

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

Injury No.: 07-042497

Employee: James Witte
Employer: Sho-Me Livestock Cooperative, Inc. (Settled)
Insurer: Hartford Underwriters Insurance Company (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. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated January 24, 2011.

Introduction

The sole issue stipulated in dispute at the hearing before the administrative law judge was the liability of the Second Injury Fund for permanent partial disability benefits. The administrative law judge found that employee failed to sustain his burden of proof on the issue of Second Injury Fund liability.

Employee filed an Application for Review alleging the administrative law judge's award is erroneous in that: (1) the administrative law judge ignored the unimpeached testimony of employee's medical expert; (2) the administrative law judge based her findings on her own personal opinions unsupported by competent evidence; (3) the administrative law judge failed to resolve all doubts in favor of employee; and (4) the award was against the overwhelming weight of the evidence, greater weight of the evidence, and greater weight of the credible evidence.

We reverse the award of the administrative law judge for the reasons set forth herein.

Findings of Fact

Primary injury

On April 18, 2007, employee was cleaning a walk-in freezer at work when he slipped and fell onto a concrete floor. Employee suffered a broken right leg and hip and underwent surgery and placement of instrumentation in both his right leg and right hip. The instrumentation is uncomfortable and interferes with employee's ability to bend, stoop, and lift. Employee also has ongoing right hip and leg pain from his injuries. Employee takes three or four ibuprofen pills four times a week to manage his pain.

Dr. Poetz was the only physician to testify in this matter. Dr. Poetz rated employee's permanent partial disability resulting from the primary injury at 20% of the body as a whole referable to the lumbar spine and 30% of the right hip.

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We find Dr. Poetz's disability ratings as to the primary injury to be credible. We find that, as a result of the primary injury, employee sustained a 20% permanent partial disability of the body as a whole referable to his lumbar spine and a 30% permanent partial disability of the right hip.

Preexisting conditions

Employee suffered from multiple preexisting conditions of ill at the time of the April 2007 primary injury. We discuss each condition below.

Employee was in a bicycle accident when he was six years old. Employee broke his right leg in five places and underwent multiple surgeries. His right leg healed in such a fashion that his right leg ended up shorter than his left. Employee's leg length discrepancy results in an uneven gait, and this condition, combined with employee's great height (seven feet) and attendant need to bend or stoop throughout his entire life, has caused employee to experience some back problems in the past. Employee saw a chiropractor for his low back before the primary injury. Doctors advised employee to try orthotics to balance his gait and relieve the tension on his hips and spine, but employee did not obtain the orthotics because they were too expensive and he lacked insurance. Although he had low back pain and discomfort, employee wasn't under any doctor's work restrictions and wasn't missing work due to his low back as of April 2007. Employee was taking ibuprofen to manage his pain.

Employee suffers from preexisting type 2 diabetes. An August 13, 2006, treatment record from St. John's Mercy Hospital indicates employee's diabetes was "poorly controlled." Employee gets tingling in his feet. Employee takes insulin twice a day.

Employee had several surgeries on his left eye to address a large angle exotropia. The problem started when he was about six years old. But employee's visual acuity is 20/20 with glasses, and employee doesn't miss work due to his left eye condition.

Employee suffered preexisting depression and anxiety. Employee suffered from these psychiatric problems from the age of about ten years old. Employee has seen various doctors over the years for these conditions and has intermittently sought relief through the use of psychiatric medications such as antidepressants. Employee's psychiatric problems sometimes kept employee confined indoors.

Finally, employee has a spastic colon which causes him severe diarrhea or constipation when stressed. Employee has suffered this condition since he was seven years old. The condition makes it difficult for employee to predict when he will need restroom breaks and has posed a problem with some of employee's jobs. Employee was taking medication for this condition both before and after the April 2007 primary injury.

Dr. Poetz rated employee's preexisting permanent partial disabilities as follows: 15% of the body as a whole referable to diabetes; 20% of the body as a whole referable to the left eye; 15% of the right lower extremity referable to the childhood right leg injury; 15% of the body as a whole referable to a spastic colon; 20% of the body as a whole

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referable to anxiety and depression; and 10% of the body as a whole referable to the lumbar spine.

After carefully considering all of the evidence, we find employee suffered the following preexisting permanent partial disabilities: 10% of the body as a whole referable to diabetes, 10% of the body as a whole referable to employee's gastrointestinal condition, 10% of the body as a whole referable to his psychiatric problems, 10% of the right leg at the 207-week level referable to the childhood right leg injury, and 5% of the body as a whole referable to the lumbar spine. In light of the distinct possibility for each of these conditions to combine with a work injury to result in worse disability than in the absence of such condition, we conclude that each of these conditions was serious enough to constitute a hindrance or obstacle to employment at the time of the April 2007 primary injury. We have not assigned a rating to the preexisting left eye condition because we are not persuaded that employee suffered preexisting permanent partial disability referable to this condition, as employee had perfect vision with correction and testified that he did not have problems with work related to his eyesight.

Dr. Poetz also opined that the disability from the primary injury combines with the disability from the preexisting injuries to result in greater disability than the simple sum of the disabilities. We find Dr. Poetz credible on this point and find that employee's overall disability from the combination of his preexisting conditions and the primary injury is greater than the simple sum of those disabilities. We find that this synergism is best represented by a load factor of 15%.

Conclusions of Law

On page 6 of her award, the administrative law judge explained why she denied employee's claim against the Second Injury Fund: "While [employee] had multiple complaints referable to diabetes, colon, mental health, left eye, right leg, and back, there is very little evidence that any of these complaints were significant enough ... to reach the thresholds set out in Section 287.220.1 for Second Injury Fund liability for permanent partial disability." These comments suggest the administrative law judge was of the opinion that if none of a worker's preexisting disabilities, considered in isolation, meet one of the thresholds in § 287.220.1, then there can be no Second Injury Fund liability. Such an approach has no support in the Missouri Workers' Compensation Law or in Missouri case law. We reject the administrative law judge's reasoning regarding the triggering of Second Injury Fund liability. Our analysis of the operation of the Second Injury Fund thresholds follows.

Purpose of the Second Injury Fund

The purpose of the Second Injury Fund is "to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury." *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004) (citation omitted). The Second Injury Fund statute encourages such employment by ensuring that an employer is only liable for the disability caused by the work injury. Any disability attributable to the combination of the work injury with preexisting disabilities is compensated, if at all, by the Second Injury Fund.

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Purpose of the thresholds

Before 1993, any preexisting disability that was a hindrance to employment or reemployment could open the door to possible Second Injury Fund liability. The Second Injury Fund statute was amended in 1993 to limit permanent partial disability awards against the Second Injury Fund to those cases where both the preexisting disabilities and the disabilities from the work injury are more than de minimis. The provision defining what preexisting disabilities will trigger Second Injury Fund liability now states:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability.

The thresholds found in the quoted provision serve to protect the Second Injury Fund from enhanced permanent partial disability claims of claimants with de minimis disabilities. And that is where the service of the thresholds ends. Section 287.220.1 goes on to say:

After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to **all injuries or conditions existing at the time the last injury was sustained** shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund...(emphasis added).

Under the plain language of the statute, once it is determined that the thresholds are met, all disabilities that exist at the time of the work injury should be considered in the calculation of Second Injury Fund liability.

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Application of the thresholds

The second threshold applies when a claimant has preexisting permanent partial disability of a single major extremity (“if a major extremity injury only”). In all other circumstances, the first threshold applies.

The legislature chose two different units of measurement to describe the thresholds: “fifty weeks of compensation” for preexisting disabilities of the body as a whole; and “fifteen percent permanent partial disability” for a preexisting disability to a major extremity only. We believe the legislature rested on different units of measurement to foster arithmetic simplicity.

Where a claimant has only a preexisting disability to a major extremity, the legislature made “a simple 15% disability to a major extremity the threshold rather than attempt a more complex formula based on weeks of disability to various body parts at various levels.” *Motton v. Outsource Int'l*, 77 S.W.3d 669, 675 (Mo. App. 2002).

But where there is more than one preexisting disability, the simplicity described above cannot be achieved. In that event, we need a method to combine the various disabilities to determine claimant’s overall preexisting disability as of the moment of the primary injury. In order to combine the disabilities for comparison to the threshold, the disabilities must be converted to a common unit of measure. The legislature selected weeks of compensation as the common unit of measure.

This claim

In the instant case, employee had more than a single preexisting disabling condition so the first threshold applies. We must determine if employee’s overall preexisting permanent partial disability – stated in weeks – meets or exceeds 50 weeks.

Converting employee’s preexisting disabilities into weeks of compensation yields the following results: 40 weeks for employee’s diabetes, 40 weeks for his psychiatric problems, 40 weeks for his spastic colon, 20.7 weeks for his right leg, and 20 weeks for his low back. The sum of the preexisting disabilities is 160.7 weeks. Employee has easily met the 50-week threshold.

We have found that employee suffers from a total of 160.7 weeks of preexisting permanent partial disability referable to his preexisting disabling conditions, and that these conditions constituted hindrances and obstacles to employment at the time he sustained the April 2007 primary injuries. As a result of the work injury, employee suffers permanent partial disability of the hip and body as a whole equivalent to 142.1 weeks. Under § 287.220.1, employee is entitled to compensation from the Second Injury Fund if he proved the disabilities combined to result in a greater disability than that which would have resulted from the last injury by itself. See *Gassen v. Lienbengood*, 134 S.W.3d 75 (Mo. App. 2004).

We have credited Dr. Poetz’s opinion that employee’s preexisting conditions of ill combine with the effects of the April 2007 work injury to result in greater disability than the simple sum. We have also found that this synergism is best represented by a load

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factor of 15% applied to the sum of permanent disability attributable to employee's preexisting conditions and primary injuries.

Employee's preexisting conditions amount to 160.7 weeks of disability. His primary injuries amount to 142.1 weeks. The sum of these two amounts is 302.8 weeks. When we multiply the sum by the 15% load factor, the result is 45.42 weeks.

Employee has met his burden. We conclude that the Second Injury Fund is liable for 45.42 weeks of permanent partial disability enhancement.

Award

We reverse the award of the administrative law judge. We conclude employee met his burden of proof on the issue of Second Injury Fund liability for enhanced permanent partial disability.

The stipulated rate of compensation is \$186.67 per week. Employee is entitled to, and the Second Injury Fund is ordered to pay, \$8,478.55 in permanent partial disability benefits.

This award is subject to a lien in favor of Douglas Salsbury, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued January 24, 2011, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 8th day December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: James Witte

Injury No. 07-042497

Dependents: N/A

Employer: (Sho-Me Livestock Cooperative)

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

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: N/A

Hearing Date: January 5, 2011

Checked by: HDF/tmt

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: April 18, 2007.
5. State location where accident occurred or occupational disease was contracted: Belle, 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? N/A.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See award.
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: Right hip, lumbar spine.
14. Nature and extent of any permanent disability: 30% right hip, 20% body.
15. Compensation paid to-date for temporary disability: N/A.
16. Value necessary medical aid paid to date by employer/insurer? N/A.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: N/A.

Employee: James Witte

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- 19. Weekly compensation rate: \$186.67 for permanent partial disability.
- 20. Method wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Second Injury Fund liability: 0
- 22. Future requirements awarded: 0

Employee: James Witte

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Witte

Injury No: 07-042497

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: (Sho-Me Livestock Cooperative)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

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

Insurer: N/A

Checked by: HDF/tmt

ISSUES DECIDED

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on January 5, 2011. Memoranda were submitted by January 14, 2011.

The parties stipulated that all facts relevant to the claimant's relationship with the employer/insurer are resolved in the claimant's favor in his claim against the Second Injury Fund. The parties further stipulated that the claim against the employer/insurer settled based on a permanent partial disability of 20 percent of the body and 30 percent of the right hip; however, the parties do not agree that this represents the extent of permanent partial disability resulting from the injury of April 18, 2007, in the pending claim against the Second Injury Fund.

The compensation rate for all benefits is \$186.67 per week.

The issue to be resolved by hearing is the liability of the Second Injury Fund for permanent partial disability benefits.

FACTS

The claimant, James Daniel Witte, was 43 years old as of the date of hearing. Mr. Witte completed the eighth grade and also received a certification from the Missouri Department of Corrections Training Academy as a corrections officer. Prior to his 2007 accident, Mr. Witte worked, without medical restrictions, as a security guard, a corrections officer, and at Sho-Me Livestock Cooperative where he was injured. Mr. Witte has always done unskilled labor work. Currently, Mr. Witte works at Dollar General, working about 12 hours a week stocking shelves.

As the result of his April 18, 2007, injury, Mr. Witte injured his right leg, right hip, and low back. Mr. Witte testified that as the result of the injury, he has a titanium pin and rod in his right leg and right hip which is very uncomfortable and causes him to be unable to bend, stoop, or lift. The same injury causes Mr. Witte to experience spasms in his low back, as well as low back pain and causes him to be unable to bend over. Mr. Witte testified that although he had diabetes,

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problems with his colon and psychological problems prior to 2007, the April 18, 2007, accident has intensified his diabetic condition, his colon problems and his mental health issues. Mr. Witte testified that with regard to his diabetes, it is only since 2007 that he has had higher blood sugar and that he has missed time from work as the result of his diabetic condition, that it is since 2007 that he has had more severe colon spasms, and that it is only after 2007 that he has been taking the medications, Wellbutrin and Celexa, for his mental health issues.

Prior to the April 18, 2007, accident, Mr. Witte described a "lazy" left eye for which he had surgery and which was corrected to 20/20 vision with glasses. Mr. Witte also testified to a bicycle accident when he was six years old, which left his right leg shorter than his left leg; Mr. Witte claimed that the difference in leg length affected his back.

Dr. Poetz evaluated Mr. Witte for his Second Injury Fund claim and found preexisting disabilities as follows: diabetes-15% of the body, left eye-20% of the body, right lower extremity-15% of the leg, gastrointestinal system-15% of the body, anxiety/depression-20% of the body, lumbar spine-10% of the body. Dr. Poetz opined that Mr. Witte's height of seven feet caused him to bend and stoop, causing back pain.

Medical records reflect a colonoscopy for a spastic colon in 1989. An August 13, 2006, St. John's Mercy Hospital record reflects an admission for pneumonia and indicates poorly controlled type 2 diabetes, tobacco use, and anxiety with depression with a reference to the use of Prozac with Ativan.

APPLICABLE LAW

RSMo, Section 287.220.1. All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or

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percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

Under Section 287.220.1 RSMo, in order for a workers' compensation claimant to recover from the Second Injury Fund, he must first establish that a preexisting permanent partial disability existed at the time that a work-related injury was sustained and that said preexisting disability was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment. Lingerfelt v. Elite Logisitics, Inc., 255 S.W.3d 1, (Mo. App.S.D. 2008), rehearing and/or transfer denied.

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AWARD

The claimant, James Witte, has failed to sustain his burden of proof that he is entitled to permanent partial disability benefits from the Second Injury Fund. While Mr. Witte had multiple complaints referable to diabetes, colon, mental health, left eye, right leg, and back, there is very little evidence that any of these complaints were significant enough at the time of the April 18, 2007, accident and injury to constitute a hindrance or obstacle to employment or to reach the thresholds set out in Section 287.220.1 for Second Injury Fund liability for permanent partial disability. The medical records provided do not document significant disabilities preexisting 2007, and Mr. Witte's testimony does not indicate significant disabilities preexisting 2007. Dr. Poetz' analysis of preexisting disability is that Mr. Witte had permanent disability of almost 100% of the body; this analysis is less than credible where Mr. Witte functioned without medical restrictions as a security guard, corrections officer, and an employee of Sho-Me Livestock Cooperative doing unskilled labor work prior to April 18, 2007.

Date: _____

Made by: _____

HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson