

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

Injury No.: 04-139635

Employee: James Wilder

Employer: Bartch Roofing Co., Inc. (Settled)

Insurer: Missouri Employers Mutual (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 § 287.480 RSMo. Having reviewed the evidence, read the 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 the award and decision of the administrative law judge dated July 9, 2010, as supplemented herein.

Introduction

The issues stipulated in dispute at the hearing were: (1) medical causation; (2) the nature and extent of disability resulting from the 2004 accident, if any; and (3) Second Injury Fund liability, if any.

The administrative law judge made the following findings: (1) employee's complaints and treatment were medically and causally related to the 2004 work injury; (2) employee is permanently and totally disabled due to the combination of his preexisting disabling conditions and the effects of the work injury; and (3) the Second Injury Fund is liable for permanent total disability benefits.

The Second Injury Fund filed an Application for Review alleging the administrative law judge erred in awarding permanent total disability benefits to employee in that: (1) the administrative law judge applied the wrong standard for permanent total disability; and (2) the evidence shows employee was permanently and totally disabled as a result of the work injury considered alone.

For the following reasons, the Commission affirms the award of the administrative law judge as supplemented herein.

Discussion

We agree with the administrative law judge that employee is permanently and totally disabled due to a combination of the last injury and his preexisting disabling conditions.

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We write this supplemental opinion to more fully address the extent of disability resulting from the work injury considered alone.

Employer's Liability for the 2004 Work Injury

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). However, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. 1999), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). "[I]f claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability." *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004).

The administrative law judge did not make any affirmative findings as to the extent of employer's liability for the 2004 work injury. In calculating Second Injury Fund liability, however, the administrative law judge implicitly found that, as a result of the work injury, employee sustained a 40% permanent partial disability of the left shoulder and a 68.7% permanent partial disability of the body as a whole referable to the cervical spine. These ratings were derived from employee's settlement with employer, and are similar to the ratings provided by Dr. Musich. Of the experts who found employee's work injury compensable, Dr. Musich was the only one to provide ratings.

Having considered the whole medical record in connection with the 2004 work injury and the credible expert testimony, we find that a 40% permanent partial disability of the left shoulder and a 68.7% permanent partial disability of the body as a whole referable to the cervical spine fairly and accurately represent the permanent partial disability that employee sustained as a result of the work injury.

Second Injury Fund Liability

The evidence is overwhelming that employee is permanently and totally disabled. Contrary to the findings of the administrative law judge, even employer's medical expert, Dr. Solman, agreed that, given employee's physical condition when he evaluated him on September 22, 2008, employee is disabled from the workforce. The issue is whether employee is permanently and totally disabled as a result of the last injury considered alone or whether it is due to a combination of the effects of the work injury and employee's numerous preexisting disabling conditions.

Of the medical and vocational experts to render an opinion on the question, Ms. Shea was the only one who explicitly indicated she believed employee was permanently and totally disabled as a result of the work injury considered alone. Specifically, Ms. Shea agreed that when she looked at employee's neck surgeries and their effects and the

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depression employee suffered following the 2004 work injury, employee is permanently and totally disabled from the last injury and its sequelae. Ms. Shea was not asked to elaborate and thus the record does not include an explanation as to how she reached this conclusion. Ms. Shea admitted that she did not perform any vocational testing or labor market surveys.

On the other hand, the testimony of Mr. England, Dr. Solman, and Dr. Musich all support a finding that employee is permanently and totally disabled due to a combination of his preexisting disabling conditions and the effects of the work injury. (Dr. Raskas clearly believed employee to be permanently and totally disabled but did not specifically identify whether he believed it was due to the effects of the work injury alone or a combination of the work injury and preexisting factors). Mr. England originally opined that employee is not actually permanently and totally disabled, but conceded on cross-examination that employee can't work and that, if you believe employee's subjective complaints, it's due to a combination of preexisting conditions and the effects of the work injury. Dr. Solman did not specifically opine whether he believed employee is disabled due to the work injury alone or a combination of factors, but his findings minimizing the effects of the work injury, combined with his admission that employee is now disabled from the workforce, indicate that it was not the work injury alone that permanently and totally disabled employee. Dr. Musich testified that employee is permanently and totally disabled due to a combination of his preexisting disabling conditions and the effects of the work injury. Dr. Musich explained he felt employee was permanently and totally disabled due to his many physical restrictions and his need for daily narcotic medications. Dr. Musich acknowledged that employee was working before December 2004 with all of his preexisting disabling conditions, and that employee's need for daily narcotic medications is due to the work injury. Dr. Musich, however, did not relent when he was pressed on cross-examination but rather reaffirmed his opinion that it was the effects of the work injury in conjunction with employee's multiple other preexisting pathologies that render employee permanently and totally disabled. We find Dr. Musich and Mr. England credible.

Because we otherwise agree with the analysis, findings, and conclusions of the administrative law judge, we affirm the remainder of the award without supplementation.

Conclusion

We supplement the award of the administrative law judge with the foregoing findings, conclusions, and comments. In all other respects, we affirm the award. The Second Injury Fund is ordered to pay to employee permanent total disability benefits at the rate of \$619.43 per week, beginning January 8, 2008, and continuing thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Linda J. Wenman, issued July 9, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

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Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 22nd day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Wilder Injury No.: 04-139635
Dependents: N/A Before the
Employer: Bartch Roofing Co., Inc. (settled) **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Missouri Employers Mutual (settled) Jefferson City, Missouri
Hearing Date: April 7, 2010 Checked by: LJW

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: December 22, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
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: While covering insulation with a tarp, Claimant fell through the insulation catching both arms as he fell.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left shoulder and cervical spine.
14. Nature and extent of any permanent disability: 40% PPD referable to the left shoulder, and 68.7% BAW PPD referable to the cervical spine.
15. Compensation paid to-date for temporary disability: \$95,834.67 representing 154 5/7th weeks.
16. Value necessary medical aid paid to date by employer/insurer? \$28,027.69

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: sufficient to produce the following rates:
- 19. Weekly compensation rate: \$619.43 / \$354.05
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable by Employer: Previously Paid

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
Weekly differential of \$265.38 payable by SIF for 367.6 weeks beginning January 8, 2008,
and \$619.43 weekly thereafter, for Claimant's lifetime.

TOTAL: TO BE DETERMINED

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 in favor of the following attorney for necessary legal services rendered to the claimant: Christopher Wagner

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Wilder	Injury No.: 04-139635
Dependents:	N/A	Before the
Employer:	Bartch Roofing Co., Inc (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Missouri Employers Mutual (settled)	Checked by: LJW

PRELIMINARIES

A Second Injury Fund hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on April 7, 2010. The parties declined post-trial briefs, and the case was formally submitted on the day of hearing. Attorney Chris Wagner represented James Wilder (Claimant). Assistant Attorney General Toni Camp represented the Second Injury Fund (SIF).

On March 31, 2010, Claimant and Bartch Roofing Company, Inc., (Employer) reached a settlement regarding the issue of Employer's permanent partial disability liability in this claim. The stipulation represented 40% PPD referable to Claimant's left shoulder, and 68.7% BAW PPD referable to his cervical spine due to an accidental injury that occurred on December 22, 2004.

Prior to the start of the hearing the parties identified the issues for disposition in this case as medical causation, and the liability of SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits. Claimant offered Exhibits A-M, and SIF offered no exhibits. The exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is fifty-one years old, and completed the 7th grade. As a child, Claimant lived in foster care, and at times on the streets. For a period of time, Claimant's sister removed him from foster care, and due to his chronological age he was placed in the 11th grade, but never completed the 11th grade or high school. During his working life, Claimant has worked as a busboy and in the roofing industry.

2. Claimant has the following preexisting conditions that preceded his last work related injury: an injury to his right middle and index fingers, with a partial loss of his DIP joint on his index finger; left leg vascular problems resulting in vein stripping and leg numbness; during 1981 bilateral ankle injuries with residual complaints that his ankles will “give way” and swell; a left knee in 1987 that resulted in four surgical procedures, Claimant took a pay-cut to become a driver as he no longer felt safe climbing a roof, and he settled that case for 47.5% PPD referable to his left knee; a 1995 bilateral wrist injury with surgery to his right wrist, and he settled that case for 25% PPD referable to his right wrist and 7.5% PPD referable to his left wrist; and a 1998 cervical spine injury with a 1999 MRI demonstrating bilateral foraminal stenosis secondary to hypertrophy at C5-6, Claimant received trigger point injections, he returned to work, but experienced persistent pain along the left trapezius and cervical muscle area, and he settled this case for 10% BAW PPD.

3. During December 2004, Claimant was working for Employer as a driver. On December 22, 2004, Claimant was running kittle and unloading insulation. While covering the insulation with a tarp, Claimant fell through the insulation and caught himself by both arms. Claimant initially received conservative care, was referred to an orthopedic surgeon, Dr. Solman, and was later diagnosed with a left rotator cuff tear and cervical strain. On April 4, 2005, Dr. Solman performed surgery to repair a partial thickness rotator cuff tear, acromial decompression, and subscapularis repair.

4. Throughout his post-operative care, Claimant continued to complain of cervical symptoms including numbness and tingling of his hands. Physical therapy was initiated. On July 11, 2005, a cervical spine MRI was obtained that demonstrated C5-6 and C6-7 osteophytic ridging and uncovertebral joint spurs producing encroachment on the spinal canal foramina. Following review of Claimant’s medical record and MRI, Dr. Solman opined Claimant “may certainly have strained or exacerbated his neck pain at the time of his left shoulder injury but it does not appear that he has significantly aggravated his cervical spine condition. He has chronic DDD [degenerative disc disease] of the cervical spine, especially at C5-C6 and C6-C7 levels which appears to be chronic and progressive in nature.” Dr. Solman suggested Claimant pursue further cervical spine treatment with his primary care physician. On October 13, 2005, Dr. Solman determined Claimant was unable to fully rehabilitate his left shoulder due to his cervical spine problems, and discharged Claimant from care to allow him to seek treatment for his neck.

5. Following the advice of Dr. Solman, Claimant underwent treatment for his cervical spine with Dr. Raskas. Following a review of Claimant’s medical records, Dr. Raskas opined “it appears that this is a new injury albeit he had a prior injury in the past. By history he had gone along for five or six years without significant symptoms that disabled him from being able to work. Certainly, the mechanism of the injury can produce these symptoms and it is not clear from the records that he ever had a radiculopathy. Certainly he has a radiculopathy now.” On December 22, 2005, Claimant underwent a C5-6 and C6-7 anterior decompression and fusion. Post-operatively, Claimant encountered difficulty forming a solid fusion at C6-7, and underwent two additional surgeries, on August 4, 2006 and July 11, 2007, before fusion was obtained. Claimant’s final surgery involved a posterior fusion and foraminotomy. Additionally during the post-operative period Claimant was treated for depression. Claimant was released from care on January 7, 2008 after a CT scan demonstrated a solid cervical fusion a C6-7. When released Claimant was seeing a pain management specialist and taking Methadone. Dr. Raskas didn’t

place work restrictions on Claimant “as I knew that from his level of disability that he was not capable of working at all.” Claimant hasn’t worked since his release by Dr. Raskas.

6. On March 31, 2010, Claimant settled his case with Employer for 40% PPD referable to his left shoulder, and 68.7% BAW PPD referable to his cervical spine. As of hearing, Claimant continues to take Methadone and Flexeril daily, supplemented by Oxycodone as needed to control his pain. Claimant attempts to assist his wife with housekeeping chores, but is no longer able to mow the lawn due to the combination of his preexisting and last injuries.

7. Dr. Musich examined Claimant at his request on multiple occasions, with the last examination occurring on April 29, 2008. Upon examination, Dr. Musich noted the following abnormalities: tenderness and loss of range of motion of the cervical spine, a positive Spurling maneuver; pain to deep palpation of the left shoulder with a positive impingement test; and significant abnormal physical findings to both wrists and knees. Dr. Musich’s diagnoses regarding the primary injury included: acute trauma to Claimant’s neck and left shoulder resulting in surgical repairs, and chronic pain syndrome. Dr. Musich noted Claimant had cervical spondylosis prior to December 2004, but it had not produced cervical radiculopathy. Dr. Musich opined the December 2004 work trauma was the prevailing factor in Claimant’s need for treatment to his left shoulder and cervical spine. Dr. Musich’s diagnoses regarding Claimant’s preexisting conditions included both wrists and both knees. Dr. Musich rated Claimant’s December 2004 injuries at 70% BAW PPD referable to the cervical spine; and 40% PPD referable to the left shoulder. Dr. Musich rated the following preexisting disabilities: 35% PPD referable to the right wrist, 20% PPD referable to the left wrist, 75% PPD referable to the left knee, and 75% PPD referable to the right knee. Dr. Musich opined Claimant’s combination of present and preexisting injuries were a hindrance to his routine activities of daily living, and the last injury and preexisting injuries combined to create an overall disability greater than the simple sum. Dr. Musich further opined Claimant is PTD due to a combination of his disabilities, taking into account his physical limitations, and narcotic pain medication usage.

8. Dr. Salmon re-examined Claimant on September 22, 2008, found Claimant was at maximum medical improvement (MMI) for his left shoulder, and rated Claimant’s left shoulder disability at 10% PPD. In regard to Claimant’s cervical spine, Dr. Salmon opined the December 2004 injury “did exacerbate his cervical spine pain, however, the injury of December 22, 2004 is not the substantial factor in the development of the cervical spine degenerative disk disease and osteophyte formation at multiple cervical levels which eventually required surgical intervention.”

9. Vocational rehabilitation counselor, Ms. Susan Shea M.A., interviewed Claimant on July 24, 2008. After reviewing Claimant’s medical records and interviewing Claimant, Ms. Shea noted Claimant’s medical history, narcotic use, educational aptitude, relevant work history, and age, and opined Claimant was PTD and unable to compete in the open labor market due to a combination of his primary and preexisting medical conditions. Ms. Shea further opined there was no reasonable expectation that an employer would hire Claimant.

10. Vocational rehabilitation counselor, Mr. James England, M.Ed., interviewed Claimant on March 11, 2009. After reviewing Claimant’s medical records, Mr. England noted the various physical restrictions placed on Claimant’s activities by treating and non-treating physicians, and taking into account Claimant’s medical history, educational aptitude, relevant work history, and

age, Mr. England opined if one assumed applying just the permanent restrictions placed by Dr. Salmon, Claimant could perform medium level work. Mr. England found if one assumed Claimant's subjective complaints at face value, Claimant would not be able to sustain employment. Mr. England questioned Claimant's subjective complaints finding "that level of impairment, however, does not, in my opinion, appear to be backed up by the medical evidence I have reviewed." Mr. England assumed Dr. Raskas had not applied restrictions because no physical restrictions were needed. When challenged on this assumption and provided Dr. Raskas' testimony regarding employability, Mr. England conceded this to be medical evidence that confirmed Claimant's inability to maintain work.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to medical causation

SIF appears to challenge medical causation in regard to Claimant's cervical spine surgery and the December 2004 injury. To be medically causally related the work must be a substantial factor in the cause of the resulting medical condition and disability. §287.020.2 RSMo., (2004). Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds). Of the physicians who provided causation opinions in this case, only Dr. Solman does not relate Claimant's need for cervical spine surgery to the December 2004 injury because "the injury of December 22, 2004 is not *the* substantial factor in the development of the cervical spine degenerative disk disease and osteophyte formation at multiple cervical levels which eventually required surgical intervention." [emphasis supplied] However, Dr. Salmon did acknowledge "the December 2004 injury "did exacerbate his cervical spine pain." Under the 2004 law applicable to this case, Claimant was not required to show the injury was *the* substantial factor in his need for treatment; rather, he was required to demonstrate the injury was *a* substantial factor. In rendering his opinion, Dr. Salmon applied the wrong standard. I find the opinions of Dr. Musich and Dr. Raskas to be credible and persuasive, and find Claimant has met his burden to establish medical causation.

Issues related to liability of SIF for PTD benefits

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206

(Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). If the last injury standing alone did not cause the employee to become PTD, the inquiry turns to potential liability for PTD by Second Injury Fund. The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 *RSMo*. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993).

Of the medical and vocational experts who rendered opinions in this case, only Dr. Salmon did not comment regarding Claimant's employability. Initially Mr. England opined Claimant to be employable, but when advised Dr. Raskas applied no work restrictions because he believed Claimant to be PTD, Mr. England agreed Claimant was unlikely to be able to sustain work. The remaining experts all reach the conclusion Claimant is unemployable. I find the evidence produced by Claimant demonstrates PTD against SIF. Claimant has significant preexisting conditions involving both knees, both wrists, and his cervical spine that provided an obstacle or hindrance to employment. Claimant may have worked with these conditions prior to his last work injury, but the mere fact Claimant was able to work does not make them non-disabling. Claimant credibly testified prior to his last injury, he had taken himself off roofs and incurred reduced pay because he no longer felt he was physically safe to be on a roof.

I find Claimant is PTD due to a combination of Claimant's current and preexisting conditions. Given Claimant's limitations, it would be unreasonable to expect any employer to hire Claimant, or to expect Claimant to successfully perform new work duties. Claimant is permanently and totally disabled due to the combination of his last work injury and his preexisting disabling conditions measured at the time of his last work injury, and SIF shall pay PTD benefits as prescribed by law.

CONCLUSION

Claimant is found to be permanently and totally disabled as of January 8, 2008. Employer paid 367.6 weeks of permanent partial disability. SIF will pay weekly differential of \$265.38 during the period of PPD. Following the 367.6 weeks of PPD paid by Employer, SIF shall provide Claimant with permanent and total disability benefits of \$619.43 weekly for Claimant's lifetime. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation