

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

Injury No. 08-009726

Employee: Scott J. Tillis
Employer: City of St. Louis
Insurer: Self-Insured
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, read the parties' briefs, 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 and adopts as its own the award and decision of the administrative law judge with this opinion addressing employee's request to submit additional evidence.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) medical causation; (2) future medical care; (3) nature and extent of permanent partial disability; and (4) Second Injury Fund liability.

By award dated June 26, 2014, the administrative law judge rendered the following findings and conclusions: (1) employee suffered a 15% permanent partial disability of his right shoulder; (2) employee failed to prove by competent evidence that future treatment would be necessary; and (3) the issue of Second Injury Fund liability is deemed abandoned.

Employee filed a timely application for review with the Commission alleging that the administrative law judge erred: (1) in awarding only 15% permanent partial disability of the right shoulder; (2) in making errors of constitutional law in excluding certain of employee's exhibits from the record of evidence; and (3) in making errors of fact. Employee attached twelve additional pages to his application for review entitled "Plaintiff's Facts in Support of the Request of an Application for Review."

Discussion

Employee's request to submit additional evidence

On August 28, 2014, the Commission received "Plaintiff's Request for the Admittance of New and Supporting Evidence for a Review" (Motion) filed by employee. Therein, employee requested that the Commission accept additional evidence as follows: (1) the full case file; (2) testimony from employee's prior attorneys; and (3) testimony from two administrative law judges who were, at various times, involved in the adjudication of this matter.

Employee: Scott J. Tillis

- 2 -

On September 10, 2014, the Commission received "Employer/Self-Insured's Memorandum in Opposition to Employee's Request for the Admittance of New and Supporting Evidence for a Review," wherein employer/insurer set forth its opposition to employee's Motion.

On September 15, 2014, the Commission received "Respondent Treasurer's Memorandum in Opposition to Petitioner's Request for Admittance of New and Supporting Evidence," wherein the Second Injury Fund set forth its opposition to employee's Motion.

Commission Rule 8 CSR 20-3.030(2) governs the submission of additional evidence, and provides, in relevant part, as follows:

(A) After an application for review has been filed with the commission, any interested party may file a motion to submit additional evidence to the commission. The hearing of additional evidence by the commission shall not be granted except upon the ground of newly discovered evidence which with reasonable diligence could not have been produced at the hearing before the administrative law judge.

To the extent employee's reference to the "full case file" means the legal file created by the Division of Workers' Compensation (Division), we note that this legal file, which contains docket entries, orders, notices, and other documents created by or filed with the Division during the pendency of employee's claim before the Division, is already included in the materials forwarded to the Commission by the Division. We hereby take administrative notice of that file.

With respect to employee's request to submit testimony from his former attorneys and two administrative law judges that were involved in this matter, we gather from employee's Motion that he seeks to submit this evidence primarily to challenge the administrative law judge's rulings that his hearsay evidence was not admissible. Employee alleges that he was surprised to face hearsay objections to his offers of various exhibits at the hearing before the administrative law judge.

We conclude that a party exercising reasonable diligence for purposes of 8 CSR 20-3.030(2)(A) would either offer evidence at the hearing that did not amount to hearsay, or prepare to face hearsay objections. While employee's surprise at facing hearsay objections may indeed have been genuine, it simply is not a proper basis for the submission of additional evidence, and cannot satisfy the requirements of our rule. We are not unsympathetic to employee's obvious unfamiliarity with the requirements of § 287.210 RSMo, but the Missouri courts consistently instruct that we cannot change the rules of evidence for pro se litigants. *Burchfield v. Renard Paper Co.*, 405 S.W.3d 589, 592 (Mo. App. 2013).

For this reason, we must deny employee's request to submit additional evidence. In reviewing the merits of employee's appeal, we have considered only the evidence offered and received into the record during the hearing before the administrative law judge, as well as the legal file forwarded to us by the Division.

Employee: Scott J. Tillis

- 3 -

Order

We deny employee's request to submit additional evidence. We affirm and adopt as our own the award and decision of the administrative law judge.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued June 26, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of November 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Scott J. Tillis, *pro se*

Injury No.: 08-009726

Dependents: N/A

Employer: City of St. Louis

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: April 2, 2014

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

Checked by: JED

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 9, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
Employee injured his shoulder during physical altercation with a crime suspect.
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 shoulder
14. Nature and extent of any permanent disability: 15% PPD right shoulder
15. Compensation paid to-date for temporary disability: \$354.05
16. Value necessary medical aid paid to date by employer/insurer? \$1,806.42

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$772.53/\$404.66
- 20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

34.8 weeks of permanent partial disability from Employer	\$14,082.17
----------------------------------------------------------	-------------

22. Second Injury Fund liability: None

TOTAL: \$14,082.17

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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Scott J. Tillis, <i>pro se</i>	Injury No.:	08-009726
Dependents:	N/A	Before the	
Employer:	City of St. Louis	Division of Workers'	
Additional Party:	Second Injury Fund	Compensation	
Insurer:	Self-Insured	Department of Labor and Industrial	
Hearing Date:	April 2, 2014	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED

This case involves a compensable right shoulder injury resulting to Claimant with the reported accident date of February 9, 2008. Employer admits Claimant was employed on said date and that any liability was fully insured. The Second Injury Fund (“SIF”) is a party to this claim. The Employer and SIF are represented by counsel. Claimant proceeds *pro se*.

Issues for Trial

1. Liability for medical expenses;
2. Permanent partial disability;
3. Need for future medical care;
4. Nature and extent of Second Injury Fund liability.

FINDINGS OF FACT

1. Claimant was an employee of the St. Louis Police Department for 7 years when the injury occurred and was a patrol officer.
2. On the reported accident date claimant was affecting an arrest when the subject of the arrest resisted which resulted in a struggle with Claimant, resulting in an injury to his right arm, shoulder and hand.
3. Claimant was directed for treatment by the police department to Dr. Mark Miller and was diagnosed with a torn posterior labrum of the right shoulder.
4. Surgery was performed by Dr. Miller on April 21, 2008 and physical therapy was begun shortly thereafter.

5. After completion of physical therapy Dr. Miller indicated that he did not believe Claimant had regained sufficient range of motion and strength in his right shoulder to resume unrestricted duties and he was assigned restrictions at that time.
6. On July 1, 2008, Claimant reported to the Barnes Care Clinic with complaints of pain in the right ring finger which he related to this reported injury.
7. On July 15, 2008, Claimant was referred to Dr. David Brown for treatment of his right ring finger and that was diagnosed as a PIP joint sprain.
8. Claimant returned to Dr. Miller on February 18, 2009 complaining of increased pain in his right shoulder. Dr. Miller ordered an MRI arthrogram and performed a cortisone injection at that time.
9. The MRI arthrogram was completed on February 27, 2009 and Dr. Miller interpreted the MRI as showing no changes from the one performed after the surgery.
10. An independent medical examination was performed by Dr. Thomas Musich at the request of Claimant's attorney and Dr. Musich assigned permanent partial disability ratings referable to the right shoulder and the right ring finger.
11. Claimant returned to work in November of 2009 on a limited duty capacity.
12. Dr. Russell Cantrell performed an independent medical examination of Claimant on March 7, 2010 and recommended further treatment for a possible ulnar neuropathy or cervical radiculopathy.
13. Dr. Bernard Randolph performed an independent medical examination of Claimant on April 2, 2010 and placed him at maximum medical improvement with regard to his right shoulder.
14. Dr. Sandra Tate performed an independent medical examination on April 13, 2010 and placed him at maximum medical improvement.
15. Dr. Peter Mirkin examined Claimant on July 24, 2010 and recommended that he be evaluated by a shoulder specialist.
16. Claimant was seen and examined by Dr. Corey Solman on July 28, 2010 and he recommended another MRI of the right shoulder.
17. The MRI of the right shoulder showed post labral repair without definite re-tear, biceps tendinopathy, mild undersurface partial tear of the supraspinatus tendon distal slightly progressed since the previous study without complete re-tear or retraction. Dr. Solman, after the review of the MRI, recommended additional surgery.

18. Dr. David Volarich performed an independent medical examination of Claimant on July 19, 2012 and assessed disability of 50% of the right shoulder and 5% of the elbow, and 25% of the right ring finger. Dr. Volarich also noted additional surgery had been recommended by Dr. Solman for the right shoulder.
19. At a hardship setting on January 13, 2011 before Administrative Law Judge Ottenad, Claimant and his attorney were told that the employer/insurer would provide additional treatment for Claimant's right shoulder and gave Claimant and his attorney several options for treatment.
20. Claimant testified that he declined to see any of these health care providers.

RULINGS OF LAW

The burden of proof is on the employee to prove all elements of a claim. George-Brewer v. Penn Mar Southwest, 980 S.W.2d 147 (Mo.App. W.D. 1998). The claimant bears the burden of proving that not only did an accident occur, but that it also resulted in an injury. Rana v. Landstar TLC, 246 S.W.3d 614, 626 (Mo.App. 2001); Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994).

Critical opinion evidence on the severity of permanent injury was excluded pursuant to well-taken hearsay objections from Employer and the SIF. The opinions expressed by Dr. Solman, Dr. Volarich, Dr. Musich and Dr. Mirkin in their respective reports are excludable hearsay. Section 287.210 (7) RSMo (2005) provides protections for the parties against use of hearsay medical evidence. The section provides that if a physician's report is to be submitted into evidence, the party intending to submit that report must send formal Notice of that intended use at least sixty days prior to the hearing and must provide reasonable opportunities for cross-examination by deposition of the physician-author. Claimant did not comply with the statutory requirements and, as a result, the opinions of Dr. Solman, Dr. Volarich, Dr. Musich and Dr. Mirkin are not admitted. Specifically, Claimant is without admissible expert opinions on permanent partial disability (PPD) percentages (and need for future treatment).

On the other hand, the testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra.

It has also been found that "[t]he extent of an employee's disability, and thus employability, is not an issue of medical causation, nor does it exclusively require medical testimony." Schussler v. Treasurer/Custodian of Second Injury Fund, 328 S.W.3d 294 (Mo.App.

2010). The Commission “may consider all the evidence and the reasonable inferences drawn from that evidence.” *Id.* at 296, *quoting Carkeek v. Treasurer/Custodian of Second Injury Fund* 352 S.W.3d 604, 610 (Mo.App. 2011).

Here, Employer accepted liability and tendered substantial benefits to Claimant, including surgery by their authorized physician, Dr. Miller. Claimant offered substantial evidence of his right shoulder injury, treatment and surgery by Dr. Miller. (Exhibit G.) Dr. Miller’s treatment records establish surgery performed on April 21, 2008 with post-operative diagnoses of superior labrum anterior and posterior tear and a healed/intact previous labral repair. Dr. Miller’s clinical notes of February 18, 2009 (ten months post-surgery) reflect no atrophy, considerable discomfort with internal rotation to T10-T11, good strength, a positive O’Brien’s test, and superior shoulder pain with anterior translation of the humeral head. Dr. Miller recommended the 2009 MRI referenced below.

On February 3, 2010, Dr. Miller recorded a patient history of Claimant failing the “pulling the dummy drill” and that he had been asked to retire because of his shoulder. Clinical findings that date included no atrophy but a positive impingement sign, internal rotation of T12-T10, good strength, a positive O’Brien’s test, painful clicking with anterior translation, and a positive apprehension test. Dr. Miller notes Claimant continues to have mechanical symptoms. Dr. Miller’s plan was a diagnostic arthroscopy and biceps tenodesis. None of Dr. Miller’s post-surgical notes suggest a new injury that might break causation between these post-surgical findings/recommendations and the surgery itself.

Claimant also offered his radiological records in evidence. (Exhibit H.) Approximately ten months post-surgery, on February 27, 2009, Claimant underwent an MRI of his right shoulder for “increased pain, possible recurrent labral tear.” Findings included: “post-operative changes involving cartilaginous labrum” and “mild supraspinatus tendonitis.” Claimant, again, underwent an MRI almost a year and one-half later, on July 28, 2010, for shoulder pain with the findings: biceps tendinopathy or small split without complete tear and mild undersurface partial tear of the supraspinatus tendon distally slightly progressed since previous without complete tear or retraction. Each of these MRI studies demonstrates ongoing, post-operative, treatable symptoms on these dates according to the referring surgeons, Dr. Miller and Dr. Solman, respectively.

The authorized surgery together with these post-operative treatment records support a finding of significant disability of the right shoulder. The objective clinical notes of the authorized surgeon, taken in context of the post-surgical calendar, are corroborated by MRI study. Similarly, clinical notes of Dr. Solman, also post-surgical in time, are corroborated by another MRI study. The comprehensive result of these treatment events is proof of a course of chronic pain, positive clinical findings for shoulder examinations, and positive MRI findings of treated and untreated pathology. Full communication of these findings with Claimant is presumed. These notes, and the reasonable inferences that may be drawn, are sufficient to predicate a finding of permanent partial disability.

Section 287.190.1 RSMo (2005) provides that an employer shall pay compensation for “... the proportionate loss of use of any of one or more of the members mentioned in the schedule of losses.” The shoulder is the first member mentioned in the Schedule. Section

287.190.1(1). Further, the statute requires that permanent partial disability shall be demonstrated and certified by a physician. Section 287.190.6. These terms are not defined in Chapter 287. Schussler and Carkeek were decided since passage of these requirements in the 2005 amendments.

Here, Claimant proffered medical records documenting the severe injury, surgery and post-surgical problems he sustained as a result of the reported accident. It is all-important here to note that Employer accepted liability in this case and for which Claimant received *authorized* treatment, including surgery. His post-operative complaints, corroborated by MRI findings certified by qualified physicians, demonstrate severe right shoulder injury with the above described chronic symptoms and limitations. A reasonable inference of some permanent partial disability is made from this record of evidence. However, because Claimant did not offer competent evidence of PPD attribution (i.e. proportionate losses) for this 2008 injury and that from his 2005 right shoulder injury, accordingly, the amount of PPD benefits that may be awarded is limited. See Bock v. City of Columbia, 274 S.W.3d 555 (Mo.App. 2008).

Future Medical Treatment/Expenses

Claimant seeks future medical expenses. Future expense *awards* may be indefinite but the underlying theory of *medical causation* may not. See Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997), Williams v. A.B. Chance Co., 676 S.W. 2d 1 (Mo. App. 1984), and Griggs v. A.B. Chance Co., 503 S.W.2d 697, 703 (Mo.App. 1973). Chatmon v. St. Charles County Ambulance, 55 S.W.3d 451 (Mo.App. 2001). Here, Claimant offered no expert testimony and his proffer of narrative reports was unsuccessful. Thus, Claimant failed to prove by competent evidence that future treatment would be necessary.

SIF Liability

Claimant offered no testimony of his own nor other evidence of pre-existing PPD from his 2005 right shoulder surgery. Accordingly, the issue is deemed abandoned. Section 287.220.1 RSMo (2000).

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have sustained 15 percent PPD of the right shoulder. No greater amount of PPD may be awarded on this record of evidence without expert testimony. No other benefits are awarded. The SIF claim is dismissed.

Date: _____

Made by: _____

Joseph E. Denigan
Administrative Law Judge
Division of Workers' Compensation