

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

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 3, 2010. 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 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.

Given at Jefferson City, State of Missouri, this 1<sup>st</sup> day of November 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

---

William F. Ringer, Chairman

---

Alice A. Bartlett, Member

---

DISSENTING OPINION FILED  
John J. Hickey, Member

Attest:

---

Secretary

Employee: Mark Tombaugh

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed and permanent total disability benefits should be awarded.

First, there is no dispute that employee suffered an accident that arose out of and in the course of his employment on August 25, 2006, and that those injuries resulting from said accident combined with employee's preexisting disabilities trigger Second Injury Fund liability. The issue is whether employee's cardiac condition, which was not diagnosed prior to the August 25, 2006, injury, combined with his other pre-existing disabilities render employee permanently and totally disabled. 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, "[l]iability 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).

The administrative law judge found that "[t]here 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." The administrative law judge did not find employee permanently and totally disabled absent his cardiac condition, therefore, she awarded employee only permanent partial disability benefits. I disagree with the administrative law judge's conclusions.

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.

Employee: Mark Tombaugh

- 2 -

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 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 claimant'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'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.

---

John J. Hickey, Member