

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 09-026289

Employee: Anjelina Cardenas
Employer: Tyson Poultry, Inc. (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and considered the whole record and we find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the September 10, 2012, award and decision of the administrative law judge, as modified herein. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

Employee alleged she sustained an injury by occupational disease arising out of and in the course of her employment with employer. Pursuant to the terms of a settlement, employer/insurer paid to employee a lump sum of \$20,000.00 in resolution of employee's claim against employer/insurer. Employee proceeded to trial on her claim against the Second Injury Fund. The administrative law judge awarded weekly permanent total disability benefits from the Second Injury Fund to employee subject to a credit for 69.75 weeks – the number of weeks of benefits equaling \$20,000.00.

Discussion

The Second Injury Fund filed an Application for Review alleging two errors. First, the Second Injury Fund alleged the administrative law judge's award is in error because the primary injury in this matter is an occupational disease, and an occupational disease cannot be the primary injury supporting liability under § 287.220.1 RSMo. This argument has been rejected by all three districts of the Missouri Court of Appeals. See *Peters vs. Treasurer*, ED98300 (Mo. App. E.D., November 6, 2012); *Treasurer v. Stiers*, WD75101 (Mo. App. W.D, October 9, 2012); *Kirkpatrick v. Treasurer*, SD31983 (Mo. App. S.D., December 20, 2012.). We affirm the administrative law judge on this point.

The Second Injury Fund next argues that if employee is permanently and totally disabled it is due to the effects of the last injury alone. We disagree. The record supports the administrative law judge's ruling that the employee was rendered permanently and totally disabled due to the effects of the last injury in combination with her preexisting disabilities. But while the administrative law judge reached the correct conclusion, the administrative law judge did not take the right path to the conclusion.

"When assessing Fund liability, the Commission must first determine the degree of disability from the last injury alone." *Pursley v. Christian Hosp. Northeast/Northwest*, 355 S.W.3d 508, 513 (Mo. App. 2011). The administrative law judge did not determine the extent of employee's disability from the last injury alone. We will do so now.

¹ Statutory references are to the Revised Statutes of Missouri 2009, unless otherwise indicated.

Employee: Anjelina Cardenas

- 2 -

Based upon the credible opinions of employee's medical expert, Dr. Paul, we find employee sustained the following permanent partial disabilities as a result of the primary injury.

Cervical/thoracic spine	13% body as a whole (52 weeks)
Right shoulder	10% at 232-week level (23.2 weeks)
Right hand	25% at 175-week level (43.75 weeks)
Left hand	25% at 175-week level (43.75 weeks)

We do not believe the effects of the primary injury, standing alone, have rendered employee unable to compete in the open labor market. Rather, like the administrative law judge, we find credible the opinion of Mr. Eldred that employee was rendered permanently and totally disabled by the effects of the primary injury in combination with her preexisting disabilities.

Because there is no difference between employee's permanent partial disability and permanent total disability compensation rates, the Second Injury Fund's obligation to pay benefits does not begin until the benefit period for the primary injury expires. Employee reached maximum medical improvement on August 17, 2009. The primary injury resulted in 162.7 weeks of disability during which time the Second Injury Fund has no weekly obligation. Thereafter, employee is entitled to weekly permanent total disability benefits from the Second Injury Fund.

Award

We modify the administrative law judge's award regarding the permanent total disability benefits due from the Second Injury Fund. Beginning October 3, 2012, the Second Injury Fund shall pay to employee the weekly permanent total disability benefit of \$286.71. The weekly payments shall continue for employee's lifetime, or until modified by law. In all other respects, we affirm the award of the administrative law judge.

We further approve and affirm the administrative law judge's allowance of attorney's fees 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 Karen Wells Fisher, issued September 10, 2012, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 11th day of April 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

 V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: ANJELINA CARDENAS Injury No. 09-026289

Dependents: N/A

Employer: TYSON POULTRY INC.

Insurer: SELF INSURED

Additional Party: TREASURER OF MISSOURI, AS THE CUSTODEAN OF THE SECOND INJURY FUND

Hearing Date: JULY 25, 2012

Checked by:

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: April 15, 2009
5. State location where accident occurred or occupational disease contracted: Barry 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 happened or occupational disease contracted: During 13 years of employment with Tyson Poultry, Ms. Cardenas worked as a poultry trimmer. The position required her to, on a daily basis, cut wings, legs, and other body parts off of chickens with scissors. This occupational exposure led to an onset of pain in her bilateral hands and right shoulder.
12. Did accident or occupational disease cause death? No. Date of death? N/a.
13. Parts of body injured by accident or occupational disease: Right and left hand, right shoulder, neck.
14. Nature and extent of any permanent disability: See below
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0
17. Value necessary medical aid not furnished by employer/insurer? \$0

18. Employee's average weekly wages: \$430.07
19. Weekly TTD/PPD compensation rate: \$286.71/286.71
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: N/A (Employee and Employer/Insurer entered into a Stipulation for Compromise Settlement)

22. Second Injury Fund liability: Yes

Weeks of permanent partial disability from the Second Injury Fund: N/A

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund: Yes

The Claimant is awarded Permanent Total Disability against the Second Injury Fund.

Employee is entitled to permanent total disability benefits (\$286.71 per week) for her lifetime. Benefits are to commence on August 18, 2009, the date after Employee reached maximum medical improvement. There is no weekly differential between permanent partial disability compensation paid by Employer/Insurer and permanent total disability compensation paid by Second Injury Fund. However, the Second Injury Fund is entitled to credit for the amount paid by employer for permanent partial disability of 488 days

TOTAL: \$286.71 PER WEEK FOR EMPLOYEE'S LIFETIME, EFFECTIVE AS OF AUGUST 18, 2009.

23. Future requirements awarded: Yes (See Award)

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Pitts Law Office, P.C.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Anjelina Cardenas

Injury No. 09-026289

Dependents: N/A

Employer: Tyson Poultry Inc.

Insurer: Self Insured

Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund

AWARD

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on July 25, 2012. The claimant, Anjelina Cardenas, appeared personally and through her attorney, Jonathan Pitts. The Second Injury Fund appeared through its attorney, Stephen Freeland, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On April 15, 2009, Tyson Poultry Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self insured.
- (2) On May 11, 2011, Anjelina Cardenas was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On May 11, 2011, the employee sustained an occupational disease which arose out of and in the course and scope of her employment with Tyson Poultry Inc. The occupational disease was the prevailing factor in Ms. Cardenas' resulting medical condition and disability.
- (4) The above-referenced employment and occupational disease occurred in Barry County, Missouri. Venue is proper.
- (5) The claimant notified the employer of her occupational disease as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the alleged accident the claimant's average weekly wage was \$430.07, which is sufficient to allow a compensation rate of \$286.71 for temporary total and permanent disability compensation.

- (8) The employer and insurer did not provide temporary disability benefits to the employee.
- (9) The employer and insurer did not provide medical treatment to the employee.
- (10) The employee reached maximum medical improvement ("MMI") on August 17, 2009.

The parties further stipulated that the sole issue to be resolved by hearing was:

- (1) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation? The parties stipulated that if permanent total disability was not found, a permanent partial disability rate of 15% to each hand and a 10% load factor would apply.

EVIDENCE PRESENTED

The claimant testified through an interpreter at the hearing in support of her claim. In addition, the claimant offered for admission the following exhibits:

- Exhibit A – Dr. Robert Paul's CV, IME Report, and Deposition
- Exhibit B – Phil Eldred's CV, Vocational Report, and Deposition
- Exhibit C – Deposition of Employee
- Exhibit D – Medical Records
- Exhibit E – Personnel Records
- Exhibit F – Stipulation of Settlement with Employer

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses at the hearing of this case. However, the Second Injury Fund offered for admission the following exhibit:

- Exhibit 1 – Vocational Report, CV, and Deposition of James England

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

Background & Employment

The employee, Anjelina¹ Cardenas, is 59 years of age, having been born on August 26, 1953. Ms. Cardenas resides in Monett, Missouri.

Ms. Cardenas was educated through the 6th grade in Mexico and moved to the United States in 1980. She testified that she spoke "a little" English, could read labels and traffic signs, and had her daughter assist with her finances. She primarily worked in poultry production, a chair factory, and dairy milking. Ms. Cardenas obtained her U.S citizenship around 2002.

In or around 1996 Employee obtained employment with the employer, Tyson Poultry Inc., working as a poultry trimmer. The position required her to trim chickens with a mirror on a processing assembly line. Ms. Cardenas continued in this employment through May 2009.

Occupational Disease

During 13 years of active employment with Tyson Poultry, Ms. Cardenas worked as a mirror trimmer. This required her to, on a daily basis, cut wings, legs, and other body parts off of chickens with scissors. The production line was fast-paced, requiring the processing of up to 17,000 chickens per 8-hour work shift. At trial, Cardenas testified that these work activities led to an onset of pain in her bilateral hands and right shoulder.

Prior Medical Conditions

Prior to sustaining the occupational disease of April 15, 2009, Ms. Cardenas presented with several significant injuries and/or medical conditions, which include:

- Right knee. On July 28, 2006, Ms. Cardenas treated with Dr. William Goodman, complaining of a 1 year history of right knee pain due to multiple small twisting injuries. The x-ray showed mild degenerative changes, and Dr. Goodman diagnosed right knee internal derangement with a probable meniscus tear. Cardenas underwent an arthroplasty and chondroplasty on August 22, 2006. Dr. Goodman released the claimant on September 1, noting that she had full range of motion in her knee.

Ms. Cardenas testified she experienced pain in her right knee after recovering from surgery and that she used 800 mg Ibuprofen to treat that pain. She indicated her knee made it more difficult to stand up, sit down, walk, and run. Cardenas testified that while working at Tyson, she would lean against a variable-height stand to relieve her knee symptoms.

- Incontinence. Cardenas testified that she developed bladder control problems in 2007. She treated with Dr. Jeffrey Stanczyk on October 4, 2007 for a prolapsed bladder. Dr. Stanczyk indicated testing showed detrusor instability and he prescribed Ditropan. At her last visit on August 12, 2009, Cardenas reported stress and urge incontinence, complaining that she had to urinate "all the time".

¹ Ms. Cardenas' first name is misspelled as "Angelina" in the Division's records.

Ms. Cardenas testified that she provided Tyson with a note from a doctor requesting more frequent bathroom breaks. She indicated Tyson was unwilling to make this accommodation and, as a result, she used Kotex tampons to address her incontinence.

Medical Treatment for the Primary Injury

Ms. Cardenas first treated with Dr. Anjum Qureshi on November 18, 2008, complaining of shoulder and neck pain. Cardenas returned in March 2009, reporting that she was now doing a lot of "pulling action with the right shoulder on the chickens". She was diagnosed with rotator cuff tendonitis on April 13, 2009 and referred to an orthopedic surgeon. Cardenas then treated with the Steven Newbold Clinic, complaining of radiating pain and numbness in her right arm. She attributed the complaints to a change in her job position 2 months prior. Cardenas was diagnosed with overuse syndrome and was prescribed muscle relaxers and pain medication.

Cardenas was then referred to Dr. Scott McMurray, M.D., who diagnosed painful upper back and dysesthetic right upper extremity. Dr. McMurray ordered a cervical radiograph, finding degenerative changes and an MRI, finding only facet changes at C4-5. On May 4, 2009, Dr. Jennifer Zhai performed an EMG study, which revealed bilateral carpal tunnel syndrome. Dr. McMurray then performed a carpal tunnel release on the claimant's right hand later that month and a left hand release in June.

Cardenas then underwent a series of 3 epidural steroid injections at C7-T1 with Dr. Scott Clarke, M.D. Dr. Clarke's assistant noted on August 17, 2009 that the injections provided minimal pain relief. Dr. McMurray noted on August 6, 2009 that Cardenas would likely have ongoing symptoms due to the multifactoral nature of her upper extremity discomfort.

Expert Opinions

1. Dr. Robert Paul

Dr. Robert Paul, M.D., examined Ms. Cardenas on February 15, 2010 at the request of her attorney. Dr. Paul indicated that Cardenas' April 15, 2009 occupational disease was the proximate cause of and prevailing factor in her bilateral hand and right shoulder complaints. He opined that Cardenas had sustained 13% disability to the cervical/thoracic spine, 10% to the right shoulder, and 25% disability to both hands. He also rated Ms. Cardenas' prior right knee injury at 15% disability of the knee and diabetes at 15% of the body as a whole. Dr. Paul opined that Cardenas was permanently totally disabled due to the combination of the April 15, 2009 occupational injury with the prior disabilities. Dr. Paul indicated in a functional ability statement that Ms. Cardenas was able to stand/walk 2 hours in an 8-hour workday, sit for 1 hour, must alternate sitting and standing, could lift less than 5 lbs., and was restricted in a number of postural areas.

Dr. Paul testified in his August 8, 2011 deposition that Cardenas' grip strength in both hands was significantly weak and that her right knee showed mild to moderate loss of range of motion. He testified that Cardenas' bladder incontinence would constitute a hindrance to employment or re-employment based on the need for frequent bathroom breaks. On cross-examination, Dr. Paul admitted that Cardenas returned to her regular job duties, including a forced standing position, following her 2006 right knee surgery.

2. *Phil Eldred*

Phil Eldred, M.S., examined Ms. Cardenas for vocational purposes on March 8, 2011 at the request of her attorney. Mr. Eldred concluded, based on the results of vocational testing and consideration of her past work and transferable skills, that Cardenas would be unable to transition into unskilled sedentary labor and that her limited English skills would preclude vocational retraining. He indicated Ms. Cardenas was unlikely to obtain competitive employment due to a combination of the April 15, 2009 occupational disease/injury and pre-existing limitations.

On cross-examination, Mr. Eldred admitted that the medical conclusions drawn by physicians and vocational experts depend in part on subjective complaints and limitations from claimants. He also testified that unskilled workers lack the flexibility of managerial workers to lie down during the workday.

3. *James England*

James England reviewed medical records and reports and authored a vocational report on January 10, 2011. Mr. England concurred with Mr. Eldred that Cardenas did not have any transferable skills. He concluded that if Ms. Cardenas' could not use her hands "to do essentially any activity", she would be unable to perform any unskilled entry-level work regardless of her pre-existing right knee problems. Mr. England further testified that Dr. Paul's recommendation that Cardenas lie down during the day would preclude employment but was unrelated to her hand condition.

Mr. England testified in his deposition that Dr. Paul's restrictions would result in total disability regardless of Cardenas' deficiencies in speaking English. He testified that Cardenas' good work history after knee surgery was inconsistent with the level of pain and restrictions mentioned in the claimant's second deposition. On cross-examination, Mr. England indicated that unscheduled bathroom breaks due to incontinence could prevent a worker from maintaining employment. He admitted Dr. Paul found evidence of weakness and pain in Cardenas' right knee during his clinical examination. Mr. England further testified that no employer in the state would hire Ms. Cardenas given her limited English, problems with her hands and shoulder, and pre-existing problems in her right knee. He admitted that Dr. Paul's standing restriction was attributable to Cardenas' right knee pain and would preclude employment at the light level and above.

Claimant's Testimony

Claimant testified that she had been unable to take classes to improve her English because she was always working. She indicated she primarily watches Spanish language channels Telemundo and Univision. Cardenas testified that did not miss any time at Tyson due to her right knee and bladder conditions because she had to work. She reported that the April 15, 2009 work injury was the first time she had filed a workers' compensation claim or been involved in a personal injury lawsuit.

Current Complaints

Claimant testified that, due to the occupational injury, she now experiences pain and diminished strength in both hands. She testified has uses ice and Tramadol to relieve that pain, and the heaviest item she now lifts is a gallon of milk (with both hands). Ms. Cardenas indicated that she also still experiences pain in her neck and right shoulder. She testified that her conditions make it difficult or impossible to brush her teeth, wash dishes, perform chores, drive, and garden. Regarding the right knee injury, Cardenas testified that it makes it more difficult for her to bend, sit, and stand. Claimant testified she has been unable to work since August 2009 due to a combination of her hands, knee, and incontinence.

FINDINGS AND CONCLUSIONS

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 R.S.Mo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 R.S.Mo.

1. Liability of Second Injury Fund

In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with a prior permanent partial disability to result in total disability. Section 287.220.1, RSMo. (2000); *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990); *Anderson v. Emerson Elec. Co*, 698 S.W.2d 574, 576 (Mo. App. 1985).

This standard was most simply set forth when the Missouri Court of Appeals held:

Where a preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury. *Reiner v. Treasurer of State of Missouri*, 837 S.W.2d 363, 366 (Mo. App. 1992)

In determining the extent of disability attributable to the employer and Second Injury Fund, the extent of the compensable injury must be determined first. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 742-43 (Mo. App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is therefore necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury fund liability.

In the present case, after consideration and review of the evidence, I find and conclude that the occupational injury of April 15, 2009, causes Ms. Cardenas to suffer residual pain and

discomfort, and to be governed by limitations and restrictions. I further find and conclude that while this occupational disease presents a hindrance and obstacle to employment or potential employment, this injury does not render the employee permanently and totally disabled when considered alone.

Notably, Dr. Paul and Phil Eldred credibly testified that Ms. Cardenas was permanently and totally disabled, but as a result of a combination of the April 15, 2009 occupational injury/disease and the pre-existing medical conditions. In rendering this decision, I find Dr. Paul credible, reliable, and worthy of belief. Similarly, I find Mr. Eldred credible, reliable, and worthy of belief.

Further, prior to April 15, 2009, Ms. Cardenas suffered from significant pre-existing disabilities referable to the right knee and bladder. These pre-existing conditions physically impacted Cardenas's ability to perform certain activities, and to be governed by limitations and restrictions. Specifically, I find credible Ms. Cardenas' testimony that her right knee pain required her to modify how she performed her job at Tyson, by leaning against a workstand. This modification is credible in light of the physical findings found by Dr. Paul in Cardenas' right knee. Additionally, I find credible Mr. England's testimony that Cardenas' need for unscheduled bathroom breaks due to incontinence could be a hindrance or obstacle to maintaining employment.

The work injury, in combination with the pre-existing medical conditions, causes Ms. Cardenas to be governed by significantly greater permanent restrictions and limitations. I find credible Ms. Cardenas' testimony that she suffered from restrictions due to her bilateral hands and right knee, specifically that she drops items like cups and plates and is limited in performing household chores and activities. Moreover, both Dr. Paul and Phil Eldred credibly testified that Ms. Cardenas is unable to compete in the open labor market due to a combination of the primary work incident and pre-existing conditions.

The only evidence to the contrary is from James England, who concluded in his report that Anjelina Cardenas' hand complaints could be disabling by themselves. On cross-examination, however, Mr. England reversed course and testified that no employer in the state would hire Ms. Cardenas given her limited English, problems with her hands and shoulder, and pre-existing problems in her right knee. In any event, to the extent that Mr. England's opinion differs from that of Mr. Eldred, I resolve the difference in favor of Mr. Eldred. Moreover, the Second Injury Fund offered no medical opinion evidence to counter the opinion of Dr. Paul.

Accordingly, I find competent and substantial evidence supporting a finding that Ms. Cardenas is permanently and totally disabled as a result of a combination of the April 15, 2009 occupational disease and the pre-existing medical conditions referable to the right knee and bladder. Therefore, the Second Injury Fund is ordered to pay to the employee, Anjelina Cardenas, the sum of \$286.71 per week from and after August 18, 2009, for the employee's lifetime.

However, the Second Injury Fund is to receive a credit for the amount paid by employer for permanent partial disability of 69.75 weeks based upon a lump sum of \$20,000 at \$286.71 per week from August 18, 2009. The Second Injury Fund thereafter for employee's life

