

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

Injury No.: 02-156872

Employee: Janet K. Carter  
Employer: Harrah's North Kansas City LLC  
Insurer: Old Republic Insurance Company

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 February 22, 2010. The award and decision of Administrative Law Judge Robert B. Miner, issued February 22, 2010, 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 13<sup>th</sup> day of January 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

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

Injury No.: 03-060420

Employee: Janet K. Carter  
Employer: Harrah's North Kansas City LLC  
Insurer: Old Republic Insurance Company  
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 February 22, 2010. The award and decision of Administrative Law Judge Robert B. Miner, issued February 22, 2010, is attached and incorporated by this reference.

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LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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**DISSENTING OPINION FILED**  
John J. Hickey, Member

Attest:

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Secretary

Employee: Janet K. Carter

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge with regard to Injury Number 03-060420 is in error and that the decision should be modified to award permanent total disability benefits from the Second Injury Fund.

Employee sustained three separate injuries working for employer as a casino dealer. Employee's claim for Injury Number 03-060420 arose from an incident that occurred on May 12, 2003, when employee tripped on uneven concrete and hurt her back. Employee had previously injured her back in January 2002. At the time of the May 12, 2003, incident, employee was taking prescription pain medicine for back pain related to the January 2002 incident and had to ask her coworkers to help her with job tasks when she experienced back pain at work. Employee had also developed an injury of her left shoulder related to repetitive card dealing, for which she ultimately underwent surgery in November 2004 to remove calcific deposits.

Following the May 12, 2003, incident, employee suffered significant pain in her thoracic spine that radiated around to the front of her chest. An MRI in October 2003 revealed herniations at T10-11 and T8-T9. Employee underwent years of pain management treatment before undergoing a percutaneous disk decompression of T6-T7 and T8-T9 on February 8, 2008. Employee did not experience any significant relief from surgery or any of the pain management treatment. Ultimately, employee's doctors placed her on strong narcotic medications such as Fentanyl and Roxicodone, and recommended employee receive thoracic epidural injections three times a year, or consider a spinal cord stimulator. Employee's doctors also placed her on Cymbalta. None of the surgeons who saw employee considered her to be a surgical candidate.

At the hearing, employee identified a constant searing pain in her right side chest wall that she compared to being hit with a machete knife. Employee testified that she has to take Fentanyl and Oxycodone to deal with the chronic pain. These medications make her sleepy and groggy and interfere with or prevent certain activities, such as driving. Activities requiring fine motor skills make the pain more intense. When the pain is too intense, employee has to lie down. On a typical day, employee has to lie down after making breakfast due to pain. Employee then takes a shower, after which she again lies down due to pain. Employee gets dressed, straightens the house, and goes for a walk, after which she again lies down. If employee has any tasks or chores to complete, she relies on medications to get her through the pain. After finishing her tasks or chores, employee again lies down. Employee's sleep is interrupted by pain. Employee acknowledged that she is able to do most things, but made clear that she is only able to remain active for short periods of time, and that she experiences constant pain throughout.

In her appeal to this Commission, employee seeks permanent total disability benefits from the Second Injury Fund, arguing that she is permanently and totally disabled due to a combination of the last work injury and her preexisting disabling conditions.

Employee: Janet K. Carter

- 2 -

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, employee must establish that: (1) she suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007).

Dr. Stuckmeyer evaluated employee and opined that she is permanently and totally disabled due to a combination of the January 2002 and May 2003 back injuries. Dr. Stuckmeyer believed employee will likely have to remain on Fentanyl for life, and that she is not a surgical candidate. Dr. Stuckmeyer pointed out that employee was on narcotic medications before the May 2003 incident, and that it was both the January 2002 and May 2003 back injuries (rather than one or the other considered in isolation) that caused the ongoing need for narcotic pain medications. Terry Cordray, the only vocational expert to testify in this case, agreed with Dr. Stuckmeyer that employee is permanently and totally disabled due to a combination of the January 2002 and May 2003 injuries. Mr. Cordray indicated that the narcotic pain medications alone caused employee to be so inattentive that she wouldn't be able to sustain an eight-hour work day. Specifically, Mr. Cordray opined: "She's out of the labor market because of that combination of those two injuries creating the need to use Fentanyl lollipops and Oxycodone."

Contrary to the opinions of Dr. Stuckmeyer and Mr. Cordray, the administrative law judge found that employee is not permanently and totally disabled, and that she suffered only enhanced permanent partial disability following the May 2003 back injury. The administrative law judge found the opinion of Dr. Thomas that employee is able to work without restrictions to be more persuasive than that of Dr. Stuckmeyer and the unopposed vocational opinion of Mr. Cordray. The administrative law judge based his conclusion that employee is not permanently disabled, in part, on the evidence that employee is able to do most things "in spurts." The administrative law judge's award fails to explain how an individual who is only able to be active in spurts will be able to compete for jobs requiring her to maintain a constant level of activity for eight hours or more at a time. The administrative law judge also discounted the evidence regarding employee's need to use heavy narcotics to control her chronic pain, crediting Dr. Clymer's testimony that, although employee should "avoid substantial decision making issues or safety equipment handling," her narcotic use would not interfere with her ability to compete for gainful employment.

I disagree with the administrative law judge's credibility determinations and ultimate conclusion on the issue of permanent total disability. I find Mr. Cordray's testimony persuasive because it presents the only realistic picture of employee's ability to compete for gainful employment following her back injuries:

[M]y opinion is that no employer would hire her. First of all if you tried to use her previous sales knowledge of securities and insurance sales, those narcotics take her out of that. She's not going to be able to analyze policies and procedures and securities to do that kind of work. I don't want her handling my Merrill Lynch account. ... And again, even the

Employee: Janet K. Carter

- 3 -

unskilled work on a daily basis, I don't think she'd be expected to—an employer would not hire her for some type of unskilled sedentary job when they've got other people that are not taking narcotics that are certainly available to apply for those jobs and do those jobs.

I would credit the testimony of Dr. Stuckmeyer and the unopposed opinion of Mr. Cordray, and find that employee met her burden under § 287.220 RSMo, of establishing that she is permanently and totally disabled due to a combination of the January 2002 and May 2003 back injuries. Accordingly, I would modify the decision of the administrative law judge with regard to Injury Number 03-060420, to award permanent total disability benefits from the Second Injury Fund.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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John J. Hickey, Member

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

Injury No.: 03-138347

Employee: Janet K. Carter  
Employer: Harrah's North Kansas City LLC  
Insurer: Old Republic Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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