

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

Injury No.: 98-063751

Employee: John E. Watkins  
Employer: Cummings Welding (Settled)  
Insurer: Liberty Mutual Insurance Co. (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: June 6, 1998  
Place and County of Accident: St. Louis, 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. We have reviewed the evidence, read the briefs of the parties, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated May 11, 2005, and awards no compensation in the above-captioned case.

John E. Watkins (employee) sustained the primary injury to his cervical spine and shoulders on June 6, 1998. Employee and employer/insurer settled their case for 35% permanent partial disability referable to the body as a whole. The case was then tried on the sole issue of Second Injury Fund (Fund) liability for permanent total disability pursuant to § 287.220.1 RSMo. The administrative law judge (ALJ) found that employee is permanently and totally disabled due to the combination of several pre-existing injuries with the primary injury and therefore found the Fund liable for permanent total disability benefits. The Fund appeals that liability finding to the Commission. We reverse.

To recover from the Fund, employee had the burden to prove that he had a pre-existing permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or re-employment. *Lammert v. Vess Beverage Inc.*, 968 S.W.2d 720 (Mo. App. E.D. 1998). The law requires that the primary injury combine with actual and measurable pre-existing disabilities *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 215 (Mo. App. E.D. 1999), that existed at the time of the primary injury. *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo. App. E.D. 1999).

We have reviewed the whole record in this case and we conclude, based on the competent and substantial evidence therein, that there is not sufficient competent and substantial evidence in the record to support a finding that the primary injury combined with any pre-existing actual and measurable disability that existed at the time of the primary injury resulting in permanent total disability. Employee did not meet his burden of proof.

In the findings of fact, the ALJ identified the following injuries or conditions as pre-existing the primary injury:

- (1) a burn injury suffered by this 64 year-old employee when he was 5 years old;
- (2) cervical "spondylolisthesis;" and,
- (3) a "learning disability," evidenced by employee's kindergarten reading and fourth grade math ability.

The ALJ concluded as a matter of law that the June 6, 1998, primary injury to the neck and shoulders combined with the pre-existing conditions he had identified to render employee permanently, totally disabled. On that basis, the ALJ found the Fund liable for permanent total disability benefits. However, the ALJ does not cite any competent and substantial evidence in the record from a medical expert supporting his conclusion that any one, or

all of the pre-existing conditions the ALJ identified were actual and measurable “disabilities” for workers’ compensation and Fund liability purposes, § 287.220.1 RSMo (2004); *Messex*, 989 S.W.2d at 215 (Mo. App. E.D. 1999), or that such disabilities existed at the time of the primary injury. *Tidwell v. Kloster Co.*, 8 S.W.3d 585, 589 (Mo. App. E.D. 1999). There is no competent and substantial evidence in the record supporting the conclusion that any of the pre-existing conditions the ALJ identified had ever hindered the employee in his work or that such conditions were or would be an obstacle to his obtaining employment.

There is no competent and substantial evidence in the record that a nearly 60-year-old burn injury combined in any way with the primary injury to disable employee to any degree more than the primary injury by itself or ever hindered or could be an obstacle to his ability to work. There are no medical records concerning the burn injury itself. There is only employee’s testimony that he suffered such burns. There is no medical or other evidence of treatment for such burns at any time after employee was a young child. There is no medical evidence in the record supporting a conclusion that such burn injury functioned as an actual or measurable disability at the time of the primary injury or combined in any way with the primary injury thus disabling employee or impeding his labors. In addition, the employee’s vocational expert, who observed and also interviewed employee at length, did not cite the burn injury as an existing disability at the time of the primary injury or indicate in any way that it was hindering employee’s ability to work or was a potential obstacle to employment or re-employment for employee. Employee did not testify that the burn injury ever interfered with his ability to work or caused him to miss work. Thus, based on the competent and substantial evidence in the record, we find that the burn injury was not an actual and measurable disability at the time of the primary injury and that the primary injury did not combine with it to cause permanent total disability.

Concerning the cervical “spondylosthesis [sic],” identified by the ALJ, Dr. Mirkin, the operating surgeon who treated employee for the primary injury, performing a decompression, discectomy and fusion to repair employee’s primary neck and shoulder injury, diagnosed employee at that time as also suffering from cervical spondylosis as well as disc protrusion at C6-7. There is, however, no evidence in the record that the previously undiagnosed and asymptomatic spondylosis resulted in a permanent disability; was a hindrance or obstacle to employment; or combined with the primary injury to produce an enhanced permanent disability or synergistic effect. There is no evidence in the record of treatment for the condition or that it affected his work or daily activity in any way. In *Messex*, 989 S.W.2d 206 (Mo. App. E.D. 1999), the court ruled that a physically pre-existing degenerative disc disease was not an impediment to employee’s work on the date of the primary injury (no hindrance or obstacle to employment) and was not a pre-existing disability for purposes of Fund liability.

Based on the competent and substantial evidence in the record, we find that the pre-existing spondylosis was not an actual and measurable pre-existing disability at the time of the primary injury, did not combine with the primary injury to cause an enhanced permanent disability and there is no evidence in the record that the condition was a hindrance or obstacle to employment.

There is no expert opinion in the record identifying a learning “disability,” that employee’s academic deficiencies were the result of any diagnosed and measurable condition causing employee’s inability to learn to read or write which impeded employee’s ability to work. The record shows that employee did attain an 8<sup>th</sup> grade education, a minimal ability to read and write and an ability to perform basic math calculations, despite a late start in school. With respect to whether the alleged learning “disability” had ever functioned as a disability to work, the evidence in the record is actually to the contrary. Employee enjoyed a long record of successful employment as a welder, unhindered by his poor academic record.

There is no medical, psychiatric or expert psychological evidence in the record to support the proposition that employee could not have learned to read and write, only that he did not do so. The Wide Range Achievement Test, the only test administered by employee’s vocational expert that is referred to in the record, demonstrated only the current level at which employee could read or write, but not that he could not have learned to read more proficiently. There is no evidence in the record whatsoever, medical or otherwise, identifying an actual, measurable disability rendering employee unable to learn. Vague references from medical records in the 1950’s identifying employee, then a young teenager, as “slow” or having a “low IQ” are not supported by evidence providing a foundation for such conclusions and we find that such references are not credible evidence of the existence of an actual learning “disability” at the time of the primary injury.

Even employee's own testimony only indicates that when he tried to learn to read and write early it was difficult and that as an adult, he failed, not because of an innate inability to attain those skills, but because his stomach would become upset during class. He testified that the stomach upset was controlled quite well by medication but did not testify that he had ever attempted and failed to learn to read and write while on that medication.

In a case where complex medical issues are involved, proof by competent medical evidence is required. *Silman v. William Montgomery & Assoc.*, 891 S.W.2d 173, 176 (Mo. App. E.D. 1995), citing *Downs v. A.C.F. Indus., Inc.*, 460 S.W.2d 293 (Mo. App. E.D. 1970); *Tibbs v. Rowe Furniture Corp.*, 691 S.W. 410 (Mo. App. S.D. 1985) (mental condition). Here, there is no competent and substantial expert medical evidence in the record to support the conclusion that employee was medically or psychologically unable to learn. His vocational expert did testify that he was a "functional illiterate." But where illiteracy is due to lack of education rather than inability to learn, it is not a disability for Fund liability purposes. *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 866 (Mo. App. 1997). No witness testified that employee was actually unable to learn to read and write. Employee's vocational expert conceded that there were certain types of available work at the time that could accommodate poor academic skills and his physical need to stand, sit and move around in limited fashion.

Based on the competent and substantial evidence in the record, we find that none of the employee's pre-existing conditions had a pre-existing permanent partial disability constituting a hindrance or obstacle to employment. Consequently the primary injury did not combine with any actual or measurable pre-existing disability to trigger Fund liability.

Employer/insurer and employee settled the Permanent Partial Disability claim for 35% of the body as a whole. Based on the competent and substantial evidence in the record, we find that there is not sufficient evidence to support a finding that prior actual and measurable disabilities combined with the primary injury, forming the basis for Fund liability for permanent, disability compensation. We therefore reverse the ALJ and find employee permanently, partially disabled at 35% of the body as a whole, in accordance with the settlement reached between employer/insurer and employee.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued May 11, 2005, is attached for reference purposes only.

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of January 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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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 affirmed.

The administrative law judge concluded that employee is permanently and totally disabled and is unable to compete in

the open labor market because of his primary injury combined with his preexisting injuries. As to preexisting injuries and conditions, the administrative law judge found that employee suffered from a burn injury, cervical spondylosis, and a learning disability. The Second Injury Fund argues the administrative law judge erred in awarding permanent total disability because employee failed to prove that his burn injury and stomach problems were obstacles or hindrances to employment such that they triggered Second Injury Fund liability under § 287.220.1 RSMo.

The Second Injury Fund does not allege error with regard to the administrative law judge's finding that the cervical spondylosis and learning disability were preexisting conditions triggering liability. Nor does the Second Injury Fund allege that employee is capable of competing in the open labor market. These issues are not ripe for review but I will briefly touch on them to the extent necessary to show the award is supported by competent and substantial evidence.

[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).

...

"Disability" is defined as "inability to do something"; "deprivation or lack of esp. of physical, intellectual, or emotional capacity or fitness"; "the inability to pursue an occupation or perform services for wages because of physical or mental impairment"; "a physical or mental illness, injury, or condition that incapacitates in any way." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976).

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

There is competent and substantial evidence in the record to conclude that employee's functional illiteracy is a disability as defined in *Loven*. Employee testified that: he started school four years late due to a prolonged hospitalization as a child; he was merely passed along through grade 8; he has attempted to learn to read on several occasions but has been unsuccessful. Mr. England performed testing indicating that employee reads at a kindergarten level and performs math at the third-grade level.

There can be no question that in the vocational context, the inability to read, write, and perform math constitutes a deprivation or lack of intellectual capacity. Employee has established that his functional illiteracy is a disability, that it existed on the date of the primary injury, and that it is permanent. Employee's functional illiteracy constitutes a hindrance or obstacle to employment under § 287.220.1. Second Injury Fund liability has been triggered.

Mr. England testified that employee is unable to compete in the open labor market. Mr. England explained that employee would no longer be able to perform the activities required of welding or other labor/production jobs due to the restrictions resultant from his primary injury. Mr. England explained that employee's academic deficiencies and inability to use his upper extremities in front of him for long periods would prevent employee from performing even less physical service employment. Based upon these opinions, along with consideration of employee's age, Mr. England concluded that claimant is unable to compete in the open labor market.

Based upon the foregoing, I conclude that the Second Injury Fund is liable for employee's permanent total disability. I would affirm 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: John E. Watkins Injury No.: 98-063751

Dependents: N/A Before the  
Division of Workers'  
Employer: Cummings Welding (Settled) Compensation  
Department of Labor and Industrial  
Additional Party: Second Injury Fund Relations of Missouri  
Jefferson City, Missouri  
Insurer:  
Hearing Date: March 11, 2005 Checked by: CTL:tr

#### 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: June 6, 1998
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 was pushing and lifting a heavy object.
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 and shoulders
14. Nature and extent of any permanent disability: Permanent and total disability
15. Compensation paid to-date for temporary disability: \$8,390.27
16. Value necessary medical aid paid to date by employer/insurer? \$19,628.04

Employee: John E. Watkins Injury No.: 98-063751

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages:
19. Weekly compensation rate: \$317.01/\$278.42

20. Method wages computation: Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: (Settled)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:  
weekly differential (\$38.59) payable by SIF for 140 weeks beginning  
June 5, 1998 and \$317.01 per week thereafter for Claimant's lifetime \*

TOTAL: \*

23. Future requirements awarded: N/A

Said payments to begin immediately 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:

Edward A. Gilkerson

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John E. Watkins Injury No.: 98-063751

Dependents: N/A  
Before the  
Division of Workers'

Employer: Cummings Welding (Settled) Compensation  
Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Checked by: CTL:tr

### **PREFACE**

A hearing was held on March 11, 2005. The Claimant, John Watkins, was represented by Attorney Edward A. Gilkerson and the Second Injury Fund was represented by Assistant Attorney General Diana Bartels.

### **ISSUES**

1. Nature and extent of Second Injury Fund liability for Claimant being totally disabled.

### **STIPULATIONS**

1. The rates of compensation for Claimant are \$317.01/\$278.42.

### **EXHIBITS**

The Claimant offered the following exhibits which were admitted into evidence:

- |            |   |
|------------|---|
| Exhibit A. | Deposition of James England.  |
| Exhibit B. | Deposition of R. Peter Mirkin, M.D.   |
| Exhibit C. | St. Anthony's Medical Center Operative Note dated February 25, 1998.              |
| Exhibit D. | City of St. Louis Dept. of Health and Hospitals, St. Louis City Hospital Records. |
| Exhibit E. | Stipulation for Compromise Settlement for Injury Number 98-063751.                |

The Second Injury Fund did not offer any exhibits.

### **FINDINGS OF FACT**

Based upon the competent and substantial evidence, I find:

1. Claimant, while working for his Employer, Cummings Welding, on June 6, 1998, sustained a primary injury while pushing and lifting heavy objects and Claimant's injury resulted in a cervical decompression and fusion.
2. Claimant, at the time of the hearing, was 64 years of age and he last worked for a few days in the fall in 1999 but has not actually worked full time since his injury of June 6, 1998.
3. Claimant's preexisting injuries before the primary injury of June 6, 1998 are a burn injury at the age of 5; preexisting cervical spondylosthesis; a learning disability whereas Claimant reads at the kindergarten level and is at a fourth grade level in mathematics.
4. Claimant did not start grade school until the age of 9 because of his burn injury and he was placed in the special education program in the City of St. Louis and Claimant graduated at 16 years of age from the eighth grade.
5. From all of the evidence it is clear that the Claimant is unable to read and write.
6. Claimant worked as a welder and was able to do because he learned welding by watching other welders.
7. James England, a vocational expert, testified very credibly that Claimant is permanently and totally disabled and unable to compete in the open labor market because of his inability to physically function combined with his limited abilities to read and write as well as the Claimant's age.
8. James England testified on behalf of the Claimant and felt that because of Claimant's overall problems would be unable to engage in any possible employment.

CONCLUSIONS OF LAW

1. Claimant is permanently and totally disabled and unable to compete in the open labor market because of his primary injury combined with preexisting injuries to wit; the burn injury, spondylosthesis and learning disability.
2. Claimant is permanently and totally disabled and is entitled to permanent and total disability benefits from the Second Injury Fund for the Claimant's lifetime.

Date: \_\_\_\_\_

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

Cornelius T. Lane  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*