

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

Injury No.: 07-006357

Employee: Nancy Brunner
Employer: Columbia Public School District
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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. We have reviewed the evidence, read the briefs of the parties, heard oral argument and considered the whole record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated October 14, 2008.

I. Preliminary Matters

The administrative law judge concluded that employee's average weekly wage was \$766.56, resulting in a compensation rate of \$511.04 for temporary total disability benefits and \$376.55 for permanent partial disability benefits. We believe the administrative law judge erred in the computation of employee's average weekly wage. The Commission modifies that determination, by concluding employee's average weekly wage is \$1,065.80, resulting in a compensation rate of \$710.53 for temporary total disability benefits. Additionally, while the Commission agrees with the finding of the percentage of permanent partial disability awarded (50% of the index finger), we would like to further clarify that issue.

II. Permanent Partial Disability

The Commission agrees with the determination that employee is permanently partially disabled due to the January 19, 2007, work-related injury. However, we must address the language in the administrative law judge's award. The administrative law judge stated in his award:

There is little doubt that the finger injury has affected Claimant's strength in the hand itself. However, that does not make this case unusual; an injury to the finger almost always affects the strength or use of the hand. Thus, Claimant's position would suggest that a separate disability amount be paid for both the finger and for the hand in virtually every finger injury case. . . . Would it be appropriate to award a separate disability amount for each digit, as well as for the hand or wrist? Strictly construing the statute, the answer should be "no".

The administrative law judge seems to suggest that an award of permanent partial disability cannot be made to the hand or wrist for the injury to her index finger. That is clearly not the case. The percentage of partial disability does not have to be limited or restricted to a certain level; instead, it is based upon the evidence presented in each individual case.

“If a claimant has multiple injuries to a major extremity at various levels, it may be appropriate, depending on the facts and circumstances, to rate the percentage of disability to the entire major extremity.” *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44, 53 (Mo.App. E.D. 2003), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

“The extent of partial disability is rated by a percent of disability to a body part or to the body as a whole. The determination of the specific percentage of disability is a finding of fact within the special province of the commission, which is not strictly limited to the percentages of disability provided by the medical expert.” *Id.*, citing *Motton v. Outsource Int'l*, 77 S.W.3d 669, 674 (Mo.App. E.D. 2002).

In this case, we believe the evidence demonstrates that employee sustained a permanent partial disability of 50% of the index finger; however, had the evidence compelled a different conclusion, the Commission would have rated the percentage of disability at the appropriate level.

III. Compensation Rate

Section 287.250 RSMo (2005) is the applicable statutory provision; it sets forth the methods for computing an employee’s average weekly wage earnings for the purpose of establishing compensation rates. Statutory formulas for calculating benefits are set forth in subsections 1 to 3 of section 287.250 RSMo.

Section 287.250 RSMo states as follows:

- Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:
 - If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
 - If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;
 - If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;
 - If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;
 - If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee's average weekly wage;
 - If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;
 - In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation

for such labor.

Subsection 4 of section 287.250 RSMo, prescribes how benefits are determined if an employee's average weekly wage cannot be determined by applying the statutory formulas.

Section 287.250 RSMo, states:

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

In determining the applicable weekly wage rate under section 287.250 RSMo, "it is necessary to commence with the first subsection and then to descend in numerical order under the other subsections until the wage rate provision is found that applies to the particular facts of the case." *Stegeman v. St. Francis Xavier Parish*, 611 S.W.2d 204 (Mo. banc 1981).

As stated above, if the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of section 287.250 RSMo, then the Commission is provided a catch-all provision for wage determination pursuant to subsection 4 of section 287.250 RSMo.

We acknowledge that section 287.800.1 requires us to construe the provisions of this chapter strictly; however section 287.250.4 provides that if the average weekly wage cannot be fairly determined under subsections 1 to 3, then the Commission may determine an average weekly wage that is fair and just based upon the facts presented. In this case, we do not believe employee's wages may be calculated fairly and justly under subsections 1 to 3 of section 287.250. Accordingly we turn to subsection 4 of section 287.250 RSMo.

Employee presented evidence demonstrating that she worked for employer as a teacher for 187 days in the 2006-2007 school year. Per contract with employer, employee was to work for employer for the 2006-2007 school year, with a salary of \$39,861.00, to be paid in equal installments for 12 months.

The administrative law judge noted that employee's wages were "fixed by the year" and were payable monthly; therefore found the applicable subsection of 287.250.1 to be either (2) or (3) rendering an average weekly wage of \$766.56 [(3,321.75 x 12 month) /52weeks) or (\$39,861.00/52 weeks)].

It does not seem reasonable to calculate employee's wages for 187 days of work over a period of 12 months. Per contract, employee's wages were to be paid over a 12 month period; however, employee worked only 187 days in that school year. The manner in which the parties chose to administer payment does not change the fact that employee performed approximately 37 weeks of work for employer.

Given the exceptional facts presented, the Commission is of the opinion that it can only fairly and justly determine employee's average weekly earnings by using employee's salary and number of days employee actually worked. The most reasonable calculation would be to take employee's annual salary of \$39,861.00, and divide it by 187, the number of days of work in the school year, and then multiply it by 5, the number of days in employee's work week, rendering an average weekly wage of \$1,065.80. This would result in a compensation rate of \$710.53 for temporary total disability benefits and \$376.55 for permanent partial disability benefits. The Commission is also of the opinion that in so doing it is in conformance with the provisions of Chapter 287.

IV. Conclusion

The Commission concludes that the competent and substantial evidence supports a finding that employer is liable for 50% permanent partial disability of the index finger (22.5 weeks), as well as an additional 3 weeks of permanent partial disability benefits for disfigurement or permanent "drooping" of the finger, resulting in a total of 25.5 weeks of permanent partial disability benefits.

Based on the above modification, the Commission ascertains and determines employee's average weekly earnings to be \$1065.80, resulting in a compensation rate for temporary total disability benefits of \$710.53. Consequently, the amount of compensation payable is modified to the following amount: underpayment of temporary total disability in the amount of \$68.34 [(\$710.53 x 3/7 weeks) - \$236.17].

We award future medical care and treatment to cure and relieve employee from the residuals and effects of her work-related injury, pursuant to the provisions of section 287.140 RSMo.

All remaining findings of fact and conclusions of law are affirmed.

The award and decision of Administrative Law Judge Robert J. Dierkes issued October 14, 2008, as modified, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

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 20th day of May 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Nancy Brunner Injury No. 07-006357

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

Dependents:

Employer: Columbia Public School District

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing Date: September 29, 2008

Checked by: RJD/cs

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: January 19, 2007.
5. State location where accident occurred or occupational disease was contracted: Columbia, Boone 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? Employer is an authorized self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee was using a paper cutter to prepare math manipulatives for her special education students.
Employee cut her right index finger, severing the extensor tendon.

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: Right index finger.
- Nature and extent of any permanent disability: 50-percent permanent partial disability of the right index finger.
15. Compensation paid to-date for temporary disability: \$236.17.
16. Value necessary medical aid paid to date by employer/insurer? \$7,043.58.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$766.56
19. Weekly compensation rate: \$511.04 ttd/ptd - \$376.55 ppd.
- Method wages computation: Section 287.250.1(3).

COMPENSATION PAYABLE

21. Amount of compensation payable:

22.5 weeks of permanent partial disability benefits:	\$8,472.38
3 weeks additional benefits for disfigurement:	\$1,129.65

22. Second Injury Fund liability: Open

Total: \$9,602.03

23. Future requirements awarded: Future medical benefits as set forth more fully below.

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 the permanent partial disability payment hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Nancy Brunner

Injury No: 07-006357

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

Dependents:

Employer: Columbia Public School District

Additional Party: Second Injury Fund (Deferred)

Insurer: Self-insured

Checked by: RJD/cs

ISSUES DECIDED

The evidentiary hearing in this case was held before the undersigned administrative law judge on September 29, 2008 in Columbia. Claimant and Second Injury Fund agreed to defer the adjudication of the Second Injury Fund claim. Employer and Employee requested leave to file post-hearing briefs, which leave was granted. The case was submitted on October 7, 2008. The hearing was held to determine the following issues:

- Claimant's average weekly wage and resultant compensation rates;
- The nature and extent of Employee's permanent partial disability;
- Any additional sum to be awarded for disfigurement;
- Whether additional sums shall be awarded for alleged underpayment of temporary total disability ("TTD") benefits; and
- Whether Employer shall be ordered to provide future medical treatment pursuant to Section 287.140, RSMo.

STIPULATIONS

The parties stipulated:

- That the Missouri Division of Workers' Compensation has jurisdiction over this case;
- That venue for the hearing is proper in Boone County;
- That the Claim for Compensation was filed within the time allowed by the Statute of Limitations, Section 287.430, RSMo;
- That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
- That the notice requirement of Section 287.420, RSMo, is not a bar to Claimant's Claim for Compensation;
- That Claimant sustained an accident arising out of and in the course of her employment with Columbia Public Schools on January 19, 2007;
- That Employer paid medical costs of \$7,043.58 and \$236.17 in TTD benefits;
- That Employer was an authorized self-insured employer for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Nancy Brunner; the deposition testimony of Dr. Mark Lichtenfeld; medical records; and the EMPLOYMENT CONTRACT FOR PROBATIONARY TEACHERS between Claimant and Employer.

DISCUSSION

Nancy Brunner ("Claimant"), was born on May 12, 1948, and has been employed by Columbia Public Schools ("Employer") as a special education teacher since 2003. As stipulated, Claimant sustained a compensable accident on January 19, 2007 when she was using a manual paper cutter and lacerated her right index finger near the distal joint which severed the extensor tendon. Surgery was performed on January 25,

2007 by Dr. Matthew Anderson, and a pin was inserted. The pin was removed on March 8, 2007. Dr. Anderson's note of March 8, 2007 also states: "We will see her back on March 20th. If at that time she is having difficulty regaining her motion, we will consider supervised hand therapy to help her regain her motion." Shortly after the pin was removed, the distal phalanx began to droop. Claimant was therefore seen by Dr. Anderson again on March 15, 2007. Dr. Anderson stated that it was highly unusual to have a tendon repair fail this quickly. A second surgery was discussed, but not recommended. The finger was splinted until April 24, 2007, at which time Claimant was instructed on exercises for her finger. Claimant had no formal physical therapy or occupational therapy. Dr. Anderson released Claimant from his care on June 5, 2007 with an impairment rating of 33% of the right index finger, or 7% of the hand, or 6% of the upper extremity, or 4% of the body as a whole.

At the request of her attorney, Claimant was evaluated by Dr. Mark Lichtenfeld in June 2008. Dr. Lichtenfeld's narrative report dated June 13, 2008 was in evidence, and Dr. Lichtenfeld testified by deposition taken August 29, 2008. Dr. Lichtenfeld testified that Claimant had permanent redness and swelling at the distal joint of her right index finger, with permanent inflammation and arthritis. Dr. Lichtenfeld testified that the permanent injury to the index finger affected Claimant's grip strength, pinch strength, writing and other fine motor tasks. Dr. Lichtenfeld testified that, although Claimant is right-hand dominant, her pinch strength in her right hand is 50% weaker than in the left hand, and her grip strength is 40% weaker in the right hand. Dr. Lichtenfeld testified that

Claimant has lost significant sensation in her right index finger. Dr. Lichtenfeld testified that Claimant sustained a permanent partial disability of 50% of the entire index finger and sustained a permanent partial disability of 20% of the right hand.

Claimant missed work from January 25, 2007 through January 30, 2007, a total of six days. Claimant was paid 3 days of TTD benefits. Claimant testified that these were the only days she missed from work. Therefore, only 3 days of TTD benefits were owed. Claimant suggests that these 3 days of benefits were underpaid, due to a dispute over the calculation of the average weekly wage.

Claimant is a school teacher. Claimant's Exhibit D is a copy of the EMPLOYMENT CONTRACT FOR PROBATIONARY TEACHERS for the 2006-07 school year. The total salary was \$39,861.00, to be paid in equal monthly installments for 12 months. The contract provided that Claimant would work 187 days during the school year.

Section 287.800.1, RSMo, provides: "Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

The calculation of average weekly wage is governed by Section 287.250, which I must construe strictly. Section 287.250.1 provides:

Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

- (1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
- (2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;
- (3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;
- (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work

days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

(5) If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee's average weekly wage;

(6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;

(7) In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor.

Claimant's wages were not fixed by the week, so paragraph (1) does not apply. Claimant's wages were "fixed by the year" and were payable monthly. Therefore, either paragraph (3) or paragraph (2) applies. Both paragraphs yield the same result in this case: an average weekly wage of \$766.56, and a TTD compensation rate of \$511.04. In strictly construing the statute, I find that paragraph (7) changes nothing. While Claimant only "actually performed (labor) for the employer" over 41 or 42 weeks, this does not change the average weekly wage. Since paragraph (7) requires that we consider (only) those weeks in which "labor is actually performed by the employee" AND in which "wages are actually paid", the results are the same. Employee was paid the same each week during the school year, whether working or not. If we only consider the weeks in which she worked, we must also consider the "wages actually paid" during those weeks, and the result is identical: an average weekly wage of \$766.56, and a TTD compensation rate of \$511.04.

Using the TTD compensation rate of \$511.04, Claimant should have been paid \$219.03 for the three compensable days. Therefore, Employer actually overpaid Employee for those three days. As Employer is not requesting a credit, no credit should be given.

There is little question that Claimant's tendon repair failed. She has a permanent "droop" of her finger at the distal joint. There is no question that this has resulted in a permanent disability. The question is whether this is a finger disability or a hand disability, or both, and the extent of that disability. Claimant contends that she is entitled to benefits representing a significant disability of both the finger and the hand. Employer's position is that the disability should be rated at the finger.

There is little doubt that the finger injury has affected Claimant's strength in the hand itself. However, that does not make this case unusual; an injury to a finger almost always affects the strength or use of the hand. Thus, Claimant's position would suggest that a separate disability amount be paid for both the finger and for the hand in virtually every finger injury case. I suppose an argument similar to Claimant's could also be made in regard to certain wrist or hand injuries. In a case of carpal tunnel syndrome, for example, an employee may have permanent nerve damage in her thumb, index finger, middle finger and ring finger. Would it be appropriate to award a separate disability amount for each digit, as well as for the hand or wrist? Strictly construing the statute, the answer should be "no".

In this case, Claimant has sustained a serious injury to her finger. I find that Claimant has sustained a permanent partial disability of 50% of the index finger, entitling Claimant to 22.5 weeks of permanent partial disability benefits.

Claimant is also requesting additional benefits for disfigurement. There is minimal scarring on Claimant's finger, but there is a permanent "drooping" of the finger, which is quite noticeable. I find that an

additional three weeks of permanent partial disability benefits should be awarded for disfigurement.

Claimant is also requesting an order of future medical benefits. In that regard, Dr. Lichtenfeld testified:

She would benefit from treatment with anti-inflammatory medication. As stated earlier, she would also benefit from treatment with an occupational and physical therapist, specifically like a hand therapist to help assist her in regaining as much movement as possible in her right index finger. (Exhibit A, Lichtenfeld deposition, p. 15).

On cross-examination, Dr. Lichtenfeld testified that his recommendation regarding anti-inflammatory medication referred to either prescription or over-the-counter medications. (Exhibit A, Lichtenfeld deposition, p. 28). Regarding his recommendation of occupational or physical therapy, Dr. Lichtenfeld testified:

With respect to physical therapy, it's important for her to stay active with these fingers and learn methods of strengthening and use putty balls if you have putty and stuff like that and increase and improve her movement or at least make it as good as it can get. Certainly there's going to be a limitation to what she can do given the fact that there is a lacerated tendon that was repaired but then failed. (Exhibit A, Lichtenfeld deposition, pp. 30-31).

Both of these recommendations from Dr. Lichtenfeld are reasonable and are consistent with Claimant's injury.

FINDINGS OF FACT

In addition to those facts to which the parties stipulated, I find the following facts:

- At the time of her work-related injury on January 19, 2007, Claimant was employed as a teacher, under a written contract which paid an annual salary of \$39,861.00, payable in equal monthly installments;
- The contract required that Claimant work 187 days during the 2006-2007 school year;
- Claimant's work-related accident of January 19, 2007 resulted in a laceration of the distal joint of her right index finger which severed the extensor tendon;
- On January 25, 2007, surgery was performed on Claimant's finger, including insertion of a pin;
- The pin was removed on March 8, 2007, but shortly thereafter the distal phalanx began to droop, indicating that the tendon repair failed;
- Claimant is left with a permanent droop of the right index finger distal phalanx;
- Claimant also has some minimal scarring near the distal joint;
- Claimant has a permanent partial disability to her right index finger as a result of the January 19, 2007 accident;
- Claimant was temporarily and totally disabled, due to the January 19, 2007 accident and the resultant January 25, 2007 surgery, from January 25, 2007 through January 30, 2007, a total of six days;
- Claimant was paid for 3 days of temporary total disability benefits in the amount of \$236.17; and
- Claimant is reasonably in need of anti-inflammatory medications and hand therapy.

RULINGS OF LAW

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

- Claimant has sustained a 50% permanent partial disability of the right index finger, entitling her to 22.5 weeks of benefits;
- Claimant is not entitled to additional permanent partial disability benefits based upon an alleged disability of the right hand;

