

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

Injury No.: 06-113409

Employee: Janette Brennell  
Employer: Patients First Health Care LLC  
Insurer: State Farm Fire & Casualty Co.

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, as modified herein, is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 11, 2009, except to the extent modified herein.

The administrative law judge awarded "future medical care in the form of medications" and held employer/insurer "responsible for providing such medications as are necessary." We do not so limit the award. We award employee such future medical care as needed to cure and relieve her from the effects of the injury relevant to this matter, pursuant to the provisions of the Workers' Compensation Law.

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.

The award and decision of Administrative Law Judge Vicky Ruth, issued February 11, 2009, is attached and incorporated by this reference, except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 13th day of August 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

  
  
\_\_\_\_\_

Secretary

## FINAL AWARD

Employee: Janette Brennell

Injury No. 06-113409

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: Patients First Healthcare

Additional Party: N/A

Insurer: State Farm Fire and Casualty Co.

Hearing Date: November 12, 2008

### 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: November 28, 2006.
5. State location where accident occurred or occupational disease was contracted: Franklin County, Missouri.
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:  
The claimant was engaged in repetitive work with her hands.
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: Both hands and wrists.
14. Nature and extent of any permanent disability: 17.5% of the left hand; 15% of the right hand; and a 10% load. Plus, there is 1.5 weeks of disfigurement for the left hand and 1 week of disfigurement for the right hand.
15. Compensation paid to-date for temporary disability: \$2,318.07.

16. Value necessary medical aid paid to date by employer/insurer? \$11,523.29.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$901.43.
19. Weekly compensation rate: \$600.98/\$376.55.

- Method of wages computation: By agreement.

#### COMPENSATION PAYABLE

- Amount of compensation payable:

Permanent partial disability of the left hand:	30.625 weeks
<u>Permanent partial disability of the right hand:</u>	<u>26.25 weeks</u>
Subtotal:	56.875 weeks
Plus 10% loading factor	5.6875 weeks
Plus Disfigurement of the left hand:	1.5 weeks
<u>Plus Disfigurement of the right hand:</u>	<u>1 week</u>
	65.0625 weeks

Calculation: 65.0625 weeks x \$376.55 = \$24,499.28

**TOTAL: \$24,499.28**

22. Second Injury Fund liability: N/A.
23. Future medical awarded: Yes; see award.

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: Dean L. Christianson.

### FINDINGS OF FACT and RULINGS OF LAW:

Employee: Janette Brennell

Injury No: 06-113409

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial Relations of Missouri  
Jefferson City, Missouri

Dependents: N/A

Employer: Patients First Healthcare

Additional Party: N/A

Insurer: State Farm Fire and Casualty Co.

On November 12, 2008, the claimant and the employer/insurer appeared for a final award hearing. The claimant, Janette Brennell, was represented by Dean L. Christianson. The employer/insurer was represented by Terry Mort. The claimant testified on her own behalf. Dr. Benjamin Verdine and Dr. Mark Lichtenfeld testified by deposition. The parties submitted briefs by the December 3, 2008 deadline.

### **STIPULATIONS**

The parties stipulated to the following:

- On or about November 28, 2006, the claimant was an employee of Patients First Healthcare (the employer).
- The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
- The employer's liability for workers' compensation was insured by State Farm Fire and Casualty Co.
- The Missouri Division of Workers' Compensation has jurisdiction, and venue in Franklin County is proper.
- The claimant sustained an injury by way of an occupational disease that arose out of and in the course of her employment with the employer.
- The employer had notice of the injury and a Claim for Compensation was filed within the time prescribed by law.
- The employer/insurer paid temporary total disability benefits to the claimant in the amount of \$2,318.07.
- The employer paid \$11,523.29 in medical aid.
- The claimant's average weekly wage is \$901.43, yielding a compensation rate of \$600.98/\$376.55.
- The employer/insurer did not make an offer of settlement in this case.

### **ISSUES**

At the hearing, the parties agreed that the issues to be resolved in this proceeding are as follows:

- Whether the claimant is entitled to an award for permanent partial disability.
- Whether the claimant is entitled to an award for disfigurement.
- Whether the claimant should be provided with any future medical treatment for the work-related injury.
- Whether the employer/insurer should be liable for the payment of the claimant's legal fees and costs.

### **EXHIBITS**

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit A	Dr. Lichtenfeld's deposition and attached report.
Exhibit B	Washington Physical Therapy medical records.
Exhibit C	St. John's Mercy Hospital medical records.
Exhibit D	Dr. Smith's medical records.
Exhibit E	Dr. Verdine's medical records.
Exhibit F	(Withdrawn.)
Exhibit G	Attorney's list of costs (objections overruled).

The employer/insurer offered the following exhibit, which was admitted into the record without objection:

Exhibit 1          Dr. Verdine's deposition with attachments.

*Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.*

### **FINDINGS OF FACT**

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

- The claimant is a 55-year-old woman who is left hand dominant.
- The claimant has worked for the employer as a registered nurse for the past 14 years. She performs her job on a full-time basis, with some overtime work.
- While working with her hands, the claimant performs activities such as pulling and pushing files in a file cabinet, manually pumping blood pressure cuffs, pushing carts of laundry, lifting bags of laundry, keyboarding, giving injections, and performing ear lavage.
- The claimant developed symptoms in her hands, in the form of numbness and tingling that would wake her at night. She sought medical care from her employer, Patients First Health Care. On November 6, 2006, Dr. Kenneth Smith at Patients First noted that the claimant had bilateral carpal tunnel syndrome. He indicated that he would check nerve conduction studies and EMGs, and that the claimant might be a candidate for surgery in the future. Dr. Smith told her that she could continue her nocturnal wrist splinting. On November 15, 2006, the notes from the EMG and NCV studies revealed mild bilateral carpal tunnel syndrome affecting sensory and motor components.
- The claimant saw Dr. Benjamin Verdine on November 28, 2006. Dr. Verdine noted that the claimant has carpal tunnel syndrome, left greater than right. He gave her an injection. His notes indicate that they discussed her options, including continued splinting or surgical intervention.

- Dr. Verdine performed surgery on each of the claimant's wrists in March 2007. The left wrist was operated on first, with an open carpal tunnel release being performed on March 2, 2007. Surgery was performed on the right wrist about two weeks later, on March 16, 2007. The claimant was off work for four weeks due to her wrist surgeries. She was compensated for this time off by the employer/insurer.
- After the surgeries, the claimant received physical therapy through Washington Physical Therapy. The claimant began physical therapy around March 22, 2007, and completed the therapy on April 16, 2007. At discharge, the therapist noted that the claimant made good progress, although she complained of some weakness.
- The claimant saw Dr. Verdine for follow-up visits on March 28, 2007 and on April 18, 2007. He released her to work full duty effective April 23, 2007. At the May 14, 2007 visit, the doctor noted that the claimant had reached maximum medical improvement. He also wrote that he believed that the claimant will have no permanent partial disability related to the injury, and that he did not believe that she will require any additional treatment.
- The claimant again saw Dr. Verdine on October 17, 2007. Dr. Verdine reported that "her biggest complaint now is of some fatigability of her forearm." Dr. Verdine reported that the fatigability occurs when the claimant carries several heavy charts at a time or when she does a lot of repetitive activities. The doctor noted that the claimant's sensation was normal, as was her range of motion. He did not feel any CMC arthritis. Dr. Verdine thought that the claimant's current symptoms were not related to her carpal tunnel release, but he was unsure of the pain's "exact etiology."
- An undated medical record from Patients First Health indicates that the claimant's next appointment was on March 28, 2007, and that her bilateral carpal tunnel syndrome is work-related. A similar form, showing the next appointment as April 18, 2007, also indicates that the diagnosis is bilateral carpal tunnel syndrome and that the condition is work related. The same form, dated April 18, 2007, again reflects the same diagnosis and that the condition is work-related. Another copy of the form, dated May 14, 2007, gives a diagnosis of bilateral carpal tunnel syndrome, and notes that the condition is work related.
- Dr. Mark Lichtenfeld examined the claimant on May 29, 2008. In his report, he noted that the claimant has the following diagnoses: 1) bilateral carpal tunnel syndrome; 2) status-post bilateral carpal tunnel release; and 3) residual symptoms from her bilateral carpal tunnel syndrome. He also indicated that the substantial cause of the claimant's bilateral carpal tunnel syndrome was the cumulative trauma work she did for her employer. He rated the claimant's permanent partial disability at 30% of her left wrist and 27.5% of her right wrist, and he added a loading factor of 15%. He opined that she is in need of further treatment as a result of her bilateral carpal tunnel syndrome in that she would benefit from treatment with anti-inflammatory medications to be taken on an as-needed basis. Due to her history of gastrointestinal symptoms, she should use caution in taking anti-inflammatory medication on a regular basis. He indicated that she might be able to be treated with Celebrex for her ongoing wrist and hand symptoms. He also felt that she would benefit from work restrictions of avoiding repetitive and power gripping with her hands; avoiding using any type of gas, electric or air-powered tools with her hands; avoiding using torquing and impact tools; avoiding repetitive lifting of more than six to eight pounds with either hand; and avoiding working with her arms outstretched and overhead.

- Dr. Lichtenfeld's deposition was taken August 8, 2008. In addition to reiterating his findings noted above, he testified that claimant has continued irritation in her wrists, probably from scar tissue around the nerve, but possibly from epineural fibrosis. Dr. Lichtenfeld found that the claimant has lost motion in her wrists, which he attributes to scar tissue. The claimant has a decreased pinprick sensation in the median nerve distribution of her hands, which is a sign of ongoing damage to the median nerve. Dr. Lichtenfeld found that there was decreased circumference in the claimant's left forearm, her dominant arm, which is indicative of atrophy due to an avoidance of using her arm. Dr. Lichtenfeld also clarified that the claimant's work was the substantial and prevailing cause of her bilateral carpal tunnel syndrome.
- Dr. Lichtenfeld took issue with several things in Dr. Verdine's May 14, 2007 report. Dr. Lichtenfeld pointed out that although Dr. Verdine indicates that there was no limitation of the range of motion, the doctor does not provide "even one quantitative measurement in any of the six planes of movement. He fails to test any type of sensation, pinprick sensation. He doesn't mention the Tinel's sign, Phalen's sign or reverse Phalen's sign. There's no notation of any measurement of the forearm to ascertain if there's any atrophy." Although Dr. Verdine did not assess any permanent partial disability, Dr. Lichtenfeld points out that "it's hard to assess the permanent partial disability when a quantitative examination is not performed or noted in their examination."
- Dr. Verdine's deposition was taken on October 7, 2008. Dr. Verdine did not place any restrictions on the claimant when he discharged her, and he does not believe that she has any permanent disability. He acknowledged that the claimant returned to see him in October 2007 due to ongoing symptoms, particularly in the left forearm. He also admitted that he did not measure the circumference of her forearms. He erroneously testified that the claimant is right-handed. Dr. Verdine used the AMA (American Medical Association) guidelines when he evaluated the claimant's permanent partial disability. He testified that for carpal tunnel syndrome, the AMA guidelines look at the function of the nerves post-operatively.
- The claimant continues to have complaints in her hands and wrists. Her complaints include an occasional numbness with pain on pressure of the palms, along with pain in her hands and wrists. Her symptoms sometimes wake her at night, and they are made worse with activity. She has difficulty driving, pulling charts, performing ear lavage, opening jars, picking up coins, fishing, and similar activities. The claimant tends to drop things. She believes that her right hand is a bit better than her left hand. She treats her symptoms with ibuprofen.
- The claimant has never injured her hands or wrists in the past.

### **CONCLUSIONS OF LAW**

Based upon the findings of fact, I find the following:

The date of onset of the claimant's occupational disease is November 28, 2006. Thus, this case is governed by the amendments to the Workers' Compensation Act (the Act) that became effective on August 28, 2005.

Issues 1 and 2: Permanent partial disability and disfigurement

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim. Proof is made only by competent and substantial evidence, and may not rest on speculation. Medical causation not within lay understanding or experience requires expert medical evidence. When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.

Section 287.190.1 provides that compensation for permanent partial disability shall be allowed for "loss by severance, total loss of use, or proportionate loss of use of one or more members mentioned in the schedule of losses." The term "permanent partial disability" is defined as a disability "that is permanent in nature and partial in degree."

The determination of the degree of disability sustained by an injured employee is not strictly a medical question, because while the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors that are both medical and non-medical. Accordingly, the courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony.

Section 287.190.4, RSMo 2005, provides that the division or the commission may allow an additional sum, not to exceed 40 weeks, for disfigurement of the head, neck, hands, or arms.

The claimant testified credibly regarding her ongoing complaints. These complaints affect her in both her work and in her home life. Her symptoms wake her at night, and she has difficulty with work tasks such as using blood pressure cuffs, pulling charts or files, and performing ear lavage. Outside of work, the claimant experiences pain and difficulty when she attempts to drive, open jars, fish, or pick up small objects. All of these complaints are supported by ongoing objective signs of injury, including decreased pinprick in her median nerve distribution, and left forearm atrophy. A review of her hands shows that she also has some minimal scarring from the surgeries.

Although Dr. Verdine did not attach significance to the left forearm complaints, his testimony is somewhat questionable in that his evaluation was not as extensive as that of Dr. Lichtenfeld. Dr. Verdine was, at least at times, apparently under the mistaken impression that the claimant is right handed. She is, in fact, left handed. Further, Dr. Verdine did not measure the circumferences of the claimant's forearms. And, he was operating under the assumption that the claimant's only ongoing complaint was weakness in the left forearm. Moreover, his final evaluation seems cursory, and combined with the above, his testimony is lacking in credibility. In addition, his testimony concerning permanent disability is also questionable given his use of the AMA guidelines in making his evaluation. The AMA guidelines look at impairment, rather than disability, and are generally not favored in the setting of Missouri Workers' Compensation Law.

Based on the foregoing, I find that the claimant has sustained permanent partial disability of 17.5% of her left hand (at the level of the wrist) and 15% of her right hand (at the level of the wrist), with a 10% loading factor. I also find that she is entitled to 1.5 weeks of disfigurement for her left wrist and 1 week of disfigurement for her right wrist.

### **Issue 3: Future medical care**

Medical aid is component of the compensation due to an injured worker under the Act. Pursuant to Section

287.140 (RSMo 2005) an employer is required to furnish such medical, surgical, and hospital treatment as is necessary to cure and relieve the effects of a work-related injury of disability. For medical care to be awarded, the medical care must of necessity flow from the occupational disease, via evidence of a medical-causal connection between the compensable injury and the medical condition for which treatment is sought, before the employer is to be held responsible. Future medical care may be awarded even though a claimant has reached maximum medical improvement.

The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Conclusive evidence is not required, and it is sufficient if a claimant shows by reasonable probability that he or she will need future medical treatment. "Probably means founded on reason and experience which inclines the mind to believe but leaves room to doubt." However, evidence that shows only a mere possibility of the need for future treatment will not support an award.

The claimant testified credibly that she has significant, ongoing complaints that she treats with over-the-counter medications. Dr. Lichtenfeld testified that prescription anti-inflammatory medications may be more beneficial to the claimant.

Based upon the evidence, I find that the claimant has met her burden in proving that she needs ongoing future medical care in the form of medications. Therefore, the employer/insurer is responsible for providing such medications as are necessary.

#### Issue 4: Attorney's fees and costs

The claimant argues that she is entitled to attorney's fees and costs as the employer/insurer made no effort to reach a settlement with the claimant. The claimant notes that there was a compensable injury with ongoing objective and subjective signs of injury and disability. According to the claimant, the employer/insurer's absolute unwillingness to consider any settlement discussions seems vexatious and egregious.

The employer/insurer argues that its defense of the claim was not without reasonable grounds, and therefore, no attorney's fees or costs should be awarded.

Section 287.560, RSMo, provides that if the division or the commission determines that "any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them." The court in *Landman v. Ice Cream Specialties* found that attorney's fees can be included as a cost of proceeding. Thus, the court determined that it could award an attorney fee of an additional 25% of the benefits awarded to an employee when the defense of a case was unreasonable.

I find that, in this case, the actions of the employer/insurer did not rise to the level at which an award for attorney's fees and costs would be appropriate. Therefore, attorney's fees and costs will not be awarded.

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**Summary**

The issues and their resolution are as follows:

- Whether the claimant is entitled to an award for permanent partial disability? Yes (see award).
- Whether the claimant is entitled to an award for disfigurement? Yes (see award).

- Whether the claimant should be provided with any future medical treatment for the work-related injury? Yes.
- Whether the employer/insurer should be liable for the payment of the claimant's legal fees and costs? No.

Any pending objections not expressly ruled on in this award are overruled.

An attorney's fee of 25% is awarded to the claimant's attorney, Dean L. Christianson; this shall be a lien on the proceeds until paid. Interest is applicable as provided by law.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Vicky Ruth

*Administrative Law Judge*

*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Peter Lyskowski

*Acting Division Director*

*Division of Workers' Compensation*

The employer/insurer objected to this exhibit being offered by the claimant's attorney. The exhibit is admissible under Missouri Supreme Court Rule 4-3.7(2).

Claimant's Exh. D.

Claimant's Exh. E.

Claimant's Exh. C.

Claimant's Exh. B.

Claimant's Exh. E.

*Id.*

*Id.*

*Id.*

Claimant's Exh. A.

*Id.*

Claimant's Exh. A, pp. 29-30.

Claimant's Exh. A, p. 25.

Claimant's Exh. A, p. 27.

Employer/insurer's Exh. 1.

Employer/insurer's Exh. 1, p. 14.

Employer/insurer's Exh. 1, pp. 17-18.

*Id.*

*Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

*Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

*Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

*Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. S.D. 1984).

*Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

*Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. E.D. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. S.D. 1986).

Section 287.190.1, RSMo 2005.

Section 287.190.6(1), RSMo 2005.

*Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo. App. W.D. 1989).

*Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo. App. 1975).

Employer/insurer's Exh. 1, p. 14.

*Id.*

Employer/insurer's Exh. 1, p. 10.

*Mathia v. Contract Freighters*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996).

Section 287.140, RSMo. 2005.

*Bock v. Broadway Ford Truck Sales*, 55 S.W.3d 427, 437 (Mo. App. E.D. 2005).

*Mathia v. Contract Freighters*, 929 S.W.2d 271, 277 (Mo. App. S.D. 1996).

*Williams v. A.B. Chance*, 676 S.W.2d 1 (Mo. App. W.D. 1984).

*Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo. App. 1997)

*Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo. App. W.D. 1986).

*Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo. App. W.D. 1997); *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 278 (Mo. App.

S.D. 1996); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo. App. S.D. 1995).

107 S.W.3d 240 (Mo. App. E.D. 2002).