

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

Injury No.: 05-029562

Employee: Ruth Atkins
Employer: Schreiber Foods (Settled)
Insurer: Zurich American Insurance Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 7, 2005
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 20, 2007. The award and decision of Administrative Law Judge Margaret D. Landolt, issued November 20, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 8th day of April 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge erred by substituting her own vocational opinion for the uncontradicted expert vocational evidence provided by Ms. Browning. "[C]ompetent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached" may not be disregarded or ignored. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 636 (Mo.App. 2007). Since there was no contrary evidence provided, and because Ms. Browning's testimony and report are wholly credible, it is unclear to me why the administrative law judge disregarded this evidence and instead injected her own opinion.

Ms. Browning determined that employee is permanently and totally disabled based on the synergistic effect of the combination of her prior disabilities and the primary injury. Ms. Browning opined that employee could not work as a File Clerk or Customer Service Representative because it was "highly likely that [employee] would have difficulty with continuous use of her hands . . . and use of a computer keyboard . . . secondary to reports of hand cramping after a few minutes of use with paresthesias and numbness and sensitivity to light." The administrative law judge did not find this opinion to be persuasive, making note that some of employee's limitations were based on subjective complaints. The administrative law judge then substituted her own "expert" opinion in place of Ms. Browning's and stated that she did not "believe" employee's hand cramping, numbness and paresthesias would prevent employee from performing sedentary work.

The evidence presented at the hearing shows otherwise. Nothing prohibits Ms. Browning from considering employee's subjective complaints, especially in light of the fact that those complaints were not contrary to the expert medical evidence. Employee testified credibly that due to her wrist injuries, her hands still go numb, that she can only lift approximately one gallon of milk, and that she is unable to write for extended periods, stir when cooking, or peel potatoes. The administrative law judge does not dispute those findings or directly attack employee's credibility. Without explanation or supporting evidence, she simply stated that she believed employee could perform the job duties of a File Clerk, Customer Service Clerk or Motel Desk Clerk. Such a finding is contrary to the competent and substantial evidence in the record, especially since Ms. Browning's credible and undisputed expert vocation opinion shows that all of those job types would require employee to perform tasks that she is unable to perform due to her disabilities, limitations and restrictions.

Furthermore, even if employee's hand complaints were disregarded as the administrative law judge chose to do, employee is still permanently and totally disabled. Employee's sensitivity to light prevents employee from working jobs requiring the use of a computer monitor. Employee is unable to sit or stand for extended periods due to her prior knee, pelvis and back injuries, which Ms. Browning opined prevented employee from performing work as a File Clerk, Customer Service Clerk or Motel Desk Clerk.

Finally, I also note that the administrative law judge erred in finding that employee turned down offers of work based on the wage offered. Nowhere in the record did employee, or anyone else for that matter, provide evidence that employee was ever offered any work after her primary injury. This finding of fact is simply wrong.

Based on the above, I believe that employee has carried her burden of establishing that she is permanently

and totally disabled based on the synergistic effect of the combination of her prior injuries and her primary work injury of April 7, 2005. Ms. Browning provided expert vocational evidence that based on the combination of employee's physical impairments, restrictions, age, education and training, employee is unemployable in the open labor market. Therefore, employee is permanently and totally disabled. As such, I would reverse the award of the administrative law judge and award employee permanent total disability benefits against the second injury fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to only award employee permanent partial disability benefits.

John J. Hickey, Member

AWARD

Employee: Ruth Atkins

Injury No.: 05-029562

Dependents: N/A

Employer: Schreiber Foods (settled)

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer:
N/A

Hearing Date: October 3, 2007

Checked by: MDL: ms

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - Was the injury or occupational disease compensable under Chapter 287? Yes
 - Was there an accident or incident of occupational disease under the Law? Yes
 - Date of accident or onset of occupational disease: April 7, 2005
 - State location where accident occurred or occupational disease was contracted: St. Louis, Missouri
6. Was above employee in employ of above employer at time of alleged accident/occupational disease? Yes
7. Did employer receive proper notice? N/A

- Did accident or occupational disease arise out of and in the course of the employment? Yes
- 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: Employee used her hands in a repetitive fashion.

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Both wrists

- Nature and extent of any permanent disability: 17.5% PPD of each wrist

15. Compensation paid to-date for temporary disability: N/A

16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Ruth Atkins

Injury No.: 05-029562

17. Value necessary medical aid not furnished by employer/insurer? N/A

- Employee's average weekly wages: N/A

19. Weekly compensation rate: \$422.67/\$354.05

20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

37.7 weeks of permanent partial disability from Second Injury Fund	\$13,347.69
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Total:	\$13,347.69
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23. Future requirements awarded: None

Said payments to begin 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 hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. James Heckel

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ruth Atkins Injury No.: 05-029562
Dependents: N/A Before the
Employer: Schreiber Foods (settled) Division of Workers' Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial Relations of Missouri
Insurer: Zurich American Insurance Company Jefferson City, Missouri
Checked by: MDL: ms

PRELIMINARIES

A hearing was held on October 3, 2007, at the Division of Workers' Compensation in the City of St. Louis. Ruth Atkins (Claimant) was represented by Mr. James Heckel. Schreiber Foods (Employer) and its Insurer, Zurich American Insurance Company previously settled its liability with Claimant, and this case proceeded to a hearing against the Second Injury Fund, which was represented by Assistant Attorney General Kay Osborne. Mr. Heckel requested a fee of 25% of Claimant's Award.

The parties stipulated that on or about April 7, 2005, Claimant sustained an occupational disease arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis; and the claim was timely filed. Claimant's rate is \$422.67 for total disability benefits and \$354.05 for PPD benefits.

ISSUES

The issues for determination by hearing are: nature and extent of permanent disability; and liability of the Second Injury Fund for permanent total or permanent partial disability.

SUMMARY OF EVIDENCE

Claimant is a 59 year old woman with a ninth grade education and no other vocational training or formal education. Claimant never performed office or sales work, and is unable to type or use a computer. After high school Claimant worked briefly in the fast food industry, and then worked in various jobs in the manufacturing industry.

In 1981, Claimant began working in the dairy industry for Raskas Dairy which later became Employer. Most of Claimant's work in the dairy industry was physically demanding. Claimant made boxes, cleaned, and broke down machines. Claimant had to work quickly, and speed was a major factor in her job. Claimant performed a job called "cheese peeling" which required her to clean tubs of cheese or sour cream.

Prior Injuries

In 1984, Claimant sprained her lower back at work, and briefly treated conservatively with Dr. Sedgwick. In 1985, Dr. Sedgwick rated 5% PPD of the body as a whole referable to the low back. Claimant returned to see Dr. Sedgwick in 1988 for recurrence of low back pain. MRI scans of the lumbar spine in 1988 and 1989 were negative for herniated discs. Dr. Sedgwick did not recommend surgery, and released Claimant from his care in January 1990.

In 1996, Claimant injured her right shoulder when she fell, and had surgery to repair a rotator cuff tear. Dr. Johnston released Claimant at MMI, but recommended she avoid occupational activities with use of the arm above the shoulder level. Claimant settled her claim with Employer for 20% of the right shoulder. At the same time Claimant was treating for her shoulder, Dr. Johnston also treated Claimant for a non-displaced fracture of the right distal radius. Treatment consisted of a short arm cast, and the fracture healed without residual problems.

Claimant received conservative treatment for her knees in 2003 from Dr. Johnston and Dr. Wright. MRIs of her knees in May 2003 revealed early osteoarthritis bilaterally. Claimant returned to see Dr. Johnston in June 2003 for bilateral knee pain. Dr. Johnston diagnosed bilateral patellofemoral syndrome. Dr. Johnston did not recommend surgery, but prescribed stabilizing braces for her knees. Claimant continues to experience pain in both knees.

Claimant has a history of heart problems and had heart surgery. Claimant was last evaluated at Washington University in August 2003 and had a stable cardiac exam.

Claimant returned to see Dr. Johnston in 2004 complaining of bilateral knee pain and right hip pain. Dr. Johnston diagnosed right sciatica and ordered an MRI of Claimant's lumbar spine. The MRI revealed bulging discs and arthritis at L4-5 and L5-S1. Claimant received epidural steroid injections.

Claimant injured her low back in August 2004 when a co-worker moved a chair and she fell to the floor on her buttocks. Claimant was diagnosed with a lumbar and coccyx sprain, and received conservative treatment. An MRI performed in January 2005 revealed bulging discs. A functional capacity exam performed in February 2005 found Claimant could perform medium duty work. Dr. Wayne found Claimant to be at MMI in March 2005 but gave her permanent restrictions of no lifting from the floor more than 20 pounds, no lifting more than thirty pounds above the waist, and no frequent bending. Dr. Wayne's final diagnosis was lumbosacral sprain and right medial thigh sprain.

Claimant was treated for depression in the past and was on Zoloft on April 7, 2005. Before April 7, 2005, Claimant had heel spurs. She had surgery on her right heel, and wears inserts in her shoes. She was also diagnosed with a left foot spur, but has not had surgery. Leading up to April 7, 2005, Claimant was unable to stand a long time because of her spurs.

Claimant has a thyroid condition which affects her eyes. She has light sensitivity, double vision, dryness, and her eyes bulge. Claimant wears reading glasses, but she is unable to read for extended periods of time because of eye strain.

Primary Injury

Claimant experienced numbness in her hands for several years leading up to April 7, 2005. Dr. Rottman examined Claimant on April 11, 2005, and ordered nerve conduction studies which showed bilateral carpal tunnel syndrome. Claimant had carpal tunnel releases in April and May of 2005. Following physical therapy, Claimant was released without restrictions in June 2005. Claimant settled her claim with Employer for 17.5% PPD of each wrist with a 10% loading factor.

Since her surgery Claimant has decreased grip strength. Her hands go numb and she gets cramps.

She is unable to peel potatoes or lift a gallon of milk, and has some problems with thumb soreness.

Claimant was laid off while on medical leave for her carpal tunnel syndrome. She attempted to find a job by submitting applications, making phone calls, and sending out her resume. Following her layoff Claimant received unemployment compensation for five months. Claimant was able to find some jobs, but did not take them because they only paid minimum wage.

Claimant currently has a lot of difficulty sleeping, and invested in a hospital bed. She has difficulty lifting or carrying things, and her back prevents her from standing too long. She is only able to walk about one and one-half block. Claimant also has difficulty sitting over an hour. She has to get up and stretch if she sits too long. Claimant has difficulty going to sleep, and gets approximately four to five hours of sleep a night.

Currently Claimant takes aspirin daily for pain. She takes the aspirin for her back, hands, hip, and knees. In a typical day, Claimant watches television or sits on her front porch. She reads a little bit and does some housework. She is able to fold her clothes, take care of her birds, and cook a little. She is unable to sweep. Claimant has to sit down or lay down during the day because her back bothers her. She occasionally drives, but her hands go to sleep when she drives. It is difficult for her to get in and out of the car because of her back and hips, and she has trouble with steps.

Opinion Evidence

Dr. Bruce Schlafly testified on behalf of Claimant. Dr. Schlafly testified Claimant's work for Employer is the substantial and prevailing factor in causing her bilateral carpal tunnel syndrome, and in the need for bilateral carpal tunnel surgery. Dr. Schlafly rated Claimant's disability at 25% PPD of each hand at the wrist. He opined a loading factor of 15% should be applied. Dr. Schlafly recommended Claimant avoid work that requires forceful or repetitive pinching and gripping with her hands.

Dr. Schlafly testified Claimant sustained 35% PPD of the right shoulder due to her prior rotator cuff injury and surgery; 20% PPD of both knees for patellafemoral syndrome; and 30% PPD of the body as whole for her low back and pelvis. Dr. Schlafly testified Claimant's pre-existing disabilities to her right shoulder, knees, back, and pelvis were obstacles to employment or re-employment prior to her carpal tunnel surgery, and there is a synergistic effect between the disabilities greater than the simple sum of their components.

Dr. Schlafly testified Claimant should avoid occupational activities requiring the use of the right arm above shoulder level. He recommended Claimant be limited to sedentary activity, no bending and lifting more than 20 pounds from the floor, and should be limited in going up and down steps due to her knees. Dr. Schlafly deferred to a vocational expert on whether Claimant could perform sedentary work in the open labor market.

Dr. Schlafly did not rate Claimant's disability for her eye condition because he had no information on whether Claimant received treatment for her eye condition between May 18, 1998 and November 14, 2005. Dr. Schlafly testified it is possible Claimant's thyroid disease could have worsened between April 7, 2005, and when he saw her in November of 2005. Dr. Schlafly did not find any significant industrial disability on the basis of her heart condition or thyroid disease.

Sherry Browning, a vocational rehabilitation counselor testified on behalf of Claimant. Ms. Browning assessed Claimant after personally meeting with her, and prepared a report. Ms. Browning concluded Claimant is not employable in the open labor market. Ms. Browning testified Dr. Schlafly's restrictions placed Claimant at a sedentary work demand level. Ms. Browning testified Claimant could potentially qualify for specific positions as a File Clerk, Motel Desk Clerk or Customer Service Representative, but found it highly likely Claimant would have difficulty with continuous use of her hands as a File Clerk, and continuous use of

a computer keyboard and monitor as a Customer Service Representative, due to her subjective complaints of hand cramping after a few minutes of use, with numbness and tingling, and sensitivity to light.

Ms. Browning testified Claimant does not have a learning disability, and she scored in the average range in every area but reading, in which she was above average. Ms. Browning testified Claimant's academics would not pose a hindrance or obstacle to her being retrained. Ms. Browning testified Claimant found some jobs, but did not take them because they were minimum wage jobs.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon my observations of Claimant at hearing, a comprehensive review of the evidence, and the application of Missouri Law I find:

Claimant is not permanently and totally disabled. Total and permanent disability occurs when no employer in the usual course of business would reasonably be expected to employ the Claimant in his present physical condition. *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App.1997), overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

The testimony of Ms. Browning is not persuasive with regard to whether Claimant is employable in the open labor market. Ms. Browning based her opinion upon the restrictions imposed on Claimant by Dr. Schlafly, as well as Claimant's subjective complaints. I do not believe Claimant's complaints with regard to her hands would prevent her from working in a sedentary job. Claimant was released without restrictions by Dr. Rottman, her own treating physician, and settled her case with Employer for a typical 17-1/2% PPD of each wrist. It is reasonable to believe she could return to some type of sedentary work such as File Clerk, Customer Service Clerk or Motel Desk Clerk. Claimant successfully found some jobs, but did not take them because they were only minimum wage jobs.

The Second Injury Fund is liable for permanent partial disability sustained by Claimant due to the combination of her prior injuries and her primary injury of April 2005. In order to recover permanent disability compensation from the Second Injury Fund, claimant has the burden to prove, among other things, that he had a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment. §287.220.1 RSMo (1994); *Leutzinger v. Treasurer*, 895 S.W.2d 591, 593 (Mo. App. 1995). The preexisting disability necessary to trigger Second Injury Fund liability is permanent partial disability existing at the time the work-related injury was sustained which meets the statutory thresholds. §287.220.1 RSMo (1994); *Garcia v. St. Louis County*, 916 S.W.2d 263, 266 (Mo. App. 1995). The Second Injury Fund is not responsible for progression of preexisting conditions or new conditions that develop after and unrelated to the work injury. *Id.*

Claimant sustained PPD of 17 1/2 % of each wrist for the primary injury of April 2005. Claimant settled with Employer for that amount and the evidence supports this level of disability. I further find Claimant sustained 20% PPD of the right shoulder, 20% of the body as a whole referable to her low back, and 20% of each knee as a result of her prior injuries. These injuries were a hindrance or obstacle to employment, and combined with the primary injury to create a greater overall disability. A loading factor of 15% shall be applied.

The Second Injury Fund is liable for 37.7 weeks of PPD benefits or \$13,347.69.

This award is subject to an attorney's lien of 25% in favor Claimant's attorney, Mr. James Heckel.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation