shall be computed on the basis of the average earnings at the time
of the last injury. 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 considered alone and of itself. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of the second injury fund.

**AWARD**

The claimant, Jackie Taylor, has sustained his burden of proof that he has an increased disability as the result of the combination of the right eye injury of 2009 in combination with his preexisting bilateral knee injuries. I find that the disability Mr. Taylor sustained to his right eye as the result of the 2009 accident is 70.2 percent of the right eye based on Mr. Taylor’s testimony as well as the opinion of Dr. Somers and Dr. Kleinsasser. I find that preexisting disability is 15 percent of each knee, based on Mr. Taylor’s description of his knee conditions and the report of Dr. Hopkins. Mr. Taylor testified to the effect his combined injuries have on his ability to be employed as a long distance truck driver. I find the synergisitic effect of Mr. Taylor’s combined
disabilities over and above the disabilities attributable to each disability individually is 3.6 percent of the body.

Made by:  
HANNELORE D. FISCHER  
Administrative Law Judge  
Division of Workers' Compensation