

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

Injury No.: 01-126813

Employee: Zelda Walls
Employer: Wal-Mart (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: Alleged August 8, 2001
Place and County of Accident: Alleged Kansas City, Jackson County, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 11, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Lisa Meiners, issued May 11, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of January 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

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I have reviewed and considered 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.

The parties stipulated that employee sustained a permanent partial disability of 12.5% of the body as a whole as a result of her August 8, 2001, work-related injury. As to preexisting injuries and conditions, the administrative law judge found that employee failed to meet her burden of establishing that her undiagnosed multiple sclerosis was an obstacle or hindrance to employment or reemployment such that it triggered Second Injury Fund liability under § 287.220.1 RSMo.

[I]n order for there to be Fund liability, a claimant has the burden of proving that he had a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment, and that such preexisting disability existed at the time the work-related injury was sustained. *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo. App. 1999); *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997). The Fund is not available where the employee is not shown to have had a preexisting disability at the time of the subsequent work-related injury. *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo. App. 1997).

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Loven v. Greene County, 63 S.W.3d 278, 284 (Mo. App. 2001).

The inquiry is whether there was a preexisting permanent partial disability, known or unknown, at the time of employment which will thereafter combine with a new disability to cause a greater disability than the new injury.

Garibay v. Treasurer of Mo. as the Custodian of the Second Injury Fund, 964 S.W.2d 474, 479 (Mo. App. 1998).

The crux of *Garibay* is that an otherwise-qualified disability could not be ignored just because it was not diagnosed before the work-related injury, was unknown to the employer, or the claimant did not know what he had.

Messex v. Sachs Elec. Co., 989 S.W.2d 206, 214 (Mo. App. 1999).

There is competent and substantial evidence in the record to conclude that employee's as-yet undiagnosed multiple sclerosis was a preexisting permanent partial disability. Employee has established that she experienced at least two distinct episodes of eye problems known to be associated with multiple sclerosis before her August 8, 2001, neck injury; the 1980 outward-turning eye incident, and earlier bouts with double vision. In addition, employee established through the medical records that she suffered from another multiple sclerosis marker – headaches – for which she missed work. Dr. Parmet reports employee was suffering from headaches for more than a decade. Employee's multiple sclerosis symptoms were disabling before her work injury. The administrative law judge erred by ignoring this otherwise-qualified disability simply because it was not diagnosed before the work-related injury, was unknown to employer, and employee did not know what she had. *Id.*

Dr. Parmet testified that it was more likely than not that multiple sclerosis preexisted the August 8, 2001 neck injury. He based his opinion on objective evidence of employee's severe neurological compromise and significant lesions of the brain at the time of her ultimate diagnosis. Employee does not have to establish a preexisting permanent partial disability by absolute certainty. Rather, employee need only establish the preexisting permanent disability by a reasonable medical certainty. The testimony of Dr. Parmet satisfies employee's burden.

Employee has established that her multiple sclerosis was a disability as described in *Garibay*, that it existed on the date of the primary injury, and that it is permanent. Employee's multiple sclerosis constitutes a hindrance or obstacle to employment under § 287.220.1. Second Injury Fund liability has been triggered.

Terry Cordray, a vocational expert, testified that employee has less than a high school education and she has limited learning abilities. As a result of the primary injury, employee is limited to sedentary-light unskilled work. This results in a 49% loss of access to available jobs in the area. Such jobs entail duties such as operating a

keyboard, operating a cash register, or assembling small products. Mr. Cordray explained that for these types of work, it is essential that an employee have good functional use of her upper extremities. Unfortunately, employee's diminished functional use of her upper extremities due to her preexisting multiple sclerosis deprives employee of the opportunity to compete for even sedentary-light unskilled work. Based upon the foregoing, Mr. Cordray believes that it is the combination of the disability from employee's neck injury (that deprives employee of the opportunity to perform greater than sedentary-light duty) and employee's preexisting multiple sclerosis (that deprives employee of good functional use of her upper extremities) that renders employee unable to compete in the open labor market.

I find credible the testimony of Terry Cordray. I find that employee is permanently and totally disabled. I conclude that the Second Injury Fund is liable for employee's permanent total disability. I would reverse the award of the administrative law judge. Because my colleagues on the Commission disagree, I respectfully dissent from the award and decision of the majority.

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John J. Hickey, Member
AWARD

Employee: Zelda Walls Injury No. 01-126813

Dependents: N/A

Employer: Wal-Mart

Insurer: Self-Insured

Additional Party: Missouri State Treasurer, Custodian of Second Injury Fund

Hearing Date: April 18, 2005

Checked by: LM/lh

FINDINGS OF FACT AND RULINGS OF LAW

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: August 8, 2001.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Missouri, Jackson 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 neck while lifting a 50-pound bag of dog food.

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: Cervical region.
14. Nature and extent of any permanent disability: 12.5 percent body as a whole.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$24,291.78.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$239.57.
19. Weekly compensation rate: \$159.72/\$159.72.
20. Method wages computation: By Stipulation.

COMPENSATION PAYABLE

21. Second Injury Fund liability: There is no liability on behalf of the Second Injury Fund.

Any compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Jerry Kenter.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Zelda Walls

Injury No: 01-126813

Dependents: N/A

Employer: Wal-Mart

Insurer: Self-Insured

Additional Party: Missouri State Treasurer, Custodian of the Second Injury Fund

Hearing Date: April 18, 2005

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The parties appeared for hearing on April 18, 2005. The Employee Zelda Walls appeared in person and through her attorney Jerry Kenter. The Employer, Wal-Mart, and its Insurer, American Home Assurance Company, settled their claim on April 18, 2005. The Second Injury Fund was present and represented by LaSandra Pearl.

STIPULATIONS

The parties stipulated that:

- 1) the Employer on or about August 8, 2001, was an employer operating subject to Missouri's workers' compensation law;
- 2) that its liability was fully insured by American Home Assurance Company;
- 3) that Ms. Zelda Walls was its employee;
- 4) that Ms Walls was working subject to the law in Kansas City, Missouri, Jackson County;
- 5) that Ms. Walls sustained an accident arising out of and in the course of her employment;
- 6) that she notified the employer of the injury as well as filed the claim within the time allowed by law;
- 7) that the average weekly wage was \$239.57, making the wage rate to be \$159.72;
- 8) that Ms. Walls last day of work was December 2, 2002, (a) the parties stipulated to 12.5 percent permanent partial disability body as a whole referable to the cervical neck due to the August 8, 2001 incident;
- 9) that the employer furnished medical aid in the sum of \$24,291.78 and has paid \$5,727.18 in temporary total disability compensation.

ISSUE

- 1) The issue to be resolved is whether there is Second Injury Fund liability.

On August 8, 2001, Ms. Walls, while working as a cashier at Wal-Mart sustained an injury to her neck when moving a 50-pound bag of dog food. She told her supervisors of the injury; then went to the emergency room at Research Medical Center.

Later in September of 2001, Dr. Terence Pratt diagnosed Ms. Walls with a herniated disc at the C6-7 level. Several doctors, including Dr. Pratt, Takacs and Kauffman, recommended a cervical fusion. Eventually, Ms. Walls underwent an anterior cervical fusion performed by Dr. Hylton on July 10, 2002.

Ms. Walls returned to light duty at Wal-Mart with restrictions imposed by Dr. Hylton in September of 2002. Indeed, Dr. Hylton opined Ms. Walls had reached maximum medical improvement on October 17, 2002, and placed permanent work restrictions of no lifting over 30 pounds. Dr. Hylton also noted Ms. Walls had a 10 percent impairment body as a whole due to the August 8, 2001, incident.

Ms. Walls continued work as a cashier for Wal-Mart until December 2, 2002, when she left work and reported to an emergency room for paralysis to the left side of her face. Immediately the Baptist emergency room doctors performed several diagnostic tests, including an MRI. By January 2003, the complaints of slurred speech and facial numbness were attributed to multiple sclerosis.

Currently, Ms. Walls has ongoing pain in her neck and right arm. She has loss of grip strength in both hands with the right worse than the left. Ms. Walls also has pain, stiffness and numbness through out her entire body. Ms. Wall's speech is slurred and her memory lapsed. Additionally, Ms. Walls experiences daily headaches since August 8, 2001. Presently she has severe self-limitations with sitting, standing and walking she had not experienced prior to August 8, 2001. Ms. Walls has problems with falling due to weak lower extremities and now uses a walker to get out of bed.

Ms. Walls testified that her symptoms as noted above worsened after the cervical fusion on July 10, 2002. Further, Ms. Walls last worked on December 2, 2002, because of those problems associated with multiple sclerosis. Baptist hospital medical records from 2003 note Claimant impaired and limited on mobility and self-care due to symptoms associated with multiple sclerosis. One of her many treating doctors, Dr. Willie O. McLemore opined "Ms. Zelda Walls is disabled from multiple sclerosis." (Exhibit F, p 98).

Dr. Alan Parmet testified Claimant was permanently and totally disabled as a result of the neck combining with the symptoms of the multiple sclerosis. Dr. Parmet, opined Claimant sustained an 85 percent permanent partial disability as a result of the multiple sclerosis and a 15 percent permanent partial disability body as a whole due to the work injury of August 8, 2001.

Although Dr. Parmet could not assess with any degree of reasonable medical certainty that Ms. Walls' multiple sclerosis was a disability pre-existing August 8, 2001, he noted that the multiple sclerosis was more likely than not in existence by August 2001.

Regardless, Dr. Parmet did not assess nor find reason to assess Claimant having any pre-existing disabilities from the symptoms of Ms. Walls prior to August 8, 2001. In fact, Dr. Parmet wrote, "The earliest physical limitation I can attribute to multiple sclerosis, however, begins with left lower numbness and weakness in the summer of 2002 during her recovery of her cervical spine surgery."

Terry L. Cordray, a vocational rehabilitation expert, opined Ms. Walls was unemployable in the open labor market due to the restrictions from both the cervical injury and multiple sclerosis, as well as drowsiness caused by Ms. Wall's narcotic pain medications. Mr. Cordray stated Ms. Walls is restricted to less than 1 percent of jobs within the labor market due to her upper extremity limitations attributed to multiple sclerosis. However, Ms. Walls had only 49 percent loss of access to the job market when looking at those restrictions from the August 8, 2001, cervical injury alone.

Although Ms. Walls requests the Division make a finding that she is permanently and totally disabled as result of pre-existing blurry vision and headaches in combination with the neck injury of August 8, 2001, I am unable to do so based on the evidence presented.

LAW

In order to establish Second Injury Fund liability for permanent total benefits, a claimant must prove the following:

- 1) that he or she has permanent disability resulting from a compensable work-related injury. See §287.220.1 RSMo. 1994;
- 2) that he or she has permanent disability predating the compensable work-related injury which is "of such seriousness as to constitute a hindrance or obstacle to employment or to obtain reemployment if the employee becomes unemployable." §287.220.1 RSMo. 1994. Messicks v. Sachs Electric, 989 S.W.2d (Mo.App. 1997); and
- 3) that the combined effect of the disability resulting from the work-related injury and the disability that is attributable to all conditions existing at the time the last injury was sustained results in permanent total disability. Boring v. Treasurer, 947 S.W. 2d 483 (Mo.App. 1997).

Regarding the first requirement, the parties stipulated that Claimant sustained a 12.5 percent permanent partial

disability to the body as a whole as a result of the August 8, 2001 injury. Therefore, the first requirement is met regarding the liability of the Second Injury Fund.

However, I am unable to find based on the scant medical records provided that Claimant experienced any hindrance or obstacle to employment prior to August 8, 2001. Indeed, Ms. Wells testified she missed one week of work prior to August 8, 2001, due to blurry vision. She missed work due to an eye problem because coworkers thought she was contagious with pink eye. There is only 1 out of 507 pages of medical records showing Ms. Walls experienced blurry vision prior to August 8, 2001. The eye exam from 1980 revealed Claimant needed eyeglasses to correct the right esotropia and myopia. I do not consider a person who wears eyeglasses or misses work due to pink eye to have a hindrance or obstacle to their employment.

Ms. Walls next alleges she experienced headaches and missed one week of work due to them prior to August 8, 2001. Again, there is scant evidence out of voluminous records supporting Claimant's theory. She had a concussion from a moving vehicle accident in the late '70s but recovered. In June of 2001, Ms. Walls saw a nurse, Michael Beteet, to report a three-day headache. The nurse felt it could be a possible migraine with allergic-type congestion versus a mixed headache. Like with the claim of blurry vision, I do not find occasional headaches to be a hindrance or obstacle to employment prior to August 8, 2001.

Lastly, I do not think this is a case where Claimant suffered from an unknown but physically disabling condition prior to August 8, 2001, to later discover the name of the malaise after the last work injury. Further, Claimant's own expert, Dr. Parmet, did not opine Claimant suffered any disabling symptoms from multiple sclerosis prior to August 8, 2001. Instead, Dr. Parmet opined Claimant's earliest physical limitation attributed to multiple sclerosis was in the summer of 2002, approximately one year after Claimant's primary injury.

While I agree with Terry Cordray, Dr. Parmet, and Dr. McLemore, that Ms. Walls is unable to work in the open labor market, I do not find she is disabled from a combination of the last accident and any pre-existing condition as defined by law. Instead, Ms. Walls is unemployable in the open labor market as a result of the August 8, 2001, neck injury and the subsequent physical deterioration she now experiences from multiple sclerosis. As such, the Second Injury Fund is not liable to Ms. Walls for any permanent total or permanent partial disability benefits.

Date: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation

Made by: _____

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation