

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

Injury No.: 01-046284

Employee: Ellia Eaton

Employer: Cameron Veterans Home

Insurer: Missouri Office of Administration (CARO)

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, heard oral argument, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge (ALJ) dated December 28, 2010.

**Preliminaries**

On November 11, 2000, employee injured her lower back while attempting to lift a patient at work. On May 4, 2001, employee reinjured her lower back at work while assisting a coworker moving a patient. Employee filed two separate claims for compensation for the respective work injuries.

With respect to the November 11, 2000, injury, the ALJ awarded employee 22.5% permanent partial disability benefits rated at the body as a whole. The ALJ denied employee's claim for the May 4, 2001, injury because he found that the injury did not result in any permanent disability.

Employee appealed the ALJ's denial of her claim for benefits for the May 4, 2001, injury.

**Findings of Fact**

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

Dr. Swaim saw employee on May 18, 2009, for the purpose of an independent medical evaluation. Dr. Swaim opined that employee sustained 35% permanent partial disability of the body as a whole attributable to her low back injury of November 11, 2000, and 5% permanent partial disability of the body as a whole attributable to her low back injury of May 4, 2001.

Dr. Swaim attributed the majority of employee's permanent partial disability to the November 11, 2000, injury because the objective testing by CT and MRI scans showed the broad-based disc protrusion at L4-L5 predated the May 4, 2001, injury. However, Dr. Swaim went on to opine that both the November 11, 2000, injury and the May 4, 2001,

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2000 unless otherwise indicated.

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injury were substantial contributing factors causing the necessity for Dr. Wilson's surgery and employee's failed back syndrome.

Dr. Swaim deferred to a vocational expert regarding employee's ability to compete in the open labor market.

Dr. Wilson, the treating physician, opined that employee sustained 12% permanent partial impairment of the body as a whole, but did not apportion the disability between the two injuries. Dr. Wilson provided this opinion on April 17, 2002, and was not deposed.

The only vocational opinion in the case was provided by Ms. Titterington, who opined that employee is unable to compete in the open labor market. Ms. Titterington attributed employee's inability to compete in the open labor market to the combination of her November 11, 2000, injury, her May 4, 2001, injury, her low academic skills, her lack of transferable job skills, and her difficulty in attending work daily.

With respect to medical causation and the nature and extent of employee's permanent partial disability attributable to the May 4, 2001, injury, we find Dr. Swaim's opinions more credible than Dr. Wilson's. Dr. Swaim performed a thorough independent medical evaluation, prepared a report based on that evaluation, fully explained his opinions by way of deposition testimony, and assigned a clear apportionment of disability between the November 11, 2000, and May 4, 2001, injuries. Dr. Wilson, on the other hand, provided a 12% permanent partial impairment rating without specifying whether said 12% was a combination of the November 11, 2000, and May 4, 2001, injuries, or if it was all solely attributable to one of the injuries. In addition, Dr. Wilson's use of the "permanent partial **impairment**" standard is misplaced as Missouri Workers' Compensation Law requires findings of "permanent partial **disability**." Finally, unlike Dr. Swaim's opinions, Dr. Wilson's opinions were not supported by deposition testimony.

Based upon Dr. Swaim's expert opinion, employee's testimony, and the record as a whole, we find that as a result of the May 4, 2001, work injury, employee sustained 5% permanent partial disability of the body as a whole. We further find that employee's November 11, 2000, injury resulted in 22.5% permanent partial disability of the body as a whole and that said preexisting disability posed a hindrance and obstacle to her employment or reemployment.

Dr. Swaim opined in his May 18, 2009, report that "[employee] has most likely reached maximum medical improvement from treatment of the occupational injuries of November 11, 2000 and May 4, 2001...." Based on this opinion, we find that employee reached maximum medical improvement on May 18, 2009.

### **Discussion**

Employee contends that she is permanently and totally disabled as a result of his May 4, 2001, injury combining with her preexisting disabilities and that the Second Injury Fund should be liable for his permanent total disability benefits.

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In evaluating cases involving preexisting disabilities, the employer's liability must first be considered in isolation before determining Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. W.D. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Kizior*, the Court set out a step-by-step test for determining Second Injury Fund liability:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

*Kizior*, 5 S.W.3d at 200.

We have previously found that as a result of the primary injury employee sustained 5% permanent partial disability; and that she had 22.5% preexisting permanent partial disability of the body as a whole. Both of these injuries were to the lumbar spine and we find, based on Dr. Swaim and Ms. Titterington's opinions, that they combine to produce greater overall disability than the simple arithmetic sum of the separate disabilities.

In determining whether employee is permanently and totally disabled, we turn to § 287.020.7 RSMo, which defines "total disability" as the "inability to return to any employment..." The Court in *Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849 (Mo.App. 1995) provided a test for determining permanent total disability:

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. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

*Id.* at 853 (citations omitted).

Based upon the medical records, employee's testimony, and the uncontradicted opinions of Dr. Swaim and Ms. Titterington, we believe that no employer would reasonably be expected to hire employee in her present condition. We conclude employee is permanently and totally disabled due to the combination of the disability from her May 4, 2001, injury with her preexisting disabilities. The Second Injury Fund is liable to employee for permanent total disability benefits.

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**Award**

We reverse the award of the ALJ. Employee is permanently and totally disabled due to the combination of the disability from her May 4, 2001, work injury with her preexisting disabilities.

Employer is ordered to pay to employee 5% PPD benefits attributable to the primary injury, or 20 weeks (= .05 x 400 weeks). Beginning May 19, 2009, and continuing for 20 weeks, the Second Injury Fund shall pay to employee the difference between employee's PTD rate and her PPD rate. Because both employee's PPD rate and PTD rate are \$229.07, there is no difference for the Second Injury Fund to cover for the 20 weeks attributable to the last injury. However, after said 20 weeks, the Second Injury Fund shall be liable for employee's weekly PTD benefit of \$229.07 for the remainder of employee's life, or until modified by law.

The award and decision of Chief Administrative Law Judge Nelson G. Allen issued December 28, 2010, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

Elizabeth Diane Baker and Phillip Burdick, Attorneys at Law, are allowed a fee of 25% 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.

Given at Jefferson City, State of Missouri, this 1<sup>st</sup> day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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**DISSENTING OPINION FILED**  
James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Ellia Eaton

**DISSENTING OPINION**

I did not participate in the December 14, 2011, oral arguments in this matter. However, I have reviewed the evidence, read the briefs of the parties, and considered the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the award and decision of the administrative law judge should be affirmed. Therefore, I adopt the award and decision of the administrative law judge as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

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James Avery, Member

## AWARD

Employee: **ELLIA EATON**

Injury No. **01-046284**

Employer: **DEPARTMENT OF PUBLIC SAFETY – MISSOURI VETERANS' HOME**

Insurer: **MISSOURI OFFICE OF ADMINISTRATION (CARO)**

Hearing Date: **SEPTEMBER 2, 2010 & OCTOBER 7, 2010**

Checked by: **NGA**

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? **No**
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 4, 2001**
5. State location where accident occurred or occupational disease was contracted: **Cameron, Clinton 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 was assisting a patient walking and strained her back.**
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: **Back.**
14. Nature and extent of any permanent disability: **None.**
15. Compensation paid to-date for temporary disability: **\$7,425.25**

- 16. Value necessary medical aid paid to date by employer/insurer? **\$73,378.44**
- 17. Value necessary medical aid not furnished by employer/insurer? **None.**
- 18. Employee's average weekly wages: **N/A**
- 19. Weekly compensation rate: **\$229.07/\$229.07**
- 20. Method wages computation: **By Stipulation**

**COMPENSATION PAYABLE**

21. Amount of compensation payable: **None**

Unpaid medical expenses:

Weeks of temporary total disability (or temporary partial disability)

Weeks of permanent partial disability from Employer

22. Second Injury Fund Liability: **None**

**TOTAL: None**

23. Future requirements awarded: **None.**

Each of said payments to begin N/A 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: **Claimant had no permanent disability as a result of her injury on May 4, 2010. All her disability is the result of her November 11, 2000 injury. Claimant's claim for compensation against both the employer and the Second Injury Fund is denied.**

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

Employee: **ELLIA EATON**

Injury No. **01-046284**

Employer: **DEPARTMENT OF PUBLIC SAFETY – MISSOURI VETERANS' HOME**

Insurer: **MISSOURI OFFICE OF ADMINISTRATION (CARO)**

Hearing Date: **SEPTEMBER 2, 2010 & OCTOBER 7, 2010**

Checked by: **NGA**

**ISSUES**

Injury Numbers 00-139679 and 01-046284 were heard concurrently.

Prior to presenting evidence the parties stipulated the issues to be determined by this hearing in Injury No. 00-139679 are:

1. Nature and extent of claimant's disability;
2. Liability of the employer for future medical aid; and
3. Amount of credit, if any, the employer is entitled to for overpayment of temporary total disability.

In Injury Nos. 01-046284 the parties stipulated that the issues to be determined by this hearing are:

1. Nature and extent of claimant's disability;
2. Liability of the employer for future medical aid; and
3. Liability of the Second Injury Fund.

**STIPULATIONS**

In both injury numbers the parties agreed that on the respective dates in question, Ellia Eaton was an employee of Cameron Veteran's Home. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation law and was fully insured by CARO.

The parties also agreed that on the respective dates in question, Ellia Eaton sustained an injury by accident or occupational disease arising out of and in the course of her employment.

The parties further agreed that the employer had proper notice of claimant's injuries and that timely claims for compensation have been filed.

In Injury Number 00-139679, the parties agreed the correct rate of compensation is \$223.69 for both temporary total disability and permanent partial disability.

In Injury Number 00-139679, the parties also agreed that the employer has provided compensation in the amount of \$3,259.47, which represented a period of 7-2/7 weeks paid at an incorrect rate of \$447.38. This is an overpayment of \$1,1629.74. Medical aid has been furnished in the amount of \$9,763.12.

In Injury Number 01-0462.84 the parties agree that the correct rate of compensation is \$229.07 per week for both temporary total disability and permanent partial disability. Compensation has been paid in the amount of \$7,428.75, representing 32-3/7 weeks. Medical aid has been provided in the amount of \$73,378.94.

The claimant testified in person. She is 50 years old. She has been married for 32 years. She has a high school degree. She received her certified nurses' assistant certificate in 1991. She started her employment at the Missouri Veteran's Home on February 28, 2000. Her work consisted of getting residents up, giving oral care, giving showers, taking residents to the dining room, feeding them, and assisting them into bed and assisting with other matters such as bedding and bathroom assistance.

On November 11, 2000, Mrs. Eaton was attempting to hook a patient to a stand up lift when the patient's left foot came off the lift. She attempted to keep her from falling down. She felt immediate pain and heard a pop in her lower back. She reported this to her supervisor and was furnished medical treatment.

An MRI indicated a broadband posterior disk bulge at L4-L5. Dr. Mujica allowed the claimant to return to work on January 8, 2001 but with restrictions of not lifting over 20 pounds and avoidance of repetitive bending or stooping with twisting of her back.

The employer accommodated these restrictions and she was given less intensive work, such as feeding the patients and paperwork. She continued to work at least part time but used her vacation time, sick time, and was absent without pay according to the personnel records as explained by John David Glover.

On May 4, 2001, while she was still on light duty, Mrs. Eaton reinjured her back when she pivoted while assisting another aide in moving a patient with a gait belt. At the time, she felt a sharp burning pain in her hips and buttocks. The employer sent her to a doctor.

The claimant was eventually referred to Dr. Chris Wilson. On October 16, 2001, Dr Wilson performed a lumbar laminectomy and discectomy. This consisted of lumbar decompression at L4-L5 with bilateral partial medial facetectomies, bilateral internal foraminotomies and discectomy, a broad. A broad based annular bulge was found at surgery.

On December 19, 2001, Dr. Wilson issued a release for the claimant to return to work with no repetitive bending or stooping. And on April 17, 2002, Dr. Wilson found her to be at maximum medical improvement and rated her permanent partial disability at 12% body as a whole.

The claimant said she had recovered from surgery but had unremitting pain requiring more epidural injections and treatment with narcotic pain relievers.

She attempted to work but was limited to working part-time and fewer hours per day. She was terminated from employment on May 16, 2002 due to her permanent restrictions and the need of the employer for staffing a full-time position. She has not worked since.

Dr. Truett Swain testified by deposition taken on September 22, 2009 and admitted into evidence as Claimant's Exhibit Number V. All objections thereto are hereby overruled.

Dr. Swain examined the claimant on May 18, 2009. He found the claimant's injury of November 11, 2000 "caused or was the prevailing factor to cause Mrs. Eaton to develop a 35% permanent partial disability of the body as a whole."

He found the May 4, 2001 injury simply aggravated her pre-existing lumbar condition causing an increase in pain and radiculopathy. He rated the claimant's disability at 5% body as a whole. However, Dr. Swain said the reason for the claimant's subsequent surgery was the November 11, 2000 injury. In his report, he found the claimant had reached maximum medical improvement.

Mary Titterington testified as a vocational expert. She testified by deposition taken on July 22, 2010 and admitted into evidence as Claimant's Exhibit Number U. All objections thereto are hereby overruled.

Mrs. Titterington found that the claimant was unemployable and totally disabled by reason of the combination of the two injuries.

I agree with Dr. Swain that the real cause of the claimant's back surgery and resulting disability was her November 11, 2000 injury.

I do not believe that her May 4, 2001 injury resulted in any permanent disability and the claimant is not entitled to any additional benefit by reason of her May 4, 2001 injury.

Claimant's claim for compensation in Injury Number 01-046284 is hereby denied.

In Injury Number 00-139679, I find and believe from the evidence that as a result of her November 11, 2000 industrial accident, the claimant has sustained a permanent partial disability in the amount of 22-1/2% body as a whole. I order and direct the employer to pay to the claimant the sum of \$223.69 per week for 90 weeks for a total of \$20,132.10.

The parties had agreed the claimant received 7-2/7 weeks of temporary total disability compensation at an incorrect rate of \$447.48 per week. The claimant was entitled to compensation for 7-2/7 weeks at the rate of \$223.69 for a total of \$1,629.75. The employer has paid the claimant \$3,259.47, which is \$1,629.72 in excess of what was owed the claimant.

The employer is entitled to a credit of \$1,629.72 for its overpayment of temporary total disability, which is to be subtracted from the permanent partial disability owed of \$20,132.10, leaving a remainder owed of \$18,502.38.

As Dr. Swain has said, the claimant is at maximum medical improvement therefore I find that no future medical treatment is ordered.

Ms. Elizabeth D. Baker is hereby assigned a lien in the amount of 25% of this award for necessary legal services provided claimant.

Made by: /s/ Nelson G. Allen  
*Nelson G. Allen*  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

This Award is dated and attested to this 28th day of December, 2010.

/s/ Naomi Pearson

**Naomi Pearson**

Division of Workers' Compensation