

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**GARY SCOTT,
APPELLANT**

vs.

**TREASURER OF THE STATE OF MISSOURI – CUSTODIAN OF THE SECOND
INJURY FUND,
RESPONDENT**

DOCKET NUMBER WD76602

DATE: JANUARY 14, 2014

Appeal from:

The Labor and Industrial Relations Commission

Appellate Judges:

Division Two: Mark D. Pfeiffer, P.J., Joseph M. Ellis and Victor C. Howard, JJ.

Attorneys:

Keith V. Yarwood, for Appellant

Laura K. Van Fleet, for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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GARY SCOTT, APPELLANT

v.

**TREASURER OF THE STATE OF MISSOURI – CUSTODIAN OF THE SECOND
INJURY FUND, RESPONDENT**

WD76602

Labor and Industrial Relations

Before Division Two Judges: Mark D. Pfeiffer, Joseph M. Ellis and Victor C. Howard, JJ.

Gary Scott ("Appellant") appeals from the Labor and Industrial Relations Commission's decision concluding that he was not entitled to any benefits from the Second Injury Fund for injuries he sustained to his back on January 11, 2008, and to his chest and shoulder on December 3, 2009, based upon a finding that he was already permanently and totally disabled prior the January 2008 injury.

REVERSED AND REMANDED.

Division Two holds:

- (1) When viewed in the context of the entire record, several of the Commission's findings are not supported by substantial and competent evidence and are against the overwhelming weight of the evidence.
- (2) To the extent the Commission's decision implies that Appellant's sole function at work after his 2001 leg and foot injuries was overseeing the work and training employees, such a finding is not supported by substantial and competent evidence. Appellant's testimony, the medical records, and the report and testimony of the occupational expert all reflect that, after two or three years of recovery from that 2001 injury, Appellant resumed performing lifting, loading, and vehicle maintenance duties and that he would operate pieces of heavy equipment for as much as eight to twelve hours a day.
- (3) The Commission's finding that at least one of his doctors told Appellant in 2007 that he had "to stop working" is likewise not supported by substantial and competent evidence and is against the overwhelming weight of the evidence. None of the medical records support that finding. The Commission's finding was based solely on Appellant's testimony that his doctors told him to stop working after his double hernia diagnosis and surgery. Appellant testified, however, that he was diagnosed with the hernias while he was receiving treatment for his

January 2008 back injury, and his hernia surgery was performed on January 21, 2009, approximately five months after his back surgery. Accordingly, the Commission's finding that Appellant was told by a doctor to quit work in 2007, which would have been prior to his back injury, is not supported by substantial and competent evidence. If a doctor generally advised Appellant to stop working in 2008 or 2009, as testified by Appellant, part of that consideration would necessarily have involved the problems and restrictions resulting from Appellant's back injury. Moreover, in the context of his entire testimony, Appellant stated that his doctors advised him to ease up on or stop doing the physical work he was currently performing and does not establish that Appellant could not have worked at a different, less physical job.

(4) The report and testimony of Appellant's vocational expert does not support a finding that Appellant was unemployable in the open labor market prior to his back injury and its resultant restrictions. While the expert testified on cross-examination that Appellant was never likely to be able to compete for and obtain employment in a training or supervisory capacity for another company, based on his hearing loss, communications problems, and education, and that Appellant had self-accommodated to allow himself to perform those duties for his own company, the expert's opinion that Appellant could not obtain other, non-supervisory employment expressly took into account the restrictions place upon him as a result of his 2008 back injury and 2009 shoulder injury.

(5) As several of the factual findings underlying the Commission's decision that Appellant was completely and totally disabled prior to his January 2008 back injury are not supported by substantial and competent evidence, the Commission's decision must be reversed and the cause remanded for further proceedings.

Opinion by Joseph M. Ellis, Judge

Date: January 14, 2014

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