

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

Injury No.: 08-071776

Employee: Carol Ballard
Employer: Woods Supermarkets, Inc.
Insurer: Missouri Grocers Association Trust
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. 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 23, 2012. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued July 23, 2012, 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 1st day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Carol Ballard Injury No. 08-071776
Dependents: N/A
Employer: Woods Supermarkets Inc.
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Missouri Grocers Association Trust
Hearing Date: 4/30/12 Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
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: 8/19/08
5. State location where accident occurred or occupational disease was contracted: DALLAS COUNTY, MO
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? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
CLAIMANT SLIPPED ON GREASE AND FELL.
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: BODY AS A WHOLE
14. Nature and extent of any permanent disability: PERMANENT AND TOTAL DISABILITY
15. Compensation paid to-date for temporary disability: \$27,779.32
16. Value necessary medical aid paid to date by employer/insurer? \$76,039.29

Employee: Carol Ballard

Injury No. 08-071776

- 17. Value necessary medical aid not furnished by employer/insurer? NONE
- 18. Employee's average weekly wages: \$511.69
- 19. Weekly compensation rate: \$341.13
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/A

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning 2/22/10, for Claimant's lifetime

22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:

weekly differential (0) payable by SIF for 0 weeks, beginning N/A
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

23. Future requirements awarded: MEDICAL TREATMENT

Said payments to begin immediately 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:

JOHN WISE

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Carol Ballard Injury No. 08-071776
Dependents: N/A
Employer: Woods Supermarkets Inc.
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Missouri Grocers Association Trust
Hearing Date: 4/30/12 Checked by: MEH

The parties appeared before the undersigned administrative law judge on April 30, 2012, for a final hearing. The claimant appeared in person represented by John Wise. The employer and insurer appeared represented by Paula Green. The Second Injury Fund appeared represented by Barbara Bean. Memorandums of law were filed by May 21, 2012.

The parties stipulated to the following facts: On or about August 19, 2008, Woods Supermarkets Inc., was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Missouri Grocers Association Trust. On the alleged injury date of August 19, 2008, Carol Ballard was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about August 19, 2008, the claimant sustained an accident which arose out of and in the course and scope of employment. The accident occurred in Dallas County, Missouri. The claimant notified the employer of her injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the alleged accident, the claimant's average weekly wage was \$511.69, which is sufficient to allow a compensation rate of \$341.13 for temporary total and permanent partial disability compensation. Temporary disability benefits have been paid to the claimant in the amount of \$27,779.32. The

employer and insurer have paid medical benefits in the amount of \$76,039.29. The attorney fee being sought is 25%.

ISSUES:

1. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
2. The nature and extent of permanent disabilities.
3. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant is 62 years old. She completed the 10th grade and did not obtain a GED. Nor did she have any further formal education or training. Her work history includes being a waitress in the early 1960's and a receptionist at an auto dealer and a title company. After moving to Missouri in 1980 she worked as a cook in several restaurants.

In 1990 she went to work for Consumers Market in Bolivar, Missouri. When she started she was a baker, then was promoted to bakery manager, and was bakery merchandiser when she left in 1999. While working at Consumers she had right carpal tunnel surgery and DeQuervain's release. This resulted in a loss of grip strength causing weakness in her right hand and wrist that prevented her from doing as much cake decorating and heavy lifting of pans with her right hand.

In the 1990's she injured her left thumb when putting away frozen dough. She had several surgeries to the left thumb and wrist. This involved a DeQuervain's release of the left distal forearm and arthroplasty of the left thumb metacarpal joint. After the surgery she described ongoing pain, stiffness, and weakness in her left thumb and hand. Because of the problems in both her hands she had difficulty pinching, gripping, and doing fine work for cake decorating.

Claimant also described problems which developed in both her knees starting in about 2000 when she began to experience pain. In 2002 she had arthroscopies of both knees. Her pain continued to worsen and she had continuing problems kneeling, squatting, walking up stairs, and standing for long periods of time. She ultimately had total knee replacements performed on both of her knees, the left in January 2007 and the right in May 2007. She still continued to have problems with pain and had to take medication. She also continued to have trouble squatting, kneeling, and climbing stairs prior to August 19, 2008. In June and July of 2008 she was receiving medical treatment and physical therapy for her knees. Claimant had to cut her hours from 60 to 40 after her knee replacements.

Claimant went to work for Woods Supermarket in Bolivar on September 9, 2003. She worked as a deli manager, full-time baker, and fill-in cake decorator. On August 19, 2008, a buzzer went off on a fryer and she was walking toward the fryer to turn it off. When doing so she slipped on some oil and fell. When she fell her feet went out in front of her and she attempted to reach back and catch herself. When she hit the floor the back of her head hit the floor. She had immediate pain in her left arm, her back, and her head. She was taken to Citizens Memorial Hospital by ambulance.

As a result of the accident, claimant was diagnosed with comminuted distal left radius fracture, disc herniation at L4-5 and L5-S1, and strain/sprain of her cervical and thoracic spine.

The claimant was treated by Dr. Paul Olive for her back. He performed surgery consisting of right L5-S1 laminotomy and discectomy and left L4-5 laminotomy and discectomy on January 22, 2009. After surgery she had extensive physical therapy.

When she fell on August 19, 2008, she also fractured her left wrist. Dr. Grillot performed a total of three surgeries on her left arm. On September 25, 2008, he performed an initial surgery

to place in a plate and bone graft. He also performed two more surgeries to remove the hardware, the last one on May 8, 2009. She also had physical therapy for the left wrist injury.

Dr. Grillot found claimant to be at maximum medical improvement and released her on May 25, 2010. His diagnosis was “left distal radial fracture, ulnar impaction syndrome, and irritation of the ulnar nerve” as a result of her work injury.

The claimant also began having neck issues. She described burning pain between her shoulder blades. She was treated with physical therapy and a TENS unit.

On February 22, 2010, Dr. Jeffrey Woodward performed an independent medical examination at the request of the employer and insurer. Dr. Woodward examined her back. He testified that his impression was “work-related fall with associated L4-5 and L5-S1 discectomy surgery with very good initial pain relief and then return of pain with no apparent intervening physical injury event. The patient was noted to have residual lumbosacral spine pain primarily on the right side of the low back associated with right thigh neuropathic pain but without any objective neurologic deficits on exam.” He found her at maximum medical improvement and concluded she could work full-time modified work duties with continuous lifting, pushing and pulling zero to 15 pounds maximum. He rated her with 12% of the body as a whole permanent partial disability at the 400-week level for the work injury and 6% of the body as a whole at the 400-week level for preexisting degenerative spine abnormalities noted on the imaging reports. He said that the restrictions were caused in the same proportion as his ratings.

Dr. Woodward stated that postoperative epidural spine scarring due to the surgery claimant had could be a source of her pain. He also said that Dr. Ciccarelli noted in a July 2009 MRI possible small right L5-S1 disc protrusion that could contribute to claimant’s ongoing pain.

On March 2, 2010, and January 17, 2011, Dr. Brent Koprivica performed independent medical examinations at the request of the claimant. He addressed her preexisting bilateral hands

and bilateral knee conditions. He also addressed the work-related injury of August 2008. Arising from this injury, he diagnosed a comminuted left distal radius fracture with malunion, chronic cervicothoracic strain/sprain with a development of regional myofascial pain that involved or impacted bilateral shoulder girdle and cervicothoracic function, and disc herniation at L4-5 and L5-S1 with failed laminectomy syndrome despite surgery, all conditions caused by the work-related injury.

He testified that the conditions which preexisted the work injury in August 2008, namely the right thumb and wrist; the left thumb and wrist; and her bilateral knee replacements all constituted a hindrance or obstacle to employment. Of her work injuries she sustained in August 2008, he found her back injury to be the worst. He performed Waddell's testing which for any over or abnormal reaction, either conscious or subconscious. He found no indication that claimant was overreacting or exaggerating her back pain.

Dr. Koprivica imposed restrictions attributable to only the August 19, 2008. These include the ability to change posture, sitting or standing intervals less than an hour; walking intervals less than 30 minutes with flexibility to change positions; lifting 10-pound maximum; lift only occasionally; rarely bend at the waist; limited from squatting, crawling, kneeling or climbing; avoid activities requiring left upper extremity use, particularly vibration; sustained or awkward positions of the cervical spine; and the ability to fully recline. He concluded the claimant was permanently and totally disabled from the restrictions necessitated by her work injury alone. In the alternative, he rated her with a global 75% permanent partial disability of the body as a whole at the 400-week level, assuming she was not found totally disabled. He further assessed permanent partial disability for the preexisting conditions at 35% of each lower extremity at each knee at the 160-week level, 15% of the right upper extremity at the 200-week level, and 25% of the left upper extremity at the 200-week level.

Dr. Koprivica found claimant at maximum medical improvement but did feel she would need ongoing medical treatment. This future medical treatment included chronic pain management with a multidisciplinary approach to include a mental health expert.

The Claimant testified at the hearing and I found her to be very credible. She was very forthright in describing her problems and activities. Claimant described her current problems as a burning type pain between her shoulder blades when she has to push herself up from a chair. Her shoulders stay very tight. She has pain in her left hand and wrist and described significantly decreased use of her hand. Pain in the pinky side of her hand prevents her from resting her hand on a hard surface. She has little strength and has difficulty lifting as much as a half gallon of milk and holding it in front of her. She has pain and spasm in her hand and little finger, describing needing to physically pull the knuckle in her little finger to put it back in place sometimes.

Claimant described constant pain in her lower back that is a "deep pressure like pain." Sometimes it is a burning pain. In addition, she described pain that radiates into her right leg and travels to her foot. Her range of motion has been affected and she cannot turn her head to look behind her. While she can bend at the waist it is painful do so and she cannot hold that position and must come right back up. She has problems standing for long periods of time, how long depends on the weather and how well she slept the night before. If it is a good day she can stand for one to one and a half hours. On a bad day she can only stand for a short time. She did testify that her knee problems contribute to her difficulty standing. She also has difficulty sitting. If she sits in a normal chair for 30 minutes her low back pain increases and will travel into her right leg. Walking long distances is difficult for her. On a good day she can walk approximately an hour but on a bad day cannot walk over 10 minutes. She also has difficulty sleeping. She cannot lie on her right side or flat on her back in a bed.

Prior to 2008 she could not lift with her knees due to her knee problems. Now she has increased problem lifting because she cannot use her back to lift.

Claimant does not think she could do her former jobs because she has to sit or lie down two to three times a day. She last worked light duty for the employer in April 2009. She has not worked since.

Her husband has installed accommodations in their home to help her function due to her low back pain. These include a handicapped toilet, a front loading washer and dryer and special garden tools and bench. They have also purchased a different vehicle that is easier for her to climb in to.

Claimant testified that she has to lay down in a recliner two to three times a day because of her low back and right leg pain. She has to lie down for approximately 30 minutes to an hour. She testified that it varies the number of times and the length of time she must lie down each day. On a good day she will not have to lie down during the day and will try to do some light housework and tries to stay active.

Claimant also described an arrangement she has with her daughter who lives about 20 minutes away. If she is feeling like it she will go to her house once a week or every two weeks to do laundry and dishes. She stays between four to six hours. Her daughter pays her \$75 a week for doing this. In order for the claimant to be able to rest while there her daughter bought a recliner. The claimant testified that she will put in a load of laundry and rest in the recliner while it washes. Part of the arrangement with her daughter is that she goes to her daughter's if she feels like it but if she is not feeling well she will stay home. She also visits her teenage grandchildren when she is there. Claimant will also visit an elderly aunt and uncle about once every two weeks. They live about 20-25 minutes away. She stays for about three hours at a time. Claimant testified that she does these things to get out of the house and keep herself a little active. She will often

visit her aunt and uncle, then go on to her daughter's house and stay the night, then do laundry the next day.

James England, a certified vocational rehabilitation counselor, performed a vocational evaluation of the claimant on November 14, 2011. He also testified by deposition. Mr. England testified that he thought the claimant would be limited to sedentary or light work based on Dr. Woodward's restrictions. He did not think she could do the supervisory work in a bakery setting that she had done in the past but thought she could do some retail sales, cashiering, or security work in jobs that would allow her to change positions. He did not believe the claimant would be employable if Dr. Koprivica's restrictions were used, specifically the need to recline. Mr. England agreed that the need to lie down during the day would render a person permanently and totally disabled. He said it would be the combination of her functional limitations to both hands and both knees that would take her out of the work force.

Phil Eldred, a certified vocational rehabilitation counselor, performed a vocational evaluation of the claimant on June 9, 2011. He testified live at the hearing. Mr. Eldred testified that he reviewed medical records; reviewed deposition testimony of the claimant, Dr. Koprivica, Dr. Woodward, and Jim England; took a history of the claimant; reviewed her educational background and performed some vocational tests. He found Dr. Woodward's restrictions would put the claimant at a sedentary work level and Dr. Koprivica would put her at a less than sedentary level. He testified the need to lie down during the day is significant because it would prevent the claimant from being considered in the competitive labor market. Mr. Eldred concluded that if claimant was at the less than sedentary level she would not be employable in the open labor market. At the sedentary level he found that she had no transferable skills so she would still not be competitive in the open labor market. He found no jobs that she could be retrained for and she could not work unskilled jobs.

Mr. Eldred concluded that no reasonable employer would be likely to hire her and she was not employable in the open labor market. As a result she was permanently and totally disabled due to the last injury alone. This was due to the restrictions given by Dr. Woodward for the last injury of August 2008. He found that her preexisting disabilities did not rise to the same level. She was working full time before the last injury. He also said that the need to lie down alone made her permanently and totally disabled.

The employer and insurer offered the testimony of Ray Kimery, an investigator who conducted surveillance on the claimant. I do not find his testimony or the surveillance video admitted into evidence to be significant and give neither any weight, other than it corroborates the claimant's testimony. Mr. Kimery conducted surveillance between January 19, 2012, and February 16, 2012, for a total of 16 days, eight to ten hours a day, for a total of approximately 148-160 hours. The extent which he taped the claimant driving in her car, getting gas, going to stores for a few minutes and coming out carrying what appeared to be very light bags, traveling to her aunt and uncle's house then to her daughter's house. The longest he saw her drive was 27 minutes.

After carefully considering all of the evidence, I make the following rulings:

1. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.

Based on Dr. Koprivica's opinion, I find that the claimant will need future medical treatment to cure and relieve her of the effects of her injuries. Therefore, the employer and insurer are ordered to provide claimant with future medical treatment as recommended by a competent physician.

2. The nature and extent of permanent disabilities.

I find it credible based on the claimant's testimony and Dr. Koprivica's testimony, that the claimant has a need to recline and actually has to recline for at least 30 minutes up to several times a day. I further find that this is due to her back injury. Based on the restrictions imposed by both Dr. Woodward and Dr. Koprivica, giving particular attention to the fact that claimant has to recline, I find that she is unable to compete in the open labor market and is therefore rendered permanently and totally disabled. Mr. Eldred testified that if the claimant had to recline she would automatically be taken out of the open labor market. Although Mr. England did not find claimant permanently and totally disabled, he did agree that if she had to recline she would be.

Furthermore, Mr. Eldred found that claimant was permanently and totally disabled as a result of the last injury alone, not in combination with her preexisting disabilities. I find his opinion supported by the evidence as a whole. Although claimant had significant preexisting conditions to her bilateral upper extremities and bilateral knees, she was still able to work full-time. She testified that while it was necessary for her to reduce her hours from 60 to 40, lift differently, and she had trouble doing cake decorating she was still able to work. Clearly, she was working and competing in the open labor market until she had the back injury and left arm fracture. These injuries have much more substantially limited her ability to sit, stand, use her left arm, as well as needing to recline. These limitations alone render her permanently and totally disabled.

Based on Dr. Woodward's opinion that puts the claimant at maximum medical improvement on February 22, 2010, I find claimant was no longer temporarily and totally disabled as of that date and her disability became permanent. Therefore, employer and insurer shall pay claimant \$341.13 per week from February 22, 2010, to the present and in the future as long as claimant remains thus disabled.

3. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

I find the Second Injury Fund is not liable for either permanent total or enhanced permanent partial disability.

Attorney for the claimant, John Wise, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation