

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

Injury No.: 04-062969

Employee: Rhonda Doyle
Employer: Schreiber Foods, Inc. (Settled)
Insurer: Zurich North America (Settled)
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. 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 modifying the March 11, 2010, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge on all issues except the award of attorney fees.

Employee's counsel requested an attorney fee of 20% of all benefits awarded. For reasons unknown, the administrative law judge awarded an attorney fee of 25% of all benefit payments, but not to exceed 100 weeks. The administrative law judge does not explain why he did not award the attorney fees requested. The administrative law judge did not identify for which 100 weeks the attorney fee is due. The identification of the weeks is significant in this case because the Second Injury Fund is only liable for \$73.21 per week for the first 160 weeks of permanent total disability. If the administrative law judge's fee award is applicable to the payments for those weeks, counsel would be entitled to a mere \$1,825.00 for her representation in this claim against the Second Injury Fund.

We find that counsel provided significant and successful legal services in this matter. We modify the award of attorney fees. Ann G. Dalton, Attorney at Law, is allowed a fee of 20% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued March 11, 2010, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 10th day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Rhonda Doyle	Injury No.:	04-062969
Dependents:	N/A		Before the
Employer:	Schreiber Foods Inc. (settled)		Division of Workers' Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Zurich North America (settled)		
Hearing Date:	December 7, 2009	Checked by:	JED:sr

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: May 7, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:
Slip and fall on soapy floor.
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: Low back and psychiatric injury.
14. Nature and extent of any permanent disability: 40 % PPD of low back; PTD against SIF.
15. Compensation paid to-date for temporary disability: \$17,950.14 (39 weeks)
16. Value necessary medical aid paid to date by employer/insurer? \$108,046.01

Employee: Rhonda Doyle

Injury No.: 04-062969

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$460.26/ \$387.05
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

160 weeks of permanent partial disability from Employer	(Settled)
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22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: weekly differential (\$73.21) payable by SIF for 160 weeks beginning November 14, 2005 and, thereafter, \$460.26, for Claimant's lifetime	Indeterminate
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TOTAL: INDETERMINATE

23. Future requirements awarded: Unknown

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% (not to exceed 100 weeks) of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ann Dalton

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Rhonda Doyle	Injury No.:	04-062969
Dependents:	N/A		Before the
Employer:	Schreiber Foods Inc. (settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Zurich North America (settled)		Department of Labor and Industrial
Hearing Date:	December 7, 2009		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	JED:sr

This case involves a primary injury to the low back resulting to Claimant on the reported accident date May 7, 2004 with an allegation of permanent total disability against the Second Injury Fund. Employer/Insurer previously settled its risk of liability. Both parties are represented by counsel.

FINDINGS OF FACT

Claimant, age 51, was a production line worker for Employer for eight years before her (early) retirement in 2000. She graduated high school.

On the reported accident date, Claimant, while pulling a pallet-jack, stepped in an uncovered floor drain in which her boot stuck causing her to fall. Claimant fell backward onto her left hip and low back.

Initial treatment with Concentra is notable for the extended period of treatment with an urgent care facility before referral to an orthopedist, David Kennedy, M.D., on August 4, 2004.

On January 5, 2005, Dr. Kennedy and Dr. Raskas performed surgery for L4-5 fusion with internal fixation.

Claimant continued to experience other radicular symptoms and underwent post-surgical injection therapy.

Claimant was placed at maximum medical improvement on October 4, 2005 by Dr. Kennedy. Two other physicians placed her at MMI weeks later. Severe restrictions were imposed. Claimant never returned to work despite functional capacity rating at light work demand level.

Claimant's current complaints regarding the primary injury include daily debilitating low back pain which causes her to limp. Claimant undergoes pain management for her symptoms.

Pre-Existing Low Back Condition

In November 1999, claimant injured her low back as a result of slipping on a wet, soapy floor. Initially, Claimant was diagnosed with a concussion, cervical strain and low back strain. Claimant treated through September 2000.

Dr. Raskas, noted, by x-ray and CT scan that Claimant had a functional L6 vertebrae (congenital anomaly) together with a diagnosis of isthmic or degenerative spondylololthesis at L5-6. He also noted narrowing at L6-S1 with significant bone overgrowth and sclerotic changes about the L5 and L6 facet joints.

Claimant underwent steroid injection therapy and returned to work with medical restriction against lifting greater than 25 pounds on a regular basis, a 50 pound maximum lift and restriction against repetitive bending or twisting at the waist. Moreover, she needed to be able to sit and stand as needed.

Claimant entered a WC settlement in 2001 of twelve and one-half percent PPD of the body referable to the low back. She received nothing for her concussion.

Dr. Adam Sky, a psychiatrist, assigned a twenty-five percent pre-existing PPD of the body referable to depression.

* * *

Claimant's expert, Dr. David Volarich, examined Claimant and correlated her course of disabling symptoms with the surgical record and pain management. He diagnosed failed back syndrome. He assigned an *overall* seventy percent PPD of the body referable to the low back referable to the reported injury.

Ultimately, he concluded Claimant was permanently and totally disabled as a result of the combination of the pre-existing low back condition and the current low back injury together with her treated condition of depression, also pre-existing.

Claimant's testimony was very credible and un rebutted.

Claimant's vocational expert, Ms Sherry Browning, examined Claimant, administered various tests and measures, reviewed her work history, and reviewed the medical records. She concluded Claimant was no longer employable in the open labor market.

The SIF offered no evidence.

RULINGS OF LAW

Nature and Extent of Permanent Disability

The primary injury to the low back and resulting disability was detailed in the expert evidence which was bolstered by periodic examinations and new reports. Claimant is never pain-free. Nothing in the record suggests Claimant could return to work. Dr. Volarich's diagnosis of failed back syndrome corresponds to Claimant's permanent symptoms and severe restrictions on activity.

Claimant testified that he has had continuing, i.e. recurrent, pain in her low back since long before the reported accident. No evidence was offered that Claimant could return to work "in the open labor market" after her reported injury. The complex and longstanding, i.e. 1999, diagnoses are undisputed in the record. The evidence of a pre-existing light duty job was uncontradicted. The record suggests PPD in the range of seventy-five to 100 percent PPD. The reported injury resulted in a PPD range consistent with Claimant's settlement, or a range of forty to forty-five percent PPD.

However, it is not reasonable to suggest any employer would employ Claimant in her present physical condition. This assessment includes, but does not require, consideration of her education and transferable skills, or her pre-existing depression. Claimant cannot be reasonably expected to perform regular hours in any line of work on a full-time basis.

Liability of the Second Injury Fund

The Liability of the Second Injury Fund is set out in Section 287.220 RSMo (1994). A previous disability need only be a "hindrance or obstacle to employment or obtaining employment." *Id.* See Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995). Claimant's evidence demonstrated her severe pre-existing low back disability worsened significantly by her reported injury. The significance of the combination is manifest when considering Claimant's inability to position or reposition herself in any activity to avoid disabling pain given the multiple symptomatic lumbar dermatomes discernible in the medical record.

The record supports a finding that Claimant exhibited permanent injury from 1999, plus ongoing degeneration over the next fifteen years that supports a forty percent pre-existing disability of the low back. Claimant's evidence was probative and completely un rebutted.

Conclusion

Accordingly, on the basis of the substantial and competent evidence contained within the whole record, Claimant is found to have sustained a forty percent PPD of the body referable to the low back as a result of the primary injury. In addition, Claimant is found to have sustained permanent total disability as the result of the combination of the primary injuries and the pre-existing disabilities described. The SIF is liable for the differential between the PTD rate and the

PPD rate for the PPD installment period and, thereafter, for Claimant's lifetime. Section 287.200 RSMo (2000).

The record contains overwhelming medical evidence of permanent total disability with severe restrictions from multiple treating physicians. The SIF offered no contrary evidence. Accordingly, an attorney fee is allowed in the amount of 25% of all payments hereunder, not to exceed 100 weeks. Said fee is in addition to that allowed under the primary settlement.

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge

A true copy: Attest:

Division of Workers' Compensation

