

**FINAL AWARD ALLOWING COMPENSATION**

(In Compliance with the September 21, 2011, Mandate from the Missouri Court of Appeals for the Western District)

Injury No.: 06-079688

Employee: Mark Tombaugh  
Employer: Chux Trux (Settled)  
Insurer: Travelers Insurance Co. (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

**Procedural History**

This case was submitted to the administrative law judge (ALJ) for the purpose of determining whether employee was permanently and totally disabled by the combined effects of the August 25, 2006, injury and employee's preexisting disabilities.

In an award dated May 3, 2010, the ALJ found that employee is permanently and totally disabled, but only when the post-accident worsening of his progressive cardiac condition was considered. The ALJ found that when excluding the post-accident worsening of employee's cardiac condition, employee was merely permanently partially disabled. Therefore, the ALJ denied employee's claim for permanent total disability benefits against the Second Injury Fund and only awarded permanent partial disability enhancement of 10% against the Second Injury Fund. This amounted to 35.95 weeks of permanent partial disability benefits (.10 x 359.5 weeks).

Employee filed an Application for Review with the Labor and Industrial Relations Commission (Commission) alleging that the ALJ erred by misstating the evidence in her award and relying on said misstatement to deny employee's claim for permanent total disability benefits. Employee alleged that the ALJ's misstatement occurred when she stated that "Dr. Koprivica's assessment of [employee's] permanent total disability includes the cardiac condition." Employee argued that Dr. Koprivica, in fact, testified during his deposition that employee was permanently totally disabled without consideration of employee's prior cardiac condition.

After reviewing the evidence and considering the whole record, the Commission found that the award of the ALJ was supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirmed the decision of Chief ALJ Paula A. McKeon, dated May 3, 2010.

Employee appealed the Commission's decision to the Missouri Court of Appeals for the Western District (Court).

On August 30, 2011, the Court issued an opinion reversing and remanding the November 1, 2010, award and decision of the Commission. *Tombaugh v. Treasurer of the State of Missouri as Custodian of the Second Injury Fund*, WD73171, (Mo. App.

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W.D., August 30, 2011). By mandate dated September 21, 2011, the Court remanded this matter to the Commission for further proceedings consistent with the Court's opinion. Specifically, the Court instructed the Commission to clarify whether it made a credibility determination with regard to Dr. Koprivica's conclusion that employee is permanently and totally disabled even excluding the heart condition. The Court further instructed the Commission to state whether its denial of total, permanent disability was based on any non-medical factors.

In light of the Court's reversal and remand, we issue this award again affirming the award of the Administrative Law Judge, as supplemented herein.

### **Clarification of Facts**

Dr. Koprivica opined in his September 25, 2007, independent medical evaluation that employee's cardiac impairment is 50% of the body as a whole. Dr. Koprivica concluded that, when considering all of employee's disabilities, including his cardiac condition, employee is permanently and totally disabled.

In a subsequent independent medical evaluation on May 29, 2009, Dr. Koprivica again included employee's cardiac condition as a preexisting disability in his determination that employee is permanently and totally disabled.

Dr. Koprivica testified during a deposition on March 5, 2010, that when employee's preexisting conditions, including his cardiac condition, were combined with effects of employee's work-related accidents, the result was that employee was permanently and totally disabled. Finally, Dr. Koprivica testified that employee's permanent and total disability is "attributable to all the conditions that [he] had identified..." which included employee's cardiac condition.

After stating the aforementioned opinions in his reports and deposition, Dr. Koprivica later testified that employee is "totally disabled" even taking the heart condition out of the equation. We do not find this testimony credible. Throughout the record, Dr. Koprivica consistently included employee's cardiac condition as part of the preexisting disabilities that combine with employee's primary injury to render him permanently and totally disabled. We do not find that one contrary utterance at the end of his deposition to completely trump all of his prior opinions expressed in his deposition and independent medical evaluations. We find that the weight of the evidence establishes that employee's cardiac condition contributed largely to Dr. Koprivica's ultimate conclusion that employee is permanently and totally disabled.

In addition to the aforementioned credibility finding, our decision to deny employee's claim for permanent total disability benefits is also based on non-medical factors. Specifically, we rely on employee's testimony regarding whether any alleged preexisting cardiac limitations were a hindrance or obstacle to employment or reemployment.

Employee testified that prior to the primary injury he had fatigue and shortness of breath. However, employee also testified that he regularly smoked cigarettes during this time, which we find could have just as easily contributed to these complaints as a

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cardiac condition could have. In fact, employee's complaints of fatigue and shortness of breath were not sufficient for him to miss any work or to even consult with a doctor regarding said symptoms. Lastly, even though employee complained that his fatigue slowed his work productivity, he denied ever being disciplined for slow productivity caused by his cardiac condition or symptoms therefrom.

We find, based on employee's testimony and the record as a whole, that there is simply insufficient evidence to support employee's argument that his cardiac condition manifested itself as an actual or measurable disability at the time of the primary claim.

We find that Dr. Koprivica's permanent partial disability ratings with regard to employee's primary injury and preexisting disabilities are credible. However, we find that Dr. Koprivica's testimony stating, employee is "totally disabled" even taking the heart condition out of the equation, is not credible. We ultimately concluded, and readopt in this award, that employee is merely permanently partially disabled when his cardiac condition is excluded from the determination of the nature and extent of his disability.

The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued May 3, 2010, is attached and incorporated by this reference.

The Commission further approves and reaffirms 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.

Given at Jefferson City, State of Missouri, this 9<sup>th</sup> day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Mark Tombaugh

### **DISSENTING OPINION**

I did not participate in the initial review and decision of the Commission, as I was not a sitting member at that time; however, having reviewed the evidence and considered the whole record, I agree with and adopt former Commissioner John J. Hickey's dissenting opinion, issued November 1, 2010.

In denying employee's claim for permanent total disability benefits, the majority is taking the position that employee's cardiac condition did not manifest itself as an actual and measurable disability at the time the work injury occurred. However, the majority is also taking the position that employee is currently permanently and totally disabled **only if you consider his cardiac condition** along with his other disabilities. I disagree with the majority's apparent conclusion that all of employee's disability attributable to his cardiac condition occurred subsequent to the primary injury. It is my opinion, based on the employee's testimony, the medical records, and Dr. Koprivica's report, that employee should be awarded permanent total disability benefits instead of the mere permanent partial disability benefits awarded by the administrative law judge.

Under Missouri Workers' Compensation law, "[I]ability of the Second Injury Fund is triggered only 'by a finding of the presence of an actual and measurable disability at the time the work injury is sustained.'" *E.W. v. Kansas City Missouri Sch. Dist.*, 89 S.W.3d 527, 537 (Mo. App. 2002), citing *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. 1999).

Employee sustained a work-related neck injury on August 25, 2006, which ultimately resulted in a two-level cervical fusion. During routine pre-hospitalization for neck surgery on November 16, 2006, employee failed an EKG heart examination. Employee was referred to a cardiologist and underwent a triple by-pass on November 21, 2006.

Employee testified that although his cardiac condition was not diagnosed until November 2006, he was having substantial problems with his heart well before the accident. Employee testified that during the time period leading up to the accident he had been experiencing increased fatigue. Employee stated that he would get winded from going up a flight of steps and would get severely "over-winded" when he was doing even small chores like mowing the lawn. He also stated that it took a long time for him to recover once he lost his breath.

Employee stated that he believed his heart condition slowed him down at work because it was hard to work when he was constantly out of breath. Employee recalled going from being able to carry two boxes of tools, down to one, and eventually having to buy a cart with wheels that allowed him to roll his tools around.

The majority explains away the aforementioned symptoms by pointing out that employee was a smoker during that time. I disagree with the majority's conclusion as Dr. Koprivica's expert medical opinions make clear that these symptoms were caused by his undiagnosed progressive heart condition.

Dr. Koprivica testified that he pointed out in both of his reports that employee's cardiac impairment was symptomatic and present prior to the August 25, 2006, accident. He

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further testified that although employee's cardiac impairment was not diagnosed until after the accident on August 25, 2006, it was clearly disabling before the accident.

Dr. Koprivica testified that in his opinion employee was permanently and totally disabled. Dr. Koprivica made clear that in coming to the conclusion that employee is permanently and totally disabled he excluded post-accident progression of employee's cardiac impairment. He found employee permanently and totally disabled as a result of the combination of employee's injuries from the August 25, 2006, accident and his preexisting disabilities (including employee's preexisting cardiac impairment).

Although liability of the Second Injury Fund is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained, to qualify as a preexisting condition, it need not be shown that the employee or the employer knew of the preexisting disability prior to the work injury. *Messex*, 989 S.W.2d at 214. Therefore, it is not dispositive that employee's cardiac impairment had not yet been diagnosed at the time of the accident. It is only pertinent that employee's cardiac impairment *existed* at the time of the accident. It is clear based on employee's testimony and the fact that he underwent triple by-pass surgery less than three months after the accident that the onset of employee's cardiac impairment began well before August 25, 2006, and, therefore, existed at the time of the accident.

For the foregoing reasons, I disagree with the administrative law judge and the majority's conclusion that there is insufficient evidence in the record to support that employee's cardiac condition manifested itself as an actual or measurable disability at the time of the primary claim. I find that the great weight of the evidence establishes that employee is permanently and totally disabled as a result of the injuries from the August 25, 2006, accident combining with his preexisting disabilities. As such, I would reverse the award of the administrative law judge merely awarding employee permanent partial disability benefits and award employee permanent total disability benefits.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Curtis E. Chick, Jr., Member

**FINAL AWARD  
As to the Second Injury Fund Only**

Employee: Mark Tombaugh

Injury No.: 06-079688

Employer: Chux Trux

Insurer: Travelers Insurance Co.

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

Hearing Date: March 10, 2010

Checked By: PAM/cy

**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: August 25, 2006.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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 occurred or occupational disease contracted: Mark Tombaugh injured his neck in the course and scope of his employment with Chux Trux.

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: Neck, body as a whole.
14. Nature and extent of any permanent disability: Previously settled with Employer for 35% body as a whole.
15. Benefits paid to-date for temporary disability: \$739.40.
16. Value necessary medical aid paid to date by employer/insurer: \$48,080.39.
17. Value necessary medical aid not furnished by employer/insurer: None.
18. Employee's average weekly wage: N/A
19. Weekly compensation rate: \$402.66/\$376.55
20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: N/A
22. Second Injury Fund liability: Yes.  
Permanent partial disability benefits of \$13,536.97
23. Future requirements awarded: N/A

Said payments to begin upon receipt of Award 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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Frank Eppright.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Mark Tombaugh

Injury No.: 06-079688

Employer: Chux Trux

Insurer: Travelers Insurance Co.

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

Hearing Date: March 10, 2010

Checked By: PAM/cy

On March 10, 2010 the parties appeared for hearing. The Employee and Employer settled the claim for permanent partial disability in Kansas prior to hearing. The Division had jurisdiction to hear this claim pursuant to Section 287.110. The Employee, Mark Tombaugh, appeared in person and with counsel Frank Eppright. The Second Injury Fund appeared by Assistant Attorney General Laura Van Fleet.

### **STIPULATIONS**

At the hearing, the parties stipulated to the following:

1. That Employer and Employee were operating under and subject to the provisions of the Missouri Workers' Compensation law;
2. That Employee sustained accidental injury arising out of and in the scope and course of employment;
3. That Employer had notice of the claim and a timely claim for compensation was filed;
4. That the Employee's compensation rate is \$402.66/\$376.55;
5. That Employer's liability was previously settled for \$58,500 in Kansas;
6. That prior to settlement, the Employer paid compensation in the amount of \$8,739.40 and medical expenses in the amount of \$40,080.39.

### **ISSUE**

The parties requested the Division to determine whether Employee was permanently and totally disabled by the combined effects of the injury of August 25, 2006 and pre-existing disabilities.

### **FINDINGS OF FACT AND RULINGS OF LAW**

Mark Tombaugh is a 57-year-old former “after market” truck equipment installer for Chux Trux. Tombaugh sustained a work-related neck injury on August 25, 2006 which ultimately resulted in a two-level cervical fusion. During routine pre-hospitalization for neck surgery, Tombaugh failed an EKG heart examination. Tombaugh was referred to a cardiologist who eventually performed a triple bypass surgery in May 2007.

Tombaugh has not returned to work since the August 25, 2006 injury.

Tombaugh settled his August 25, 2006 claim in Kansas for \$58,500. Dr. Koprivica assigned a 35% permanent partial disability body as a whole.

Tombaugh has a number of disabilities which predate his August 25, 2006 injury for which Dr. Koprivica made the following disability assessments:

1. Prior right severe carpal tunnel syndrome 30% permanent partial disability at the 175 week level;
2. Prior left cubital tunnel 30% permanent partial disability at the 210 week level. Permanent restrictions from constant pushing, gripping, grasping and vibration were imposed as a result of those two prior injuries;
3. Prior bilateral impingement syndrome 10% to each shoulder at the 232 week level with permanent restrictions from constant overhead lifting;
4. Prior thoracic spine fusion and mechanical low back pain which Dr. Koprivica assigned 20% body as a whole permanent partial disability with restriction from constant bending and awkward postures;
5. Prior right knee arthroscopy with 15 % permanent partial disability and restrictions against constant squatting, crawling or kneeling;
6. Prior cardiac impairment of 25% body as a whole for undiagnosed or treated cardiac condition.

Dr. Koprivica testified that Tombaugh is permanently and totally disabled. In his opinion, Tombaugh is permanently totally disabled due to a combination of disabilities, including the prior right carpal tunnel, prior left cubital tunnel, bilateral shoulder impingement, prior right knee surgery, and cardio myopathy, which was not diagnosed prior to the August 25, 2006 injury. Dr. Koprivica opined that the heart condition was disabling because of fatigue and shortness of breath that Tombaugh suffered prior to the August 25, 2006.

Dr. Koprivica’s opinion of permanent total disability specifically excludes Tombaugh’s subsequent significant progression of his coronary artery disease and subsequent right total knee replacement.

Tombaugh claims he is permanently and totally disabled due to the combined effects of his August 25, 2006 injury and pre-existing disabilities.

There is no dispute that Tombaugh is permanently and totally disabled. The issue is whether Tombaugh's cardiac condition, which was not medically treated or diagnosed prior to the August 25, 2006 injury, can combine with his other pre-existing disabilities and the primary claim to trigger Second Injury Fund liability and render Tombaugh permanently and totally disabled.

To establish Fund liability, Tombaugh must show "either that (1) a pre-existing partial disability combined with a disability or (2) the two disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself. Gassen v. Lienbengood, 134 S.W. 3d 75, 79 (Mo. App. W.D. 2004). "When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the claimant provide evidence to support a finding, among other elements, that he had a pre-existing permanent disability." Messex v. Sachs Elec. Co., 989 S.W. 2d 206, 214 (Mo. App. E.D. 1999). Fund liability is only triggered "by a finding of the presence of an actual and measurable disability at the time the work injury is sustained." E.W. v. Kansas City Mo. School Dist., 89 S.W. 3d 527, 537 (Mo. App. W.D. 2002)

To qualify as a pre-existing condition, it need not be shown that the claimant or the employer knew of the pre-existing disability prior to the work injury. Messex, 989 S.W. 2d at 214. However, the claimant must establish that an actual or measurable disability existed at this time. *Id.* The disability must be "of such seriousness as to constitute a hindrance or obstacle to [her] employment." Loven v. Greene County, 63 S.W. 3d 278, 283 (Mo. App. 2001). Pre-existing conditions are not denominated "disabilities" as of the date of the second injury simply because, at some point in the future, they combine with that injury to render the claimant permanently and totally disabled. See Wilhite v. Hurd, 411 S.W. 2d 72, 77-78 (Mo. 1967) (pre-existing cataract was not sufficiently disabling at the time of workplace accident even though its natural progression thereafter cause a loss of vision.)

Tombaugh testified that he had fatigue and shortness of breath which he and Dr. Koprivica attributed to his heart condition. Tombaugh also testified he was regularly smoking cigarettes during this time which can also cause shortness of breath. Tombaugh's complaints of fatigue and shortness of breath were not sufficient for him to even consult with a doctor regarding his symptoms. There is simply insufficient evidence in the record to support that Tombaugh's cardiac condition manifested itself as an actual or measurable disability at the time of the primary claim. Dr. Koprivica's assessment of Tombaugh's permanent total disability includes the cardiac condition. Accordingly, there is insufficient evidence to support Tombaugh's claim for permanent total disability benefits.

There is competent and substantial evidence in the record to trigger Second Injury Fund liability for the enhanced cumulative disabilities sustained by Tombaugh.

Based on the medical records and reports, expert testimony and Claimant's testimony, I find the following:

Tombaugh sustained 35% body as a whole disability or 140 weeks as a result of his August 25, 2006 injury.

Tombaugh sustained pre-existing disabilities which meet statutory thresholds and were of such seriousness as to constitute a hindrance or obstacle to employment or reemployment as follows:

- 30% of the 175 week level right upper extremity;
- 30% of the 210 week level left upper extremity;
- 20% body as a whole referable to the thoracic spine;
- 15% of the 160 week level right lower extremity.

The total weeks for pre-existing disabilities are 219.5.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, cause 10% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability represents 140 weeks for the last injury and 219.5 weeks for pre-existing injury for a total of 359.5 weeks, 10% of which is 35.95 weeks of overall greater disability.

The award of compensation from the Second Injury Fund is  $(35.95 \times 376.55)$  or \$13,536.97.

An attorney's lien in the amount of 25% is allowed to Frank Eppright for necessary legal services rendered.

Made by: \_\_\_\_\_

Paula A. McKeon  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated, attested to and transmitted to the parties this \_\_\_\_ day of \_\_\_\_\_, 2010, by:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*