

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

Injury No.: 99-174729

Employee: Cynthia Crozier
Employer: Hy-Vee, Inc.
Insurer: One Beacon Insurance Group
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 5, 1999
Place and County of Accident: Gladstone, Clay County, 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 (ALJ) dated August 11, 2004. The award and decision of Administrative Law Judge R. Carl Mueller, Jr., issued August 11, 2004, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the lay and medical testimony in reaching his conclusions as to disability and causation. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. E.D. 2002), *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001), *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003).

The Commission affirms the award of the ALJ. It is unfortunate that the state of the medical art is not yet sufficiently advanced to the point that cure and relief may be found for this thirty eight year old woman's pain problem.

However, this award affords a certain amount of flexibility allowing for continuing medical treatment while not binding employee to a lifetime of dependence upon disability for income.

The Commission earnestly hopes that new and innovative approaches to employee's medical situation may lead to relief of her symptoms if not to an outright cure.

The parties are reminded of employer's obligation to provide medical treatment. Hand in hand with that obligation is employer's right to obtain evaluations to monitor employee's progress and to seek methods to control and/or improve her condition.

Should employee's condition improve to the point that a return to her regular employment, or its equivalent, is a viable consideration, the law provides that the weekly payment portion of this award may be suspended during the time employee is restored to her regular work or its equivalent. Section 287.200.2 RSMo.

The medical portion of the award, however, shall continue in effect, even during the period of such employment, for conditions related to this injury.

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 April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: John J. Hickey, Member

Secretary

FINAL AWARD

Employee: Cindy Crozier Injury No: 99-174729

Dependents: N/A

Employer: HyVee, Inc.

Additional Party: State Treasurer as Custodian of the Second Injury Fund

Insurer: One Beacon Insurance Co.

Hearing Date: June 15, 2004

Briefs Filed: July 30, 2004

Checked by: RCM/rm

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 5, 1999.

5. State location where accident occurred or occupational disease was contracted: Belton, Cass County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee developed bilateral carpal tunnel syndrome from using a hand-held computer scanning grocery items. After undergoing carpal tunnel release surgery on her left wrist she developed complex regional pain syndrome.
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: Body as a whole.
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$42,974.75.
16. Value necessary medical aid paid to date by employer/insurer? \$82,220.45.
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$486.94
19. Weekly compensation rate: \$324.63 for temporary/permanent total disability compensation and \$303.01 permanent partial disability compensation.
20. Method wages computation: Stipulation
21. Compensation Payable

Benefits Currently Due:

Accrued Past Due Permanent Total Disability Benefits

December 5, 2002 – June 15, 2004 (hearing date)..... \$25,877.65

Ongoing Benefits

Permanent Total Disability of \$324.63 per week from June 16, 2004 for life..... Indeterminate

Future Medical Care..... Indeterminate

Total Ongoing Benefits..... Indeterminate

Total Award..... Indeterminate

22. Second Injury Fund liability: N/A..... None

23. Future requirements awarded: Future medical care (see Award)

Said payments to begin as of date of this award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to Mrs. Crozier shall be subject to a twenty-five percent (25%) lien totaling \$6,469.41 of the accrued past due permanent total disability benefits, and \$81.16 of the ongoing weekly permanent total disability benefits in favor of Boyd and Kenter P.C., for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Cindy Crozier Injury No: 99-174729
Dependents: N/A
Employer: HyVee, Inc.
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: One Beacon Insurance Co.
Hearing Date: June 15, 2004
Briefs Filed: July 30, 2004 Checked by: RCM/rm

On June 15, 2004, the Employee, the Employer, and the State Treasurer as Custodian of the Second Injury Fund (“the Fund”) appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. Mrs. Cynthia Crozier, appeared in person and with counsel, John Boyd. The Employer, HyVee, Inc. (“HyVee”), appeared and was represented by Tom Clinkenbeard. The Fund was represented by Assistant Attorney General Benita M. Seliga. The parties requested the Division to determine the nature and extent of the Mrs. Crozier’s disability and whether she the Fund was liable to her for any benefits. I find that Mrs. Crozier is permanently and totally disabled as a result of her October 5, 1999 injury alone and that there is no Fund liability. In addition, I award her ongoing medical treatment.

STIPULATIONS

The parties stipulated that:

1. On or about October 5, 1999 (“the injury date”), HyVee was an employer operating subject to Missouri’s Workers’ compensation law with its liability fully insured by One Beacon Insurance Co.;
2. Mrs. Crozier was its employee working subject to the law in Belton, Cass, County, Missouri;
3. Mrs. Crozier sustained an occupational disease arising out of and in the course of employment;
4. Mrs. Crozier notified HyVee of her injury and filed her claim within the time allowed by law;
5. HyVee provided Mrs. Crozier with medical care costing \$82,220.45; and,
6. HyVee paid Mrs. Crozier temporary total disability compensation totaling \$42,974.75 representing 132 and 2/7ths weeks paid through December 4, 2002.

ISSUES

The parties requested the Division to determine:

1. Whether HyVee must provide Mrs. Crozier with additional medical care?
2. Whether Mrs. Crozier suffered any disability and, if so, the nature and extent of her disability and whether she is permanently and totally disabled?

3. Whether the Second Injury Fund is liable to Mrs. Crozier for any benefits?

FINDINGS

Mrs. Crozier testified on her own behalf and called as witnesses at hearing both her husband, Douglas Crozier, and Mr. Michael Dreiling, a vocational expert. In addition, Mrs. Crozier offered the following exhibits, which were admitted into evidence:

- A - Deposition, P. Brent Koprivica, MD, October 23, 2003
- B - Deposition, Daniel Kloster, MD, April 9, 2004
- C - Vocational Report, Michael Dreiling,
- D - Boyd & Kenter Attorney Fee Contract
- E - Curriculum Vitae, Michael Dreiling

HyVee called Mrs. Sarah Anderson as a witness who testified as to the availability of sedentary work for Mrs. Crozier. In addition, HyVee offered the April 8, 2004 deposition of Terrence Pratt, M.D., which was admitted into evidence. The Fund did not offer any exhibits.

Based upon the above exhibits and the testimony of the witnesses, I make the following findings:

Cynthia "Cindy" Lou Crozier ("Employee") is married to Douglas Crozier and is the mother of a 12-year-old daughter. They live at 109 East Calico Drive, in Raymore, Missouri. She stands 5 feet 2 inches in height, weighs 120 pounds, and was born November 17, 1965. She is finished the 11th grade, and one year later obtained her GED. She has attended educational courses at the American Institute of Banking while an employee of a local bank.

Employee's past work includes jobs as a bank vault teller, waitress, cashier, department manager, receptionist, office clerk, collections clerk and collections supervisor. She commenced her employment with HyVee at its Belton, Missouri store, in June 1999. She worked through November 6, 2000. During her employment, she was an inventory control specialist pricing coordinator.

Tasks of her employment at HyVee included scanning product bar codes into a computer system. This job required her to hold a product in one hand and utilize a five-pound bar code reader in the other. She typed in an office setting, made promotional signs, and described her work as essentially constant use of both hands in a gripping and grasping techniques, upwards to 50 hours per week.

As a consequence of her employment, Mrs. Crozier sustained an admitted occupational disease, which culminated in her undergoing an open right carpal tunnel surgery on April 27, 2000, and a left carpal tunnel release on June 15, 2000. Complications ensued after her left hand surgery, and she ultimately came under the care of Daniel Kloster, M.D., a pain management specialist, who continues to treat her as of the date of the hearing. His treatment is principally for Complex Regional Pain Syndrome, Type II. She has undergone 15 stellate ganglion blocks, and had an unsuccessful effort with the use of a Morphine pump. Mrs. Crozier has undergone a removal of an inclusion cyst from the left palm during a surgery performed by Lanny Harris, M.D., on October 2, 2001.

As of the date of trial, Mrs. Crozier reported taking the following medications:

- Provigil..... 200 mg daily
- Methadone..... 10 mg three times daily
- Dextromethorphan1..... 5 mg three times daily
- Lamictal..... 150 mg twice daily
- Oxycodone..... 5 mg every three hours
- Prinivil..... 20 mg daily
- Insulin..... usually 10 units NPH, 10 units Regular insulin, twice daily

Of these medications, all but Insulin are prescribed to treat the pain or side effects of the pain medicines.

These are prescribed by Dr. Kloster. Mrs. Crozier reports being unable to function since an aborted effort at returning to work in the fall of 2000. She has not been able to work since November 6, 2000 by her account.

In support of her claim, Mrs. Crozier produced evidence from P. Brent Koprivica, M.D., a board certified occupational medicine physician who is as well, board certified as an independent medical examiner. His opinions of consequence were that the Employee was permanently and totally disabled as a result of the effects of her employment related claim, independent of any pre-existing disability. See, Claimant's Exhibit A at 65:23-66:4. He believed that Mrs. Crozier would require ongoing treatment to manage her pain. *Id.* at 46:6-47:23.

Vocational expert Michael Dreiling testified that it was unreasonable to expect any employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ Mrs. Crozier given her physical condition. He noted the significant pain medication usage, the very limited daily activities, and the impact that her pain has upon her ability to sit, stand and lay down, all preclude her from returning to work in the competitive labor market. All of these limitations and problems result from her work-related condition and not her diabetes.

Treating physician and board certified pain medicine specialist Daniel Kloster, M.D. testified that Mrs. Crozier's pain was caused by the surgical release of her carpal tunnel. The extremity pain that she experiences actually extends into her spine. He testified that:

The arm is no longer normal. Again, if you touch it, it feels painful. The reason I stress it is central, patients will experience such severe pain, they will want the extremity cut off. I have known patients that have had that done. The problem is that is not the fix. Because even if you would cut off the extremity, the real cause is now in the spinal cord. So you could never amputate proximal enough to make a difference. So patients that have gone through that still have worsening pain more often than not, and certainly no better pain relief.

See, Claimant's Exhibit B at 11:14-12:1.

Dr. Kloster further noted that Mrs. Crozier's need to sleep at odd intervals during the day has been the biggest problem of treatment. To attempt to treat the sedative effects of the various pain medications, he has prescribed Provigil, but even with that stimulant, she still has interrupted sleep. *Id.* at 20. He believed that the sedation effects of the medications prescribed precluded a higher dosage to arrest pain, because to do so caused her to be significantly sedated. *Id.* at 25. He indicated that the sedation status had been static for over the past four years that he has treated Mrs. Crozier. In addition, Dr. Kloster opined that Mrs. Crozier will require future and ongoing medical care to attempt to give her pain relief. This opinion was shared by Dr. Koprivica, as well as HyVee's examining physician, Terrence Pratt, M.D.

Although Dr. Kloster has attempted to increase the dosages of pain medications to afford more pain relief, Mrs. Crozier has too many side effects of sedation, including slurred speech. She simply cannot tolerate a higher dose. *Id.* at 52. He as well explained the phenomena of sleep interruption due to the chronic pain issues. With this pain, "people that have neuropathic pain, and Complex Regional Pain Syndrome is neuropathic pain, generally do worse in the evening hours. Usually the pain progresses throughout the day. So they can have a very difficult time sleeping." *Id.* at 53-54.

Perhaps the most telling piece of Dr. Kloster's testimony was during recross-examination by HyVee's counsel:

- Q. Certainly if someone were to tell you: I feel like I have to lay down all day, might that also be an indication that the medications are not being received or balanced properly?
- A. Well, no. Obviously, I think I have got her on a regimen that I am comfortable with. With that said, she has significant side effects. To lesson that gives her more pain. To giver her more causes more sedation. Cindy and I have come to the conclusion that where we are gives her balance. The pain is controlled so she can do some things but the payoff is that she is sedated.

Prior to her employment with HyVee, Mrs. Crozier developed Type I diabetes mellitus during childhood. She was insulin dependent, and remains so currently. She had been hospitalized on several occasions through 1988, for treatment of the complications associated with this illness, including treatment for diabetic ketoacidosis as well as laser photocoagulation in 1990.

After she left high school, the diabetic condition impacted her in terms of her ability to find certain types of jobs, and to maintain work once found. One of the problems with her illness caused her to monitor what she did. She had to have a job with some flexibility that allowed her to take breaks as necessary. She had to periodically be able to monitor her blood sugars. She would be thirsty and drink more. She had to go to the bathroom more because she had the need to eliminate an increased sugar load. Thus, she had to have more frequent bathroom breaks.

Dr. Koprivica opined that this pre-existing condition resulted in a 15% whole body permanent partial disability. See, Claimant's Exhibit A at 101. Dr. Koprivica also answered "yes" to the question of whether or not her diabetes had "the potential to combine with a subsequent arising significant disability so that the result would be greater than the last accident considered alone." *Id.* at 23:2-10. However, Dr. Koprivica never opined that Mrs. Crozier's diabetic disability combined with the disability that flowed from her HyVee related condition to create any greater, or synergistic, disability. Instead, Dr. Koprivica was very unequivocal in opining that Mrs. Crozier was rendered "permanently and totally disabled as a direct result of the work-related cumulative injuries associated with the October 5, 1999, conditions." *Id.* at 101 and 75:19-25. It is very clear from his deposition testimony that he never wavered from that opinion. *Id.* at 76:6-7.

Dr. Kloster opined that the presence of diabetes precluded the use of certain pain medications, because of the interaction with the blood sugars and therefore possible exacerbation of the diabetes. However, he believed that the fatigue and sedation effects were most likely and substantially related to the medications used to treat the chronic regional pain syndrome. Dr. Kloster offered no opinion as to ability to work.

HyVee's rating doctor, Terrence Pratt, M.D., testified that Mrs. Crozier should be able to work - albeit with significant limitations. He related that he would restrict her from repetitive tasks of the right and left upper extremities. She could work one handed, although he would not be able to use the right arm repetitively, and to occasionally lift no greater than 10 to 15 pounds. See, Employer's Exhibit 1 at 43. Dr. Pratt testified that he has treated chronic pain patients, but was unfamiliar with some of the medications used by Mrs. Crozier. *Id.* at 35:22-36:1. He was unsure of the correct type of classification of her Chronic Regional Pain Syndrome. *Id.* at 45:13-46:1. Dr. Pratt opined that Mrs. Crozier suffered six percent (6%) permanent partial disability to her right upper extremity at the 175-week level and thirty percent (30%) permanent partial disability to her left upper extremity at the 200-week level. *Id.* at 17:17-18 and 18:9-10. Dr. Pratt admitted that he did not evaluate whether Mrs. Crozier's pre-existing diabetes resulted in any disability. *Id.* at 53:25-54:1. Dr. Pratt testified only that the effects of Mrs. Crozier's diabetic conditions that existed before her work-related carpal tunnel syndrome merely "could" have the potential to be an obstacle or form a hindrance to her in finding or maintaining employment. *Id.* at 51:13-17. However, he emphasized that he was merely talking about "potentials". *Id.* at 51:19.

RULINGS

To determine if a claimant is totally disabled, the central question is "whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition." Ransburg v. Great Plains Drilling, 22 S.W.3d 726, 732 (Mo. App. 2000); see also Massey v. Missouri Butcher & Café Supply, 890 S.W.2d 761, 763 (Mo. App. 1995). The term "total disability" has been construed on numerous occasions by the various courts in this State.

The resonating theme of those cases is that "total disability" has been defined as "the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo. App. 2001); §287.020.7. "It does not require that the claimant be completely inactive or inert." Sifferman v. Sears Roebuck and

Co., 906 S.W.2d 823, 826 (Mo. App. 1995); see also Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo. App. 1996); Reiner v. Treasurer, State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992); Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849, 852 (Mo. App. S.D. 1995).

The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. S.D. 1982).

The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. Reiner, at 367. Total disability means the “inability to return to any reasonable or normal employment.” Brown v. Treasurer of Mo., 795 S.W.2d 479, 483 (Mo. App. E.D. 1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* Working very limited hours at rudimentary tasks is not reasonable or normal employment. Grgic v. P & G Construction, 904 S.W.2d 464 (Mo. App. E.D. 1995). The pivotal question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person’s present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Reiner, at 367. Although HyVee’s current store manager testified that it would allow Mrs. Crozier to hand out leaflets and work what hours she could withstand, I find this offer to not only be self-serving but to represent an offer which it is unreasonable to assume any other employer would reasonably be expected to employ Mrs. Crozier given her disabilities.

From the competent and credible evidence, and the reasonable inferences therefrom, I find that Cindy Crozier is permanently and totally disabled. This disability results solely from her HyVee work related injury and its consequences - particularly the development of complex regional pain syndrome - giving rise to this claim. I find Dr. Koprivica’s opinion that this condition alone resulted in Mrs. Crozier’s total disability credible. Dr. Pratt’s testimony regarding “potential” disability from Mrs. Crozier’s diabetes was simply too speculative to be given serious consideration, especially since he specifically admitted that he “did not evaluate her in relationship to vision or diabetes.” See, Employer’s Exhibit 1 at 53:25-54:1. I do not find Dr. Pratt’s opinion as to the extent of Mrs. Crozier’s disability credible. Certainly to view her disability simply as a scheduled injury is not believable and would require that the overall impact of her complex regional pain syndrome be ignored. And, to find that Mrs. Crozier’s total disability resulted from *both* her diabetic condition and her work-related disability simply would have been an exercise in speculation and conjecture. I also find persuasive Mr. Drieling’s vocational opinion that Mrs. Crozier is unemployable because of her work-related disability considered alone.

“Where a claimant is found to be totally and permanently disabled (as is the case here), § 287.220.1 fixes and limits an employer’s liability to that part of the disability ‘result[ing] from the last injury had there been no preexisting disability.’” Kizior v. Trans World Airlines, 5 S.W.3d 195 at 200 (Mo.App. W.D. 1999). Therefore, the first step in the analysis is to consider the employer’s liability in isolation, namely, what “degree or percentage of disability . . . would have resulted from the last injury had there been no preexisting disability.” *Id.* at 200-01. Here, Dr. Koprivica unequivocally and convincingly testified that the last injury, standing alone, rendered Mrs. Crozier permanently and totally disabled. Given that I accept this opinion Mrs. Crozier’s preexisting disability became irrelevant. *Id.* at 206. This follows because, according to section 287.220.1, the total disability rating is what has to be used in adjudicating HyVee’s liability. *Id.* See also Stewart v. Johnson, 398 S.W.2d 850, 852 (Mo.1966); Vaught v. Vaught, Inc., 938 S.W.2d 931, 942 [6] (Mo.App.1997) (holding, “[o]nce Commission found Claimant had a disability before Accident 4 and that he was permanently and totally disabled after Accident 4, the next determination Commission should have made was the amount of disability resulting from Accident 4 ‘considered alone and of itself.’ That determination would fix the amount owed Claimant by Respondents”).

As such, I direct that compensation benefits commence as of December 5, 2002 (temporary-total disability benefits were paid through December 4), and to continue undiminished until such time as this Award may be modified. The permanent total disability benefits that have accrued from December 5, 2002 through the June 15, 2004 hearing date total \$25,877.65 and are due immediately in a lump-sum payment. Mrs. Crozier then shall receive \$324.63 per week for the remainder of her life or until any modification of this award by the Labor and Industrial Relations Commission. I further find and believe that Mrs. Crozier is entitled to receive such medical care and attention as may reasonably be required in order to cure and relieve her from the effects of her injuries, as may be directed by Daniel Kloster, M.D.

Finally, the compensation awarded to the Mrs. Crozier shall be subject to a twenty-five percent (25%) lien totaling \$6,469.41 of the accrued past due permanent total disability benefits, and \$81.16 of the ongoing weekly permanent total disability benefits in favor of Boyd and Kenter P.C., for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1.

Date: _____

Made by: _____

R. Carl Mueller, Jr.
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Renée Slusher
Director
Division of Workers' Compensation