



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

ALAN MARBERRY,	)	ED109554
	)	
Appellant,	)	Appeal from the Labor and
	)	Industrial Relations Commission
v.	)	15-083958
	)	
TREASURER OF MISSOURI AS	)	Filed: October 26, 2021
CUSTODIAN OF THE SECOND INJURY	)	
FUND,	)	
	)	
Respondent.	)	

Alan Marberry (Marberry) appeals from the decision of the Labor and Industrial Relations Commission (Commission) denying his claim against the Second Injury Fund (Fund) for permanent total disability (PTD) benefits pursuant to Section 287.220.3.¹ We reverse and remand.

BACKGROUND

Marberry filed a claim for compensation against the Fund, alleging he was PTD from the combination of his primary injury and preexisting disabilities. At the hearing, Marberry presented his own testimony, medical records, the expert medical opinion of Dr. David Volarich, and expert vocational opinion of Mr. Timothy Lalk. The Fund did not present any evidence.

¹ All statutory references are to RSMo 2016, unless otherwise indicated.

Primary Injury

On September 24, 2015, Marberry was attempting to remove a box of ingredients from the top of a pallet at work when he caught his foot in shrink wrap, causing him to fall backwards and land on his buttocks and upper back and whiplash his neck. On October 16, 2015, he was sent to Barnes Care and diagnosed with a contusion of his low back and pelvis, and an injury of his muscle, fascia, and tendon at the neck level. He was prescribed medications and home exercises, and placed on light duty. During the last weeks of his employment, he received help performing his job duties by coworkers and friends. The manufacturing plant where Marberry was working closed in early 2016, and he has not worked since then. As a direct result of the primary injury, Dr. David Volarich found 10% PPD of the body as a whole (BAW) rated at the lumbar spine, and 35% PPD of the BAW rated at the cervical spine. Marberry settled this claim with his employer for 13.4% of the BAW referable to his cervical spine.

Preexisting Disabilities

On July 19, 1999, Marberry injured his neck while picking up crates at work. He was diagnosed with multiple disk herniations and settled the claim with his employer for 20% permanent partial disability (PPD) of the BAW referable to his cervical spine.

On October 7, 2002, Marberry was driving a truck for work when he was T-boned, injuring his neck. He underwent neck surgery and returned to full duty work, but often complained of neck pain.

On December 19, 2014, Marberry was standing on a ladder while pouring 50-pound bags of powder gum into a mixer at work when the ladder suddenly shifted and jerked his right shoulder, causing injury. He was eventually diagnosed with a right shoulder labral tear, impingement bursitis, biceps tenosynovitis, and partial undersurface rotator cuff tear. He

engaged in physical therapy and reached maximum medical improvement (MMI) for his right shoulder injury in May 2017. Dr. Volarich rated Marberry's right shoulder at 35% PPD.

Marberry settled with his employer for 34.8% PPD of his right shoulder.

Expert Opinions

Marberry presented the deposition testimony and reports of Dr. Volarich and Mr. Lalk. He also introduced two independent medical examination (IME) reports from Dr. Michael Chabot.

Dr. Chabot examined Marberry twice at the request of Marberry's employer. Dr. Chabot found Marberry sustained thoracic, lumbar, and cervical strain injuries as the direct result of the primary injury. However, he did not attribute any PPD to Marberry as a direct result of the primary injury, but instead believed Marberry's complaints and PPD were associated with his 2002 neck injury and surgery.

Dr. Volarich performed two IMEs for Marberry. Dr. Volarich opined that Marberry sustained 35% PPD of the right shoulder as a result of the December 19, 2014 injury; 35% PPD of the BAW rated at the cervical spine as a result of the September 24, 2015 injury; 10% PPD of the BAW rated at the lumbar spine as a result of the September 24, 2015 injury; and 20% PPD of the BAW as a result of the preexisting neck injuries. Dr. Volarich testified, "Based on my medical assessment alone, it was my opinion that [Marberry] was permanently and totally disabled as a direct result of his work-related injuries of [December 19, 2014] and [September 24, 2015] in combination with each other as well as in combination with his preexisting medical conditions."

Mr. Lalk is a vocational rehabilitation counselor. He performed a vocational assessment of Marberry, and determined that Marberry would not be able to work in the open labor market.

Mr. Lalk opined that no employer hiring Marberry would be able to accommodate his need to rest during the day in order to control his symptoms or tolerate his absences from employment when his symptoms are severe and he is unable to function. Mr. Lalk concluded that Marberry would be unable to function even in an unskilled, entry level position because of his inability to control his symptoms through a full workday and on a regular basis.

Administrative Findings

The administrative law judge (ALJ) found Marberry's right shoulder could not be considered in determining Fund liability because his right shoulder had not reached MMI before the primary injury. The ALJ disregarded Dr. Volarich's opinion because he relied on Marberry's right shoulder injury in reaching his opinion that Marberry was PTD. The ALJ found Marberry's low back injury also could not be considered in determining Fund liability because it did not meet the 50-week PPD threshold. The ALJ disregarded Mr. Lalk's testimony because he relied on Marberry's subjective reports of low back pain in reaching his opinion that Marberry was unemployable. The ALJ concluded, "The Court finds [Marberry's] evidence, as a matter of law, does not meet the standards of § 287.220.3 and only demonstrates [he] is PTD from a combination of all his injuries, and not simply his primary injury and single qualifying preexisting disability." The ALJ found Marberry failed to meet his burden of proof and denied his claim for PTD benefits from the Fund. The Commission adopted and affirmed the ALJ's decision.

This appeal follows.

DISCUSSION

Marberry raises three points on appeal. First, he argues the Commission erred in determining his right shoulder injury and resulting disability could not be considered for Fund

liability under Section 287.220.3(a)(2). Second, he argues the Commission erred by mischaracterizing his low back injury as a prior injury. Third, he argues the Commission erred in denying him PTD benefits from the Fund. We address all three points together because the Commission's errors regarding the right shoulder and low back injuries resulted in the denial of PTD benefits.

Standard of Review

Our review of the Commission's decision is governed by article V, section 18 of the Missouri Constitution and Section 287.495. *Hazeltine v. Second Injury Fund*, 591 S.W.3d 45, 55 (Mo. App. E.D. 2019). We will affirm the Commission's decision unless: "(1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; or (4) there was not sufficient competent evidence in the record to warrant the making of the award." *White v. ConAgra Packaged Foods, LLC*, 535 S.W.3d 336, 338 (Mo. banc 2017); Section 287.495. It is not necessary for us to view the evidence in the light most favorable to the Commission's award. *Hazeltine*, 591 S.W.3d at 56. Although we defer to issues concerning witness credibility and the weight given to conflicting evidence, we review *de novo* the Commission's interpretation of the workers' compensation statute and its application of the law without deference to the Commission's findings. *Thompson v. Treasurer*, 545 S.W.3d 890, 893 (Mo. App. E.D. 2018); *Williams v. Treasurer*, 598 S.W.3d 180, 186 (Mo. App. E.D. 2020).

Analysis

A claimant must meet two conditions to make a compensable PTD claim under Section 287.220.3. *Treasurer v. Parker*, 622 S.W.3d 178, 181 (Mo. banc 2021). First, the claimant must have at least one qualifying preexisting disability. *Id.* A preexisting disability qualifies if it is

medically documented, equals at least 50-weeks of PPD, and meets one of the four criteria in Section 287.220.3(a)(i)-(iv). *Id.* Second, the claimant must show the combination of the primary injury and qualifying preexisting disabilities results in PTD. *Id.*

Marberry's appeal is premised on the Commission's finding that, "[Marberry's] evidence, as a matter of law, does not meet the standards of § 287.220.3 and only demonstrates [he] is PTD from a combination of all his injuries, and not simply his primary injury and single qualifying preexisting disability." He argues that because all of his injuries may be considered under a proper application of Section 287.220.3, the Commission's finding establishes Fund liability. Thus, the question is whether the Commission erred in excluding his right shoulder and low back from consideration in determining whether he was PTD.

Right Shoulder

Regarding Marberry's right shoulder, the Commission stated, "A preexisting disability qualifies under step one only if it had reached MMI before the date of the primary injury." The Commission found Marberry's 2014 right shoulder injury did not reach MMI until 2017, and thus concluded his right shoulder did not qualify under Section 287.220.3(2)(a) because the primary injury occurred in 2015. This was error, as explained by the Missouri Supreme Court in *Parker*:

Section 287.220.3(2)(a), however, requires only that "[a]n employee *has* a medically documented preexisting disability equaling a minimum of fifty weeks of [PPD]" before suffering the primary injury. [Emphasis added.] That the employee's disability was determined to reach MMI after he suffered his primary injury does not mean the employee suffered his preexisting disability after he suffered his primary injury. The statute does not require the employee *know* his injury equals a minimum of 50 weeks of PPD before suffering the injury or that PPD already be established in proceedings before the Commission. Accepting the Fund's reading of section 287.220.3(2)(a) would require this Court to add words to the statute. Therefore, an employee who suffers a preexisting disability before his primary injury can meet the first condition regardless of whether he knew (or it had

been determined) before suffering his primary injury that his preexisting disability equaled 50 weeks PPD.

Parker, 622 S.W.3d at 182 (emphasis in original). Accordingly, the Commission erred by excluding Marberry's right shoulder disability from consideration in determining Fund liability.

The Fund asserts we must remand for additional findings of fact pursuant to *Parker*, 622 S.W.3d at 183. The *Parker* Court held it was required to remand for additional findings and conclusions by the Commission when the Commission erred by applying Section 287.220.2 rather than Section 287.220.3. *Id.* at 183. The Court could not make findings or conclusions in the first instance nor ascribe to the Commission findings and conclusions all parties concede it did not make. *Id.*

In *Wilson v. Treasurer*, the Commission found the Fund was not liable for a claimant's PTD despite finding the sole medical expert witness's testimony credible that the combination of the claimant's preexisting conditions and primary injury resulted in PTD. *Wilson v. Treasurer*, 2021 WL 4432869 at *2 (Mo. App. W.D. 2021). The Commission found the claimant did not meet his burden of proof because he did not show that the PTD resulted from the combination of a *single* qualifying disability and the primary injury. *Id.* at *3. On appeal, the Fund conceded that the Commission erred, but argued the proper remedy was to remand for additional findings of fact and conclusion of law. *Id.* at *4-5. The Western District distinguished *Parker* on the grounds that the Commission applied the correct subsection of Section 287.220. *Id.* at *5 n.6. The court held no remand was required because the sole testifying medical expert, whose testimony was uncontradicted in the record, opined the claimant was PTD from the combination of his preexisting conditions and primary injury, and that expert was explicitly found credible by the Commission. *Id.* at *5. Thus, no additional factual findings were required to apply the correct legal standard to the undisputed facts in the record. *Id.* The court remanded the case to

the Commission with instructions to enter an award in favor of the claimant and against the Fund. *Id.*

Here, the Commission's award contained no findings regarding a disability rating for Marberry's right shoulder injury. The evidence in the record includes that Dr. Volarich rated Marberry's right shoulder at 35% PPD, and that Marberry settled this claim with his employer for 34.8% PPD, which equates to more than 80 weeks PPD compensation. The Fund did not present any experts or other evidence to dispute these disability ratings for Marberry's right shoulder. Accordingly, the undisputed testimony of Dr. Volarich establishes that Marberry's right shoulder injury met the 50-week disability threshold.

Moreover, the Commission implicitly found the testimony of Dr. Volarich credible. Dr. Volarich opined Marberry sustained 20% PPD of the BAW rated at the cervical spine as a result of the 1999 and 2002 neck injuries. The Commission accepted Dr. Volarich's testimony, finding Marberry's preexisting neck injury met the 50-week threshold and qualified under Section 287.220.3. Thus, the Commission's implicit credibility determination in favor of Dr. Volarich supports our conclusion that the uncontradicted evidence in the record established Marberry's right shoulder injury qualified under Section 287.220.3.

Similar to *Wilson*, Dr. Volarich's undisputed testimony regarding Marberry's right shoulder injury renders additional factfinding unnecessary. Applying the correct legal standard to the undisputed facts in the record requires the conclusion that Marberry's right shoulder injury is a qualifying preexisting disability under Section 287.220.3.

Low Back

Regarding Marberry's low back, the Commission found, "There is no evidence [Marberry's] low back is alleged as a prior injury in this case and does not reach 50 weeks of

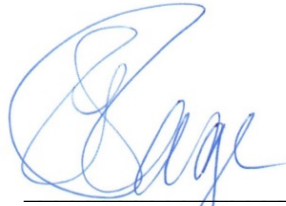
PPD (Dr. Volarich rated it at 10% PPD of the BAW, which is 40 weeks).” In other words, the Commission prohibited consideration of the low back disability because it did not satisfy the 50-week PPD threshold. However, this was error because the 50-week PPD threshold applies only to preexisting disabilities, not disabilities resulting from the primary injury. Section 287.220.3(2)(a).

The undisputed evidence in the record establishes that Marberry’s low back disability was a direct result of the primary injury. Marberry testified that he hurt his neck and lower back as a result of the primary injury, which the Commission explicitly found credible. Dr. Chabot’s 2016 IME states, “Marberry sustained a strain/contusion injury to the neck, T-spine *and* L-spine as a result of a fall at work on [September 24, 2015].” (emphasis added). Medical records from October 16, 2015, show Marberry received medical attention for neck and back pain after his work injury, and he was diagnosed with, *inter alia*, a contusion of his low back. Finally, Dr. Volarich opined that Marberry sustained 10% PPD of the BAW rated at the lumbar spine as a direct result of the primary injury. Thus, the Commission erred by excluding Marberry’s low back from consideration in determining Fund liability.

The Commission erred in finding that “[Marberry’s] evidence, as a matter of law, does not meet the standards of [Section] 287.220.3[.]” All of Marberry’s injuries could properly be considered under Section 287.220.3. We need not remand this case for additional factfinding because the Commission already found that Marberry’s evidence “demonstrates [he] is PTD from a combination of all his injuries[.]” Based on that finding, Marberry is entitled to PTD benefits from the Fund. Points I, II, and III are granted.

CONCLUSION

The Commission's award is reversed and remanded with instructions to the Commission to enter a final award of PTD benefits in favor of Marberry and against the Fund.



Lisa P. Page, Judge

Michael E. Gardner, P.J. and
James M. Dowd, J., concur.