

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

Injury No.: 07-018653

Employee: Judy Drago
Employer: Harrah's St. Louis
Insurer: Indemnity Insurance Company of North America
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 June 28, 2011. The award and decision of Administrative Law Judge Suzette Carlisle, issued June 28, 2011, 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 29th day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Judy Drago

Injury No.: 07-018653

Dependents: N/A

Employer: Harrah's St. Louis

Additional Second Injury Fund

Insurer: Indemnity Ins. Co. of No. America

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Hearing Date: March 16, 2011

Checked by:SC

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: January 18, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis County, 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: Claimant sustained injuries to her right ankle in a motor vehicle accident as she was leaving work.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right lower extremity at the knee, left knee
14. Nature and extent of any permanent disability: 60%PPD of the right knee, 5% PPD of the left knee
15. Compensation paid to-date for temporary disability: \$8,152.50
16. Value necessary medical aid paid to date by employer/insurer? \$58,294.94

Employee: Judy Drago

- 17. Value necessary medical aid not furnished by employer/insurer? \$64,050.40
- 18. Employee's average weekly wages: \$880.00
- 19. Weekly compensation rate: \$586.87/\$376.55
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$64,050.40
93.14 weeks of temporary total disability	\$46,510.33 ¹
104 weeks of permanent partial disability from Employer	\$39,161.20

22. Second Injury Fund liability: Yes

17.19 weeks of permanent partial disability from Second Injury Fund	\$ 6,472.89
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TOTAL: \$156,194.82

23. Future requirements awarded: As outlined in the award

Said payments to begin 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: Donna Clark-Frayne

¹ Claimant worked from April 4, 2008 to June 5, 2008 which totaled 8 6/7 weeks. This amount was deducted from the total number of TTD weeks owed. It should be noted Claimant asserted the weeks owed in TTD to be 84.1 weeks. However, the calculation should be: 102 weeks total weeks owed, minus 8.857 weeks Claimant worked = 93.14 weeks of TTD x \$586.87 = \$54,662.83 owed in past TTD benefits, minus \$8,152.50 paid by Employer = \$46,510.33 remaining due in past TTD owed by Employer. It is further noted the parties stipulated Employer paid \$8,152.50 toward TTD benefits.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Judy Drago	Injury No.: 07-018653
Dependents:	N/A	Before the
Employer:	Harrah's St. Louis	Division of Workers'
Additional	Second Injury Fund	Compensation
Insurer:	Indemnity Ins. Co. of No. America	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri

STATEMENT OF THE CASE

A hearing was held at the Missouri Division of Workers' Compensation (DWC), St. Louis office at the request of Judy Drago (Claimant), on March 16, 2011, pursuant to Section 287.450 RSMo (2005).² Claimant seeks a Permanent Total Disability (PTD) award against Harrah's (Employer) or the Second Injury Fund (SIF). Venue is proper and jurisdiction lies with the DWC. Attorney Donna Clark-Frayne represented Claimant. Attorney J. Bradley Young represented Harrah's St. Louis (Employer) and Indemnity Ins. Co. of No. America (Insurer). Attorney Da-Niel Cunningham represented the SIF. The record closed on March 30, 2011 after submission of the SIF's Exhibit I.³

Exhibits

Claimant's Exhibits A-U,⁴ Employer's Exhibit 1, and the SIF's Exhibit I were all admitted without objection.

STIPULATIONS

The parties stipulated that on or about January 18, 2007:

1. The Claimant was employed by the Employer;⁵
2. Claimant sustained an accident which arose out of and in the course of employment in St. Louis County, Missouri;

² All references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

³ Dr. Holekamp, a SIF witness, did not waive the reading of the deposition and her signature page was not contained within the deposition at the time of the hearing.

⁴ Exhibit D is modified to contain selected documents within the Exhibit. Exhibit D contained in excess of 500 pages; however Claimant identified 58 pages that were relevant for this hearing. Also, after the hearing Claimant submitted additional medical records from Dr. Karges and bills via email and U.S. mail, and stated it was agreed these records would become a part of Exhibit E. In addition, she offered hyperlinks after the hearing. Employer's objection to the admission of the hyperlinks is sustained. The additional medical records submitted by U.S. mail and email are not admitted. The record contains no evidence that an agreement was reached to admit medical records and bills from Dr. Karges after the hearing.

⁵ Any references in this award to the Employer also include the Insurer.

3. The Employer and Claimant operated under the provisions of the Missouri Workers' Compensation Law;
4. Employer's liability was fully insured by Indemnity Insurance Company of No. America;
5. Employer had notice of the injury;
6. A Claim for Compensation was timely filed;
7. Claimant's average weekly wage was \$880.00 resulting in rates of compensation of \$586.87 for temporary total disability (TTD) and PTD, and \$376.55 for permanent partial disability (PPD);
8. The Employer paid medical benefits totally \$58,294.94;
9. Claimant reached maximum medical improvement (MMI) on January 2, 2009; and
10. The Employer paid \$8,152.50 directly to Prudential Insurance Company. The money was used to reimburse Prudential for part of Employee's time off from work.

ISSUES

The parties have identified the following issues for deposition:

1. What is the nature and extent of Employer's liability, if any, for PPD or PTD benefits?
2. What is the nature and extent of the SIF's liability, if any, for PPD or PTD benefits?
3. Is Employer liable for past medical expenses totaling \$117,088.95?
4. Is Employer liable for past TTD totaling \$49,360.76? (from January 18, 2007 to January 2, 2009 totaling 84.1 weeks)
5. Is Employer liable for future medical care?

SUMMARY OF THE DECISION

Based on the entire record, Claimant's testimony, demeanor, medical records, and the applicable law in the State of Missouri, I find Claimant is PTD due to subsequent degeneration of her vision. Employer is liable for PPD benefits, TTD, past medical expenses, and future medical care. The SIF is liable for PPD benefits.

FINDINGS OF FACT

All evidence was reviewed, but only evidence discussed below is considered to establish the facts based upon competent and substantial evidence contained in the record.

1. Claimant was born August 8, 1951. She completed the 11th grade, married, and moved to Germany. She is currently, divorced, has no children, and resides in Florida.
2. Claimant worked for the Marriott Hotel for 22 years as a waitress and hostess, and bartender. She worked for Employer for ten years as a dealer until June 2008. Claimant has not worked since 2008.
3. At the hearing, Claimant reported **left foot numbness** after a bunionectomy was performed by Anthony Lombardo, M.D. in 1991. After surgery her complaints included ongoing left toe numbness and foot tingling. To relieve symptoms, Claimant took Lyrica and Topamax periodically between 1990 and 2007. She currently takes a generic product for left foot numbness.
4. Claimant was diagnosed with a failed bunionectomy in 2003 and missed six weeks from work after repeat surgery.
5. After surgery in 2003, Claimant did not take time off from work, no pain medication, and no accommodations were made at work. Claimant bowled, danced in high-heels, and performed aerobics.
6. In 1995 Claimant treated with **Dr. Craig Schmidt** for “situational depression” when her niece died, in 2002 when her mother died, and 2005-2006 when she divorced her alcoholic spouse, and when she could not walk after the work accident. Claimant is not currently on medication.
7. In 1998 Claimant was diagnosed with **diabetes** but testified she had no diabetic symptoms. Since 2002 she has treated the condition with diet and medication, including Foramen. Claimant tests her blood sugar daily and takes two pills per day. In 2004 Claimant told Dr. Volarich she had numbness in both feet if she stood for long periods but symptoms improved with therapy. In 2006 Dr. Lombardo treated Claimant for bilateral foot and ankle pain due to diabetic neuropathy and plantar fasciitis. Leading up to 2007 she did not miss work because of diabetes, experienced some numbness and tingling in her hands, and neuropathy in her left foot. However she testified her diabetes was under control.
8. In 2002 Claimant was diagnosed with **bilateral carpal tunnel syndrome (CTS)**. Dr. Brown performed CTS surgery in 2002 and 2003. Claimant missed a total of 6 days from work for both surgeries. Current complaints include decreased grip strength, and minor numbness and tingling. Leading up to 2007 she took no pain medications, had some weakness and numbness, and decreased grip strength. Claimant settled the case with Employer for 17.5% of each wrist, and she settled with the SIF for 17.5% of the left foot.

9. In 2003 Dr. Lombardo treated Claimant for bilateral plantar fasciitis, and prescribed injections, and special shoes. Symptoms resolved with treatment. Leading up to 2007, Claimant had periodic flare-ups which resolved with rest.
10. Around 1999 Claimant was diagnosed with **Cone Rod Dystrophy**, (CRD), left greater than right. CRD produced a blind spot in the center of her vision. Also, the condition causes a color deficiency. Claimant inherited retinol degeneration from her father. In 1999 Claimant was diagnosed with **bilateral floaters** but she did not notice them. In 2001 the number of floaters increased in the right eye.
11. In 2001 **Nancy M. Holekamp, M.D.** diagnosed cataracts. In 2004, Dr. Holekamp recommended testing with Dr. Brantley, but the condition cannot be improved with glasses, surgery, or medication.
12. **Milam A. Brantley, Jr., M.D., PhD**, diagnosed decreasing central vision, but no significant change compared to 1999 and 2002. Bull's eye maculopathy, possibly CRD, and posterior vitreous detachment. Dr. Brantley referred Claimant to Carrie Gaines, O.D. due to her difficulty distinguishing spades from clubs when dealing cards.
13. Dr. Holekamp diagnosed **macular degeneration** in 2002. In 2004 Dr. Holekamp diagnosed **night vision problems**.
14. In 2005 **Rajendra S. Apte, M.D., Ph.D.**, diagnosed cone dystrophy, bilateral Bull's eye maculopathy, and posterior vitreous detachment.
15. By November 27, 2006 Claimant informed Dr. Holekamp that her bilateral vision was getting worse. Claimant had annual visits at the Retinol Institute for the slowly progressing disease. Claimant's eyesight continued to worsen after the 2007 work accident. In March 2008 Claimant gave **Dr. Brantley** a history of vision problems at a distance of three feet when dealing cards.
16. In November 2006 Dr. Holekamp recommended Claimant for a clinical study called the Artificial Silicon Retina Phase Three that would implant a computer chip beneath her retina, to improve vision. However, funding was not obtained for the study.
17. **Carrie Gaines, M.D.**, a low vision specialist, prescribed appropriate glasses, but did not correct the problem. Claimant did not wear glasses until April 2008 when she noticed problems seeing the cards. The doctor prescribed glasses to see up close.
18. Claimant was unaware she was diagnosed with Bull's eye maculopathy, vitreous detachment, macular degeneration, night vision problems, and was legally blind in the left eye, with glasses, by 2004, or that Dr. Holekamp found Claimant's vision had affected her work in 2005. Claimant had problems driving at night, reading small print, and distinguishing spades from clubs in November 2005.
19. In November 2007, Dr. Holekamp restricted Claimant to driving 45 miles per hour in daylight only. Claimant drove to and from work with these restrictions in 2008. She was

unable to renew her driver's license in Florida because she could not pass the eye exam in November 2009.

20. In April 2010 **Sonya M. Braudway, O.D.**, performed a low vision evaluation and Claimant reported difficulty performing financial tasks, reading price tags and labels, menus in restaurants, dials on the stove, and food labels.
21. **Dr. Laue**, Claimant's gynecologist, prescribed Lexapro for "situational" depression.
22. Claimant worked for Employer for 10 years as a card dealer. She dealt cards, roulette, performed cash transactions, card placement, and entertained guests. She worked the day shift, Monday through Friday, 8 hours a day. She stood for an hour and 20 minutes, and then took a 20 minute break.
23. She was invited to work high limit games because of her successful career. Claimant was not disciplined during her employment, and received an Employee of the Month award in 1998.
24. On January 18, 2007, Claimant was at work when she learned that her brother died. At the end of her shift she clocked out, walked to the employee parking garage, and drove onto Casino Center Drive. Her cell phone rang and she reached to pick it up, but dropped. Claimant reached to pick up the telephone and ran into the back of a disabled bus.
25. The Pattonville Fire Protection District transported Claimant to DePaul Health Center. X-rays of the right ankle revealed a comminuted, displaced, and angulated fracture/dislocation of the talus, dislocated fractures of the distal tibia and fibula, and fractures to the second through eighth ribs on the right. The ankle fracture was reduced and a short leg cast was applied. Medical expenses total \$14,319.10.
26. Claimant treated for fractured ribs and right ankle, and right knee contusion. DePaul recommended amputation her right ankle. She was transferred to St. Louis University Hospital where she awakened nine days later. Claimant had at least six surgeries. Some hardware remains in her ankle.
27. On January 19, 2007 Abbott Ambulance, Inc. transferred Claimant to St. Louis University Hospital. The company charged \$825.60 for their services.
28. At St. Louis University, an external fixator was surgically applied and Claimant was discharged on January 26, 2007. On February 6, 2007 Dr. Karges performed open reduction internal fixation of the right ankle with several plates and screws and revised the external fixator. On March 9, 2007 David Karges, D.O, removed the external fixator and inserted a screw. Claimant developed a bimalleolar ankle nonunion and on May 30, 2007 Dr. Karges inserted a plate and screw to stabilize the right ankle. Claimant remained off work through the end of March 2008.
29. In May 2008, Mark A. Ludwig, M.D. debrided a burn on Claimant's right leg and prescribed medication. The burn was caused by a nerve stimulator used during physical

therapy. The wound healed slowly due to Claimant's diabetic condition. Dr. Ludwig charged \$1,245.79 for services rendered.

30. On June 10, 2008 Dr. Karges removed both plates and screws, and kept Claimant off work.
31. In October 2008 Dr. Karges opined Claimant "easily (had) 75% PPD of the right lower extremity." X-rays revealed two broken screws and a nonunion.
32. In January 2, 2009 Dr. Karges opined Claimant had achieved MMI and released her to return to sedentary work with a brace, special shoes, walking or standing limited to 10 minutes, and no more than two hours during an eight hour shift, avoid stairs, drive only to and from work, and no job that required driving. Dr. Karges recommended a motorized scooter for work and home for better mobility.
33. In June 2009 Dr. Karges recommended x-rays and CT scans in the future to monitor Claimant's arthritis. Dr. Karges opined Claimant's ankle is the prevailing factor that will cause more disability with daily activity. Also, the work accident was the prevailing factor in the need for more treatment. Dr. Karges released Claimant from care.
34. On December 20, 2010 Dr. Karges diagnosed posttraumatic arthrosis and opined Claimant may require an ankle and subtalar fusions with a bone graft.
35. Also, Claimant reported progressive left knee pain which Dr. Karges attributed to compensation for the right ankle. Dr. Karges observed the left leg was firm, hypertrophied, and more toned than the right leg. Dr. Karges found mild joint space narrowing but no instability. He injected the left knee and opined more treatment may be needed in the future, including a brace or total knee replacement. In the future Dr. Karges suggested an evaluation by an orthopedic surgeon may be needed.
36. Dr. Karges scheduled Claimant to return in June 2011 and recommended she continue to use the brace, compression stockings, and take medication.
37. Claimant was off work from January 19, 2007 until April 4, 2008, but received no TTD benefits. Initially, Claimant could not walk. When Claimant began to walk, she used a walker at home and wheelchair outside. Claimant worked until June 8, 2008. Claimant had additional surgery on June 10, 2008. Dr. Karges released Claimant in January 2009 but she did not return to work. On February 28, 2009 Employer terminated Claimant. She moved to Florida in November 2009.
38. During physical therapy, Claimant was burned on the outside of her right ankle. The quarter-size wound was surgically repaired by Dr. Ludwig. The scar is sensitive to the touch. Dr. Ludwig treated Claimant from April 22, 2008 until August 4, 2008.
39. In April 2008 Dr. Karges limited Claimant to sedentary work. For two weeks she sat all day, but her supervisor required her to stand for half the day. When she complained, the manager informed her she could not work with restrictions so Claimant left.

40. Claimant received bills for medical services related to the work injury. Some of the bills were paid by Cigna Health Care (Cigna), Claimant's insurance company.
41. Exhibit S is a lien from SLUCare for \$86,760.35; Exhibit T reflects a letter from ACS Recovery Services (ACS) to obtain reimbursement for bills paid by Cigna. Other bills include; Pattonville Fire District, Abbott Ambulance, Midwest Emergency Associates, Tenet, and an anesthesiologist. Claimant estimated the bills totaled about \$100,000.00. Claimant did not know if all the bills were paid.
42. Claimant last saw Dr. Karges in December 2010 and complained that her left knee gave out. She received a cortisone injection in the left knee and Dr. Karges predicted she may need a left total knee replacement. Also, the right ankle may need to be fused. Claimant continues to see Dr. Karges at least once a year. At this time, Claimant is not willing to have these procedures.
43. Claimant complained of limited range of motion of the right foot. She uses a scooter to travel. She does not walk much. To walk, she flings her right foot out and lands on her heel. Claimant took Celebrex but stopped because it affected her kidneys. Now she takes Tylenol Arthritis. The doctor stopped cortisone injections to the right ankle after several injections. Cortisone injections to the left knee were helpful.
44. Claimant uses a pillow to prop her foot in bed because it catches in the cover. Claimant does not believe she could sit and work because she needs to elevate her right leg whenever possible. She climbs stairs one at a time. She takes Tylenol PM to sleep. Before the accident in 2007, Claimant belonged to a dance club, bowled two nights a week, and participated in aerobics. Now she cannot perform these activities due to her ankle which has caused her to gain weight. She has not worn high-heels in four years.
45. All surgeries were to Claimant's right ankle. The ribs and right knee healed without surgery.
46. On June 1, 2008, Claimant had a subsequent motor vehicle accident while coming home from work when her brace became stuck under the pedal. That was the last time she drove because she did not want to put other people at risk given the brace and her vision.
47. **David T. Volarich, M.D.**, examined Claimant at the request of her attorney on May 28, 2004 and December 21, 2009. In the 2009 report Dr. Volarich concluded the January 18, 2007 car accident was the prevailing or primary factor which caused Claimant's right ankle fracture and the need for six surgeries.
48. Dr. Volarich concluded Claimant had achieved maximum medical improvement for the primary injury, and rated 85% PPD of the right knee, and 15% PPD of the left knee due to pain and aggravation of preexisting chondromalacia caused by abnormal weight bearing.
49. Permanent restrictions for the 2007 ankle injury include no stooping, squatting, crawling, kneeling, pivoting, climbing, impact activity, or uneven surfaces, and handle weight to tolerance. The brace should be worn at all times, and a cane used to walk. Weight bearing

should be limited to five minutes or tolerance. Dr. Volarich concluded Claimant could perform some work activities on a limited basis within these restrictions.

50. For preexisting disabilities, Dr. Volarich rated 25% PPD of the right ring finger, 35% PPD of the right wrist, 25% PPD of the right forearm, 25% PPD of the right elbow, 35% PPD of the left long finger, 35% PPD of the left wrist, 25% PPD of the left forearm, 35% PPD of the left foot, and 20% PPD of the body as a whole for diabetes. Foot restrictions before 2007 include limited repetitive stooping, squatting, and crawling, kneeling, pivoting, climbing and impact activities. Standing should be limited to two hours as tolerated.
51. Dr. Volarich found the combination of all Claimant's disabilities created more disability than their simple sum and a loading factor should be applied.
52. Dr. Volarich concluded Claimant was unable to work due to a combination of the 2007 work injury and preexisting medical conditions. Also, she is advanced age at 58, with a GED, is unable to return to work for Employer, and has limited work experience.
53. To relieve future ankle pain, Dr. Volarich recommended medication and conservative treatment, follow-up evaluations twice a year, x-rays to monitor arthritis, footwear, and braces and injections. Dr. Volarich predicted Claimant may need an ankle fusion in the future and recommended she consult with Dr. Karges.
54. Dr. Volarich did not rate disability for vision or depression.
55. **Nancy Melberg Holekamp, M.D.**, is an ophthalmologist and retina specialist, who testified at the request of the SIF. Dr. Holekamp treated Claimant at the Barnes Retinal Institute from 1999 to 2008.
56. In 1999 Dr. Holekamp diagnosed CRD;⁶ an inherited degenerative disease that affects visual acuity. Dr. Holekamp found Bull's eye maculopathy is consistent with CRD. She also diagnosed the following age related conditions: nuclear sclerosis, (cataracts), floaters, and posterior vitreous detachment.
57. Dr. Holekamp explained that Claimant's retinal dystrophy would not improve, but Claimant may have days when her vision is better. Based on annual test results, Dr. Holekamp concluded Claimant's visual acuity deteriorated over time. In 1999 visual acuity in the right eye was 20/25. Nine years later it was 20/60. The left eye was 20/40 in 1999 and 20/150 nine years later. In 2006 Claimant reported wavy lines, and blurriness in both eyes.
58. Dr. Holekamp opined that difficulty distinguishing spades from clubs reflects the loss of visual acuity which affected Claimant's employment in November 2005. Dr. Holekamp cautioned that 20/50 right eye vision in November 2005 was border line for easy reading or driving. Therefore, Claimant had sufficient vision to work at that time.

⁶ Dr. Holekamp defined cone-rod dystrophy as a defect in the DNA or genetic code that causes progressive deterioration. The cones supply color and center vision.

59. Dr. Holekamp informed Claimant about a clinical trial of an artificial silicone retina because of the lack of available treatment for her left eye. However, the study was not funded.
60. On November 21, 2007, Dr. Holekamp noted Claimant's right eye vision had deteriorated between the November 2006 examination and the November 2007 examination. Consequently, Dr. Holekamp restricted Claimant to daytime driving at 45 miles per hour.
61. In 2008 **Carrie Gaines, M.D.**, a low vision specialist, prescribed glasses to address Claimant's difficulty reading cards, however, it did not correct the problem.
62. On November 18, 2008 Dr. Holekamp opined Claimant was visually disabled, and legally blind in her left eye. However, Dr. Holekamp did not issue a disability rating because it was not requested and she considered that to be someone else's responsibility.
63. **Mr. Timothy G. Lalk**, a vocational rehabilitation counselor, interviewed Claimant on March 3, 2009 at the request of her attorney. Claimant reported she could not make out Mr. Lalk's facial features.
64. Mr. Lalk was unable to administer any vocational tests because Claimant could not read large print.
65. Based on the 2007 work injury alone Mr. Lalk concluded Claimant was employable in the open labor market in a sedentary position which would allow her to sit most of the time. However, Claimant lacked the training and experience required for skilled sedentary work.
66. Even if Employer accommodated Claimant's need to sit, Mr. Lalk concluded Claimant could not work for Employer due to deterioration of her vision.
67. If Employer could not accommodate Claimant's restrictions Mr. Lalk concluded she required sedentary, entry-level work based on her right ankle alone, or neuropathy in her hands and feet. Sedentary work included desk clerk at a motel or rental store, information clerk, customer service representative, cashier at a convenience or self service store, and parking lot/toll booth attendant.
68. However, Mr. Lalk concluded Claimant could not perform many of these jobs due to restrictions for her right ankle, feet, and hands. Based on Claimant's vision in 2009 Mr. Lalk concluded Claimant could not work for Employer or in any unskilled entry-level position.
69. In contrast, if Claimant could work with information or receive training to do so, assistive devices were available to assist her vision. Generally employers do not provide assistive devices for entry-level positions. Therefore, Claimant would not find unskilled sedentary employment.
70. To reenter the workforce, Mr. Lalk recommended she contact the Missouri Bureau for the Blind, which provides assistive devices for daily living for persons with limited vision.

RULINGS OF LAW

After giving 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 Claimant did not meet her burden to show Employer or SIF liability for PTD benefits because of subsequent deterioration of preexisting vision problems.

The Last Injury Alone

Claimant seeks PTD benefits from either the Employer or the SIF. Employer contends they are not responsible because Claimant is not PTD due to the work injury. The SIF contends Claimant is not entitled to PTD due to deterioration of a preexisting vision problem.

An employee has the burden to prove by a preponderance of credible evidence all material elements of his claim. *Meilves v. Morris*, 422 S.W.2d 335, 339 (Mo. 1968). In the case of permanent partial disability against the SIF, Section 287.220 RSMo. requires the fact finder to make the findings below regarding disability:

- 1) There must be a determination that the employee has permanent disability resulting from the last injury alone which is compensable, and
- 2) There was a pre-existing permanent disability that was serious enough to constitute a hindrance or obstacle to employment or re-employment which combines with the disability from the compensable work-related injury to create a greater overall disability to the employee's body as a whole than the simple sum of the disability from the work injury and the pre-existing disability considered separately, and for PTD benefits to be awarded;
- 3) There must be a determination that all of the injuries and conditions combined, including the last injury, resulted in the employee being permanently and totally disabled.

However, if a claimant's last injury rendered her permanently and totally disabled, the SIF has no liability and the employer is responsible for the entire amount. *Hughey v. Chrysler Corp.* 34 S.W.3d 845, 847 (Mo. App. 2000). Therefore, the inquiry begins with the Employer's liability.

I find Claimant sustained disability from the last injury alone. Dr. Volarich found Claimant walked with a limp and an antalgic gait. She could not tandem walk, and was unable to bear full weight on the right lower extremity alone. The right calf and thigh measured smaller than the left. Dr. Volarich rated 85% PPD of the right knee and 15% PPD of the left knee.

I find Claimant's testimony is credible. She has to elevate her foot. The foot gets caught in the cover at night. She has limited range of motion in the right ankle and decreased right leg strength. She wears one brace all the time and a second brace when she goes outside. She cannot dance, bowl, and perform aerobics as she did before the injury. Her right leg swells when it hangs down, her toes are numb, and one toe drops. To walk, she steps on her heel but does not walk through the foot because the ankle hurts with up and down movements, and does not move

side to side. The left knee is swollen all the time. She stopped driving after her brace became caught under the pedal and caused an accident. In the store she uses a scooter.

During the hearing I observed Claimant wear a brace attached to a rocker sole tennis shoe, with metal bars that extend up both sides of the leg. The calf rests on a cushion secured by Velcro strips. The inside of the ankle is larger than the outside. The left leg is much larger than the right leg from the knee to the ankle. The big brace is worn when she walks outside more than 15 minutes or stands for any length of time. Near the ankle is a smaller brace secured with Velcro and worn inside. She wears extra socks on the left foot to fill up space in the shoe.

Dr. Karges, the treating physician, prescribed two braces, limited walking or standing to 10 minutes, for no more than two hours during an eight hour shift. Claimant was to avoid stairs, drive only to and from work, and perform no job that required driving. He also recommended a motorized scooter for better mobility. Claimant received a left knee injection to relieve discomfort.

Based upon credible testimony by Claimant and Drs. Volarich and Karges, I find Claimant sustained 60% PPD of the right knee and 5% PPD of the left knee.

Permanent Total Disability

Section 287.020.7 RSMo (2000) defines “total disability”...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. Any employment means any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. *Kowalski v. M-G Metals and Sales, Inc.* 631 S.W.2d 919, 922 (Mo. App. 1982) (*Citations omitted*).

The test for permanent total disability in Missouri is a claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in [her] present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo.App. 1995) (*Overruled by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo.banc 2003)).⁷

I find credible the opinions of Dr. Volarich and Mr. Lalk that Claimant is PTD but not from the last injury alone. Dr. Holekamp credibly testified that Claimant’s vision continued to deteriorate after the 2007 work injury, which is consistent with Claimant’s testimony; driving restrictions imposed by Dr. Holekamp after the work injury, and Claimant’s inability to renew her license in 2009 because she could not pass the vision test.

I find Dr. Volarich’s testimony is not credible that Claimant is PTD due to a combination of the primary injury and preexisting medical conditions. Neither Dr. Volarich nor Dr. Holekamp rated Claimant’s vision disability.

I find Mr. Lalk’s testimony is credible. Based upon the right ankle restrictions imposed by Drs. Volarich and Karges, Mr. Lalk concluded Claimant could perform unskilled sedentary

⁷ Several cases herein were overruled by *Hampton* on grounds other than those for which the cases are cited. No further reference will be made to *Hampton*.

work. However, Mr. Lalk found Claimant's vision problems alone prevented her from working, and Claimant would need more training before her vision could be accommodated. I find Claimant is PTD; however the SIF is not liable due to subsequent deterioration of the preexisting vision problems. *Garcia v. St. Louis County*, 916 S.W.2d 263 (Mo.App. 1995).

Second Injury Fund Liability

Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. *Leutzinger v. Treasurer of the State of Missouri*, 895 S.W.2d 591, 593 (Mo. App. 1995). Section 287.220.1 RSMo., provides the SIF is triggered in all cases of PPD 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 the preexisting conditions must produce additional disability greater than the last injury standing alone.

I find Claimant sustained 17.5% PPD of the right wrist, 17.5% PPD of the left wrist, 17.5% PPD of the left foot, and 12.5% of the body as a whole referable to diabetes.

Although Claimant had preexisting vision disability, I find no award can be made as no doctor gave an opinion about the nature and extent of disability as required by Section 287.190.6.2.⁸ Dr. Holekamp provided a disability letter but was not asked to provide a rating.

To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, the fact finder should focus on the potential that the pre-existing injury may combine with a future work related injury, and result in a greater degree of disability than would have resulted if there was no such prior condition. *E.W. v. Kansas City, Missouri, School District*, 89 S.W.3d 527, 537 (Mo.App.2002).

I find Dr. Volarich's opinion credible that Claimant's pre-existing diabetes, bilateral carpal tunnel syndrome, vision, and bunionectomies were a hindrance or obstacle to employment or reemployment which combined with the primary work injury to create greater overall disability than their simple sum. Claimant had a history of bilateral pain and numbness in her feet and she treated for neuropathic pain. Claimant had residual numbness and tingling in her hands.

I find Dr. Volarich's opinion is credible that the combination of Claimant's disabilities creates more disability than the total of each injury and a loading factor should apply. I find Claimant's pre-existing conditions were serious enough to constitute a hindrance or obstacle to Claimant's employment or reemployment prior to January 18, 2007. I find the credible evidence

⁸ Section 287.190.6 (2) provides: Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty...

establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes 12.5% greater overall disability than the independent sum of the disabilities.

Employer is liable for past medical expenses

At the hearing Claimant asserted Employer owed \$117,088.95 in medical expenses, and the parties stipulated Employer paid \$58,294.94 in medical expenses. However, Claimant asserted in a post-hearing brief that Employer owed \$129,019.94 in medical expenses.⁹ In Employer’s post-hearing brief the medical expenses were not disputed and Employer agreed to pay the reasonable and customary charges for Claimant’s medical care. Given the inconsistencies in the amounts stated, it is not clear from the evidence how much the Employer should pay in medical expenses.

A sufficient factual basis exists to award past medical expenses when the employee identifies all of the medical bills as being related to, and the product of a work related injury and the medical bills are shown to relate to the professional services rendered by medical records in evidence. *Martin v. Mid-America Farm Lines, Inc.* 769 S.W.2d 105, 111 -112 (Mo banc 1989). Claimant testified she received the following bills related to treatment for the 2007 work injury: SLU Care, Pattonville Fire District, Abbott Ambulance, Midwest Emergency Associates, Tenet, and an anesthesiologist. Cigna Health Care paid for some of the services, but Claimant is not certain if all the bills were paid.

Based on a review of all the medical bills contained in the record, the stipulation of the parties, and Claimant’s testimony, I find Employer is responsible for the following medical expenses related to Claimant’s 2007 work injury:

	PROVIDER	AMOUNT	EXHIBIT	
1.	Pattonville Fire District	\$ 672.50	A	
2.	DePaul Health Center	\$ 14, 319.10	B	
3.	Abbott Ambulance	\$ 825.60	C	
4.	SLUCare	\$ 17, 175.00		E
5.	SSM Rehab	\$ 239.00		F ¹⁰
6.	Dr. Abramson	\$ 90.00	G ¹¹	
7.	Dr. Lombardo	\$ 1, 018.00	H ¹²	
8.	Dr. Ludwig	\$ 1, 245.79		I
9.	St. Louis University Hospital	\$ 86, 760.35		

Total medical expenses incurred: \$122,345.34
 Employer payments \$-58,294.94
 Unpaid medical owed by Employer: **\$ 64,050.40**

⁹ Claimant’s brief further stated that Employer paid \$58,294.94 which left a balance of \$70,725.00 in unpaid medical expenses. At the hearing no detailed account of the unpaid medical bills was offered, but Claimant testified the bills totaled about \$100,000.00, and included \$86,760.35 owed to St. Louis University Hospital. The post-hearing brief provided more medical expenses than the \$117,088.95 raised as an issue during the hearing.

¹⁰ Claimant’s post-hearing brief reports \$7,823.60 in unpaid medical expenses; however the record contains only one bill for \$239.00.

¹¹ Claimant’s brief does not include Dr. Abramson’s May 6, 2008 visit which is contained in the record and totaled \$90.00.

¹² Claimant’s brief reflects \$198.00 owed to Dr. Lombardo, but the record reflects \$1,018.00 for treatment from July 9, 2007 to July 22, 2008.

I find Employer is liable for unpaid medical expenses totaling \$64,050.40, and is directed to pay this amount to Claimant.

Employer is liable for past temporary total disability

Claimant asserts Employer is liable for TTD benefits totaling \$49,355.7, from January 18, 2007 to January 2, 2009 for a total of 84.1 weeks. In post-hearing briefs Employer did not dispute the issue of TTD and agreed to pay this amount.

The test for entitlement to TTD “is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market [in her] physical condition.” ***Boyles v. USA Rebar Placement, Inc.***, 26 S.W.3d 418, 424 (Mo.App. 2000). TTD benefits are intended to cover the employee's healing period from a work-related accident until she can find employment or the condition has reached a level of maximum medical improvement. ***Id.*** Once further medical progress is no longer expected, a temporary award is no longer warranted. ***Id.*** Claimant has the burden to prove entitlement to TTD benefits by a reasonable probability. ***Cooper v. Med. Ctr. of Independence***, 955 S.W.2d 570, 574-75 (Mo.App. 1997) (*Citations omitted*).

I find Employer is liable for TTD benefits totaling \$46,510.33 from January 19, 2007 to January 2, 2009. Claimant worked from April 4, 2008 until June 5, 2008, when more surgery was performed. Dr. Karges released her to sedentary duty on January 2, 2009.

Future Medical Care

Claimant seeks future medical care for the 2007 ankle injury. Employer contends no physician requires additional medical care at this time for the right or left knee.

Section 287.140.1 RSMo (2000) states the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury..., to cure and relieve from the effects of the injury.

Where future medical benefits are to be awarded, the medical care must of necessity flow from the accident, via evidence of a “medical causal relationship” between the injury from the condition and the compensable injury, before the employer is to be responsible. ***Modlin v. Sun Mark, Inc.*** 699 S.W. 2d 5, 7 (Mo.App. 1985). It is sufficient for the claimant to show his need for additional medical care and treatment by a reasonable probability. ***Rana v. Landstar TLC***, 46 S.W. 3d 614, 622 (Mo. App. 2001). Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt. ***Id.***

I find Employer is liable for future medical care. I find credible the opinions of Dr. Karges and Dr. Volarich that Claimant will need future medical care. Dr. Karges opined Claimant may need fusions of the pantalar and subtalar joints to diminish arthritis. However, the surgery is not recommended at this time. Furthermore, Claimant may need medical treatment for the left knee due to the need to favor the leg because of the injured right ankle. Claimant’s left leg is very firm compared to the right which causes pain. Left knee surgery may be required, including a brace or total knee replacement.

Dr. Volarich recommended medication, conservative treatment, follow-up evaluations twice a year, x-rays, injections, and monitoring of footwear and braces. Dr. Volarich predicted Claimant may need an ankle fusion in the future.

I find Employer is liable for future medical treatment and is directed to provide medical care for Claimant's injuries as needed.

CONCLUSION

Claimant is permanently and partially disabled from the work injury. Employer is liable for past medical expenses, temporary total disability, permanent partial disability benefits, and future medical care. The Second Injury Fund is liable for permanent partial disability benefits. The award is subject to a lien in favor of Claimant's attorney for legal services rendered.

Date: _____

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation