
IN THE SUPREME COURT OF MISSOURI

CARL GREER,

Appellant/Cross-Respondent,

vs.

SYSCO FOOD SERVICES OF ST. LOUIS, LLC,

Respondent/Cross-Appellant,

and

THE TREASURER OF MISSOURI as
CUSTODIAN OF THE SECOND INJURY FUND,
Missouri Attorney General,

Respondent.

Appeal from the Labor and Industrial Relations Commission

SUBSTITUTE BRIEF OF RESPONDENT TREASURER OF MISSOURI

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STATEMENT OF FACTS

Carl Greer (“Greer”) worked as a forklift operator from 1989 until 2007. (Tr. 20). He operated a standing forklift which required him to stand approximately eight to twelve hours a day on his feet. (Tr. 21-22). He used his legs and arms to operate the vehicle. (Tr. 22). His job also required bending, stooping, lifting, climbing into the forklift, picking up products, and getting products that were stuck in slots overhead. (Tr. 22-24). Greer continued to do these job duties until his primary work injury to his left foot in 2006. (Tr. 122).

That was not the first time Greer was injured at work. In 1993, Greer had an injury to his neck. (Tr. 28). He completed treatment in 1994 and had no further treatment for his neck until after the primary work injury. (Tr. 126-127). Following his neck injury in 1993, Greer returned back to and performed the same job duties including heavy lifting that he did before the injury. (Tr. 127).

In 1995, Greer had a low back injury. (Tr. 33). He had only physical therapy for his back condition and never had surgery or injections. (Tr. 128). He completed treatment for this low back injury in 1996 and had no further treatment for his back condition until after the primary work injury. (Tr. 127-128). After his back injury, Greer performed the same job duties as before the

injury. (Tr. 128). Greer never missed work due to back pain before the primary work injury in 2006. (Tr. 36).

And Greer had an injury to his right shoulder, for which he completed treatment in 1999. (Tr. 128). Following his right shoulder injury, he returned back to and performed the same job duties he did before his right shoulder injury. (Tr. 128).

Medical and Vocational Expert Opinions

Dr. Shawn Berkin

Dr. Berkin testified that prior to the primary work injury Greer worked beyond the restrictions Dr. Berkin recommended that Greer should follow. (Tr. 249). Dr. Berkin is a family medicine physician and not a surgeon. (Tr. 166, 250). Dr. Berkin is not a vocational expert and does not place people into jobs. (Tr. 250-251).

Mr. Stephen Dolan

Greer's vocational rehabilitation expert, Mr. Stephen Dolan, testified that Greer has to lie down most days in order to stay off of his left foot. (Tr. 759). Greer told Mr. Dolan that he typically lies down for one to two hours a day. (Tr. 759). Mr. Dolan testified that Greer's need to lie down during the day would keep Greer from competing for employment in the open labor market. (Tr. 759). Mr. Dolan testified that the pain that Greer experiences relative to the ankle injury in and of itself renders him unemployable in the

open labor market. (Tr. 759). Mr. Dolan testified that Greer's pain level from the primary work injury that requires him to lie down for significant parts of the day prevents Greer from performing a sit down or sedentary type job. (Tr. 781-782).

Mr. Dolan testified that if Greer is being truthful about his pain and problems with his foot, he is permanently and totally disabled solely and exclusively due to the primary work injury of February 2006. (Tr. 768). Mr. Dolan testified that there are sedentary or sit down jobs Greer could do considering only the condition of the right shoulder. (Tr. 781-782). Mr. Dolan testified that the right shoulder would not interfere with sedentary employment. (Tr. 782). Mr. Dolan testified that the neck injury and headaches likewise would not interfere with or keep Greer from working. (Tr. 782-783).

Mr. Terry Cordray

Mr. Cordray, the vocational rehabilitation expert hired by the Second Injury Fund ("Fund"), testified that he had enough information in the records he reviewed to render opinions and conclusions regarding Greer's employability within a reasonable degree of vocational certainty. (Tr. 2741-2742). Mr. Cordray found that based upon Dr. Berkin's restrictions, Greer is capable of performing jobs as a cashier at a parking garage such as St. Louis Airport or in downtown St. Louis, a surveillance system monitor at large

office buildings, hospitals and department stores, and as a collections clerk and telemarketer. (Tr. 2814-2815). Mr. Cordray opined that these jobs exist in significant numbers in the labor market, they are sedentary in strength demand, do not require lifting over 15 pounds frequently, nor 20-25 pounds occasionally, and they do not require lifting with the right arm extended from the body, or excessive lifting or working with the right arm above shoulder level. (Tr. 2814). Mr. Cordray opined that these jobs do not require more than a high school education, standing for more than 20-30 minutes at a time, climbing ladders or stairs, working at heights above ground, or walking on uneven surfaces. (Tr. 2814-2815). Mr. Cordray opined that based upon a review of the objective medical evidence, Greer maintains capacity to work full time in the labor market and is not totally disabled. (Tr. 2815).

Mr. Cordray opined that these sedentary jobs he listed do not require a lot of exertion, and, therefore, Greer would not need to assume the restriction of taking frequent breaks to avoid exacerbation of his symptoms. (Tr. 2815). In conclusion, Mr. Cordray found Greer employable and placeable in the labor market in unskilled jobs that are sedentary and require no more than a high school education. (Tr. 2815). He further found that these jobs exist in significant numbers in the metropolitan St. Louis labor market. (Tr. 2815).

Mr. Cordray testified that if he took into consideration Greer's subjective complaint of needing to lie down and elevate his feet, Greer would

be unemployable. (Tr. 2778). However, Mr. Cordray testified the Claimant's subjective complaints are not congruent with the objective evidence of the physical therapists and the occupational therapists. (Tr. 2784-2785). Mr. Cordray testified that he is not offering opinions of employability on Greer's subjective complaints because there is an abundance of objective medical evidence from doctors, physical therapists, and occupational therapists, whom have all either treated or examined Greer over the course of his injury recovery. (Tr. 2785, 2786). Mr. Cordray testified that he had better objective evidence than utilizing the subjective complaints of Greer. (Tr. 2786).

Dr. Jeffrey Johnson

Dr. Johnson, an orthopedic surgeon who treated Greer, testified that there is no record of Greer reporting that he needs to use a cane. (Tr. 361). Dr. Johnson testified that he did not recommend that Greer use a cane. (Tr. 361). Dr. Johnson testified that as of June 22, 2011, following the surgery to Greer's foot, Greer was rehabilitated in terms of strength. (Tr. 518). Dr. Johnson did not find Greer to be permanently and totally disabled. Dr. Johnson placed no permanent restrictions on Greer when he released Greer at MMI on February 4, 2011. (Tr. 520).

Dr. Gary Schmidt

Dr. Schmidt, a board certified orthopedic surgeon, performed an independent medical examination on behalf of Employer. Dr. Schmidt did

not recall Greer reporting that he had to lie down throughout the day and put his foot in the air. (Tr. 2462-2463). Dr. Schmidt did not find Greer permanently and totally disabled. Rather, Dr. Schmidt found that Greer can return to work without any permanent restrictions. (Tr. 2464).

Procedural History

The Administrative Law Judge (“ALJ”) found that Greer was not permanently and totally disabled in the open labor market, and awarded Greer only permanent partial disability benefits from both Employer and the Fund. (L.F. 44). The Labor and Industrial Relations Commission (“Commission”) affirmed the award of the ALJ and likewise found Greer is not permanently and totally disabled. (L.F. 95, 116).

ARGUMENT

Standard of Review

This court's standard of review is governed by Section 287.495 RSMo. (2005). The Labor and Industrial Relations Commission's ("Commission") decision will be affirmed unless it acted in excess of its powers, the award was procured by fraud, the facts did not support the award or there was not sufficient evidence in the record to warrant the making of the award. §287.495.1 RSMo. (2005).

This court's review is limited to a single determination of whether, considering the whole record, there is sufficient competent and substantial evidence to support the Award. *Larry Hampton v. Big Boy Steel Erection, et al.*, 121 S.W. 3d 220, 222 (Mo. 2003).

I. The substantial and competent evidence supports the Commission's decision that Greer is not permanently and totally disabled in the open labor market. As a result, the Fund is not liable to Greer for any permanent total disability benefits.

(Responding to Appellant Greer's Point A)

The Commission's decision that Greer is not permanently and totally disabled is supported by sufficient competent and substantial evidence. Greer seeks to re-litigate the evidence on appeal, but this court's standard of review

is fatal to his cause. When the whole record is reviewed, it is evident that there is substantial and competent evidence to support the denial of permanent and total disability benefits against either the Fund or the Employer. Greer asserts in his brief that he is permanently and totally disabled and that the issue is merely whether the Employer or Fund is liable for permanent total disability benefits. (Appellant's Brief p. 16). However, as the Commission found, Greer did not meet his burden of proof that he is permanently and totally disabled.

Greer argues that there is no credible evidence in the record to support a finding that he is capable of working full-time, 40 hours per week or that he is likely to be hired over other applicants. (Appellant's Brief p. 18). Greer's argument is factually incorrect. In this case, the credible evidence in the testimony of Mr. Cordray, Dr. Johnson, and Dr. Schmidt all provide sufficient and competent evidence to support that Greer is not permanently and totally disabled.

Importantly, the opinions of Mr. Terry Cordray, a vocational rehabilitation expert, support that Greer is not permanently and totally disabled. Mr. Cordray analyzed all of the medical experts' opinions regarding permanent restrictions. Greer's own medical expert, Dr. Shawn Berkin, placed the most stringent physical restrictions of any doctor for all of Greer's injuries. The restrictions include the following: avoid excessive squatting,

kneeling, stooping, turning, twisting, lifting, and climbing; avoid standing on his feet for longer than 20 to 30 minutes at a time; avoid climbing ladders and stairs, working at heights above ground level, and walking on uneven surfaces; limit lifting to 20 to 25 pounds on occasional basis and 15 pounds on a frequent basis; avoid lifting with his right arm extended from his body and avoid excessive lifting or working with his right arm above shoulder level; and if required to perform exertional activities for an extended period of time, he should pace himself and take frequent breaks to avoid exacerbation of his symptoms, or further injury to his left foot, lower back, and neck. (Tr. 286-287).

Notably, Mr. Cordray found that even with Dr. Berkin's restrictions, Greer can work full time in the labor market and is not totally disabled. (Tr. 2751-2752). Mr. Cordray further found that Greer is employable and placeable in the labor market at unskilled lower paying jobs that are sedentary and require no more than a high school education. (Tr. 2815). Mr. Cordray opined that these jobs exist in significant numbers in the metropolitan St. Louis labor market where Greer resides. (Tr. 2815).

The Commission correctly then found that based on the greater weight of the credible evidence and the objective evidence that Greer is not permanently and totally disabled, a conclusion adequately supported by Mr. Cordray's application of Dr. Berkin's restrictions. (L.F. 44). In addition, Dr.

Johnson and Dr. Schmidt never found Greer to be permanently and totally disabled.

Greer argues that the Commission erred in not accepting the evidence that he believes finds him permanently and totally disabled. (Appellant's Brief p.17-18). Specifically, Greer asserts that numerous medical experts and other experts who met with Greer found him permanently and totally disabled. (Appellant's Brief p.16). What Greer fails to concede is that the Commission expressly found that evidence from Greer regarding his subjective complaints and the evidence from his vocational expert Mr. Dolan, not credible. (L.F. 81-82).

The Commission explained that the surveillance video showing Greer walking, climbing stairs, leaning on his left foot, standing, and driving cast doubt on his credibility. (L.F. 78) The Commission wrote "Greer's subjective complaints should be viewed as suspect, reflecting poorly on Greer's credibility." (L.F. 82). The finding of the Commission to reject Greer's subjective complaints as the basis of determining his abilities is based on competent and substantial evidence and should not be disturbed by this court.

Equally important, the Commission noted that Mr. Dolan's opinions were not credible in part because they were based on Greer's subjective complaints, which the Commission already discounted. (L.F. 82). In finding

Greer permanently and totally disabled, Mr. Dolan considered Greer's subjective complaint of needing to lie down and elevate his leg. (Tr. 759-760, 774, 781-782). No medical doctor placed such a restriction on Greer, and Greer's activity in the surveillance video cast doubt on his need to do these things. (L.F. 81-82). The Commission correctly found "Mr. Dolan's opinion of permanent and total disability was against the great weight of the credible and objective medical evidence." (L.F. 82).

The Commission appropriately gave more weight to the testimony of Mr. Cordray, who found Greer employable in the open labor market and gave several different specific examples of employment available to Greer. (L.F. 82). Acceptance or rejection of expert opinions, as well as the weight to be given testimony, is for the Commission. *Copeland v. Thurman Stout Inc.*, 204 S.W.3d, 737, 743 (Mo. App. S.D. 2006) *citing Alexander v. D.L Sitton Motor Lines*, 851 S.W. 2d 525, 527 (Mo. 1993). *Royal v. Advantica Restaurant Group Inc.*, 194 S.W.3d 371, 376 (Mo. App. W.D. 2006). The Commission is free to choose between experts, and the court will not reverse such choices even if the other expert is worthy of belief. *Payne v. Thompson Sales Co.*, 322 S.W.3d 590, 593 (Mo. App. S.D. 2010). As a result, this court must defer to the Commission's credibility determinations.

Whether a particular employee is permanently and totally disabled is a factual, not a legal question." *Molder v. Mo. State Treasurer*, 342 S.W.3d 406,

409 (Mo. App. W.D. 2011). Even if the evidence lends itself to different factual inferences, this court is obligated to defer to Commission's findings unless those findings are unsupported by competent and substantial evidence. *Pace v. City of St. Joseph*, 367 S.W.3d 137, 150 (Mo. App. W.D. 2012). Here, the Commission appropriately weighed all of the evidence and the opinions of the experts to determine credibility. Thus, there is substantial and competent evidence to support the denial of permanent total disability benefits to Greer, and the award of the Commission should be affirmed.

II. The Fund does not concede that Greer is permanently and totally disabled. However, if this court finds Greer to be permanently and totally disabled, then it is due to the last injury alone. Thus, the Fund has no liability for permanent partial or permanent total disability benefits.

(Responding to Appellant Greer's Point B)

Greer correctly asserts that if he is permanently and totally disabled, it is due to the last injury alone. (Appellant Greer's Brief p. 21). In Fund claims, the first determination to be made is the degree of disability from the last injury alone. *Hughey v. Treasurer of Missouri*, 34 S. W.3d 845 (Mo. App. E.D. 2000); *Roller v. Treasurer of Missouri*, 935 S.W. 2d 739 (Mo. App. S.D. 1996). The Missouri Supreme Court, in explaining Section 287.220.1 RSMo 2000,

stated that to determine the liability of the employer, only the disability resulting from the last injury alone should be considered. *Stewart v. Johnson*, 398 S.W. 2d 850 (Mo. 1966). According to the Supreme Court, [U]ntil that disability is determined, it is not known whether the Second Injury Fund has any liability for the statute contemplates that the employer's liability for compensation may at least be equal to that provided for permanent total disability in '287.200....Id. If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made and the employer is responsible for the entire amount. *Hughey*, 34 S.W.3d at 847; *Vaught v. Vaught*, 938 S.W.2d 931,938 (Mo. App. S.D. 1997).

Here, when considering the degree of disability from Greer's primary work injury alone based on Greer's subjective complaints, then Greer is permanently and totally disabled due to the last injury alone. Greer testified that he has to lie down throughout the day to elevate his leg from the primary work injury. (Tr. 74). Both vocational experts testified that if Greer's subjective complaint of lying down and elevating his leg throughout the day is credible, then Greer is permanently and totally disabled due to the last injury alone. (Tr. 758-759, 2778). Specifically, Mr. Dolan found that the pain Greer experiences relative to the primary work injury to his ankle in and of itself renders Greer unemployable in the open labor market. (Tr. 759).

Because the evidence supports that if Greer is permanently and totally

disabled it is due to the last injury alone, the analysis for Fund liability ends. The Employer, and not the Fund, is liable to Greer for permanent total disability benefits.

CONCLUSION

For the foregoing reasons, the Commission's decision that Greer is not permanently and totally disabled should be affirmed. Neither the Fund, nor the Employer is liable for permanent and total disability benefits to Greer.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on March 27, 2015, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 3393 words.

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