

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

Injury No.: 01-128915

Employee: Mary Coffee  
Employer: Husch & Eppenberger (Settled)  
Insurer: Lumbermens Mutual Casualty Company (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: October 22, 2001  
Place and County of Accident: St. Louis City, Missouri

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 is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 29, 2004, with the following supplemental findings and conclusions.

Dr. Samuel Bernstein testified that employee is unemployable in the open labor market because of her advanced age and because he did not believe that she could work an eight-hour day due to pain and a requirement that she elevate her legs during the day. We are not persuaded by Dr. Bernstein's opinion. He stated that employee could only function for fifteen minutes at a time because of pain, then she must rest. However, employee testified that she can sit, stand, drive and perform other activities for up to 30 minutes at a time. Dr. David Volarich recommended that employee not stay in a fixed position in excess of sixty minutes at a time. Additionally, neither employee nor Dr. Volarich mentioned that employee must elevate her legs during the day. We are unclear where Dr. Bernstein came under this impression, but this assumption appeared to play a significant role in his opinion that employee is unemployable. The restrictions that Dr. Bernstein assumed in rendering his opinion are not supported by employee's testimony or by Dr. Volarich. Dr. Volarich's opinion is that employee is unemployable only if a vocational assessment is unable to identify a job for which she is suited to perform. His opinion does not establish permanent and total disability.

Employee's preexisting back problems did not significantly impair her ability to perform her work duties. She had occasional flare-ups when she had to do some heavy lifting and she had assistance when she had to reach items that were located on a high shelf or a low shelf, but this did not significantly interfere with her ability to perform the job duties. She stated that her left ankle only bothered her when she had to stand for long periods of time or when she had to rush down the hall. Her preexisting disabilities were hindrances or obstacles to employment and combine with the primary injury to cause enhanced disability, but we do not find that her preexisting disabilities combine with her primary knee injury to render her unemployable on the open labor market.

Additionally, employee has worked as a legal secretary for 35-37 years, the last 23 years of which were with the same law firm as a litigation secretary. Common sense dictates that she has acquired highly valuable and desirable skills during the course of her employment. Her physical restrictions from her disabilities are not of the degree that would prohibit her from working in a sedentary capacity with a sit/stand option, including in the secretarial field. Her "advanced age" of 60 at the time of the hearing, although a factor to be considered in determining employability, is not such an impediment that no employer in the open labor market would employ her. Individuals do not become unemployable simply by reaching a certain age. Age is but one factor to consider

along with an individual's work experience, educational history, and medical restrictions. Just as the Commission is prohibited from using a person's younger age to negate the existence or the nature of a disability (*Baxi v. United Technologies Automotive*, 956 S.W.2d 340, 343 (Mo. App. 1997)), we cannot use age alone to affirm or exaggerate the existence or the nature of a disability. Employee's medical restrictions, physical condition, work history, and educational history do not render her unemployable. We find employee is employable on the open labor market.

The Commission further approves and affirms said 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 Linda J. Wenman, issued November 29, 2004, are attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of May 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

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

\_\_\_\_\_  
Secretary

**AWARD**

Employee:	Mary Coffee	Injury No.:	01-128915
Dependents:	N/A	Before the	
Employer:	Husch & Eppenberger (settled)	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund	<b>Compensation</b>	
Insurer:	Lumbermens Mutual Casualty Company	Department of Labor and Industrial	
Hearing Date:	August 20, 2004	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	LJW:tr

**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: October 22, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis City, MO

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: When arising from a chair, Claimant felt a pop and pain in her right knee.
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 knee
14. Nature and extent of any permanent disability: 35% permanent partial disability referable to right knee previously paid from Employer.
15. Compensation paid to-date for temporary disability: \$3,152.28 from Employer.
16. Value necessary medical aid paid to date by employer/insurer? \$14,030.28 from Employer.

Employee: Mary Coffee

Injury No.: 01-128915

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$721.15
19. Weekly compensation rate: \$513.16 / \$329.42
20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable: Previously settled
22. Second Injury Fund liability: Yes

25.39 weeks of permanent partial disability from Second Injury Fund	\$8,363.97
<b>TOTAL:</b>	<b>\$8,363.97</b>

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Thomas Gregory

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Mary Coffee	Injury No.: 01-128915
Dependents:	N/A	Before the <b>Division of Workers'</b> <b>Compensation</b>
Employer:	Husch & Eppenberger (settled)	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Lumbermens Mutual Casualty Company	Checked by: LJW:tr

### **PRELIMINARIES**

On October 22, 2001, Mary Coffee (Claimant) injured her right knee while in the course and scope of her employment with the law firm Husch & Eppenberger (Employer). The parties stipulate that on July 7, 2004, Claimant and Employer entered into a stipulation for compromise settlement. Employer agreed to settle Claimant's work related injury for 35% permanent partial disability referable to Claimant's right knee. At the time of settlement, Claimant's claim against the Second Injury Fund (SIF) was left open, to be concluded at a later date.

The SIF claim was heard by the undersigned Administrative Law Judge on August 20, 2004. Briefs were received, and the case was formally submitted on September 20, 2004. Attorney Thomas Gregory represented Claimant. Assistant Attorney General Kevin Nelson represented SIF.

Prior to the start of the hearing the parties identified the following issues for disposition in this case: liability of SIF for permanent total disability benefits, and SIF liability for permanent partial disability. Claimant offered Exhibits A-C, and the exhibits were admitted into the hearing record. Any objections not expressly ruled on in this award are overruled.

### **SUMMARY OF EVIDENCE**

Only testimony necessary to support this award will be reviewed and summarized.

#### **Testimony**

**Claimant:** Claimant is 61 years old, a high school graduate, who has worked primarily as a legal secretary for the past 35 years, and for Employer for the last 23 years. Her job duties included litigation preparation, typing, filing, copying and answering the telephone. Claimant currently lives in Kansas. On October 22, 2001, Claimant was arising from her chair when she heard a pop and experienced pain in her right knee. Claimant came under the care of Dr. Anderson, and initially received conservative care. During December 2001, an MRI was obtained of her right knee, and as a result of the MRI Dr. Anderson recommended Claimant undergo surgery.

Claimant waited to undergo surgery until she left her employment with Employer. Employer was moving its office from St. Louis City to Clayton, Missouri, and Claimant had decided not to continue her employment, as she lived in Illinois and did not want to drive a further distance to work. On March 19, 2002, Dr. Anderson performed a right knee arthroscopy and partial meniscectomy. Post-operatively, Claimant attended physical therapy, and Dr. Anderson discussed with her the eventual need of a knee replacement. Claimant last saw Dr. Anderson during May 2002.

Claimant has pre-existing medical conditions that include a 1991 lumbar discectomy. Following that surgery Claimant missed 8 weeks of work, but did return to employment with Employer. Upon her return to work, Claimant utilized

lifting safety precautions including bending her knees when lifting, and requesting assistance from co-workers. During 1999, Claimant underwent surgical removal of a bone spur that necessitated disruption of her Achilles tendon that was surgically repaired. Following her post-operative period, Claimant could no longer wear high-heeled shoes.

Claimant's current complaints include: pain approximately 3-4 days per week; pain when walking or sitting longer than 30 minutes on days that she has pain; difficulty bending and stooping, sleep disturbance; and climbing stairs. Claimant is no longer able to bend to reach low cabinets or wash floors without using a mop. She no longer vacuums, her husband assists with laundry, and Claimant limits her driving time to 30 minutes. Weather changes cause increased discomfort. Claimant testified she has not sought employment due to her knee and low back discomfort. She continues to take Tylenol with Codeine, and muscle relaxants to control her discomfort. Claimant planned to work to age 62 or 65 before retiring, and does not believe she can return to work as a legal secretary.

Upon cross-examination, Claimant acknowledged that prior to her right knee injury, she would experience occasional flare-up of back pain that she treated by taking Advil. Also prior to her knee injury: Claimant was capable of walking at a fast pace; could jump over a box; could toe/heel walk; could bend, twist, push or pull as long as the weight was limited; was able to squat and kneel, and worked without medical restrictions. Claimant confirmed that her vocational examination did not include any testing.

### **Medical Deposition Testimony**

**Dr. David Volarich:** Dr. Volarich examined Claimant on September 23, 2003, and provided diagnoses with rating percentages for Claimant's October 22, 2001 (primary) injury, and her pre-existing injuries. Dr. Volarich obtained a history and conducted a physical examination. Additionally, Dr. Volarich reviewed medical records that were provided to him.

During the examination, Dr. Volarich noted Claimant walked with a slight limp favoring her right knee. The abnormal findings of the right knee included: weakness of the right quadriceps and right calf; inability to toe or heel walk due to right knee pain; inability to stand or hop utilizing the right leg only; 50% loss in her ability to squat due to right knee pain; and right knee swelling and crepitus. The abnormal findings of Claimant's back included: pain in her low back with extension; pain with palpation to bilateral sacroiliac joints. The abnormal findings of Claimant's left ankle included crepitus and slight decreased range of motion.

Dr. Volarich listed five diagnoses which included; internal derangement of the right knee, status post partial medial and lateral meniscectomies; aggravation of right knee arthritis; status post decompression laminectomy L4-5; left ankle Achilles tendonitis with Haglund deformity and surgical repair; and resolved right knee contusion. Of these diagnoses, Dr. Volarich rated the primary injury at 65% permanent partial disability (PPD) referable to the right knee. Dr. Volarich rated Claimant's pre-existing injuries as 30% BAW PPD referable to the lumbar spine, and 30% PPD referable to the left ankle. Dr. Volarich testified that Claimant's pre-existing injuries were a hindrance or obstacle to maintaining employment. Dr. Volarich indicated that he would defer to a vocational expert regarding Claimant's ability to work. But, if a vocational assessment of Claimant was unable to identify a suitable job, then Dr. Volarich opined Claimant would be permanently and totally disabled due to the combination of her last work injury, and her pre-existing conditions.

Upon cross-examination, Dr. Volarich acknowledged that Claimant described her back pain as occasional, but not present on a consistent basis, and following her ankle surgery Claimant was able to run, jump, and walk without difficulty. Dr. Volarich further acknowledged that prior to her knee injury she was able to complete her household duties, worked without restrictions, and had no sleep disturbances or difficulty driving.

### **Vocational Deposition Testimony**

**Samuel Bernstein, Ph.D.:** Dr. Bernstein is a licensed psychologist and vocational expert who examined Claimant on June 23, 2004. Dr. Bernstein interviewed Claimant to obtain vocational and medical histories, and reviewed medical records provided to him. Dr. Bernstein did not administer any intelligence or vocational testing. Dr. Bernstein did not perform a transferable skills assessment, or conduct a labor market survey.

Based on the above information, Dr. Bernstein determined that Claimant's advanced age, orthopedic impairments, which include Claimant's right knee, low back, and left ankle/foot, make Claimant unemployable. Dr. Bernstein did not feel that Claimant's anxiety was a serious impairment. Dr. Bernstein concluded that age, and physical limitations do not make Claimant a candidate for reemployment. Dr. Bernstein found Claimant to be permanently and totally disabled for the open competitive labor market due to the combination of Claimant's injuries and conditions.

Upon cross-examination, Dr. Bernstein acknowledged Claimant had described having occasional problems with sitting, bending, twisting motions and lifting. Dr. Bernstein also acknowledged Claimant describing her back pain as occurring from "time to time" prior to her right knee injury. Dr. Bernstein conceded the work of a legal secretary is mostly spent sitting, and that Claimant's largest physical problems relate to her right knee.

## FINDINGS OF FACT & RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

### Liability of the Second Injury Fund for Permanent Total Disability

Claimant seeks permanent total disability benefits from the Second Injury Fund. Section 287.020.7 RSMo., defines “total disability” as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See also Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996) (overruled on other grounds). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant’s condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999) (overruled on other grounds). SIF liability is only triggered by a finding of the presence of an actual and measurable disability at the time the work injury is sustained. *Id.* An employer must be reasonably expected to hire the claimant, given the claimant’s current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003) (overruled on other grounds). The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App. 1995).

Two experts addressed Claimant’s ability to be employed in the open labor market. The medical expert, Dr. Volarich, defers to a vocational expert to determine if suitable employment exists for Claimant in the open labor market. The vocational expert, Dr. Bernstein, makes no effort to quantify the level of Claimant’s intelligence, assess Claimant’s possible transferable skills to less rigorous sedentary jobs, or to determine if any possible jobs exist that could accommodate Claimant’s physical needs. As stated above: “total disability” is the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. Claimant’s vocational expert failed to answer this question.

Claimant left her last employment because she did not wish to drive further to work every day. When she left her employment, treatment for her right knee was far from complete, and once treatment was completed Claimant has never attempted a return to employment. Claimant no longer feels capable of performing as a legal secretary, but it remains unknown if other employment may exist for Claimant, who although at an “advanced age” has functioned in an intellectually demanding job for at least 23 years. Claimant has the burden to demonstrate she is eligible to receive PTD benefits. Claimant has not met that burden, and PTD benefits are denied.

### Issues relating to permanent partial disability of Second Injury Fund

Once a determination is made that a claimant is not permanently and totally disabled, the inquiry then turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutzing v. Treasurer of the State of Missouri*, 895 S.W. 591 (Mo.App. 1995). Section 287.220.1 RSMo., provides that SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the preexisting disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and preexisting conditions must produce additional disability greater than the last injury standing alone.

Claimant alleges pre-existing conditions involving her low back, and left ankle. Dr. Volarich diagnosed a decompression laminectomy at L4-5 and provided a 30% BAW PPD rating for Claimant’s low back, and surgical repair for a Haglund deformity and Achilles tendonitis in Claimant’s left ankle. Dr. Volarich rated Claimant’s left ankle disability at 30% PPD. The uncontradicted testimony of a medical expert concerning the extent of disability may be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656 (Mo.App.1995) (overruled in part). With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled in part).

Claimant had undergone a surgical procedure with each alleged pre-existing condition. She testified to lost time from employment with each procedure, and physical limitations following recovery. I find Claimant’s low back and left ankle are pre-existing disabling conditions. I find these conditions were a hindrance or obstacle to employment. None of these conditions were work related, and therefore, each disabling condition must be assigned a percentage of disability. Regarding Claimant’s low back, I find a 22.5% BAW disability referable to Claimant’s lumbar spine. As for Claimant’s left ankle, I find a 15% disability at the level of the ankle.

Claimant's primary injury to her right knee settled for 35% referable to the knee. When Claimant's assigned preexisting disabilities are combined with Claimant's primary injury, the combination creates a substantially greater disability than the simple sum. Applying a 15% load factor, Claimant is entitled to receive an additional 25.39 weeks in compensation from SIF or \$8,363.97.

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**CONCLUSION**

In summary, Claimant sustained an injury on October 22, 2001, that arose out of and in the course of her employment with Employer. Claimant has not met her burden to establish permanent total disability, however, Claimant has pre-existing conditions that created a hindrance and obstacle to employment, and meet the required statutory thresholds to trigger permanent partial disability from SIF. Claimant is awarded \$8,363.97 in permanent partial disability from SIF. Claimant's attorney is entitled to a 25% lien.

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

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

LINDA J. WENMAN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Gary Estenson  
*Acting Director*  
*Division of Workers' Compensation*