

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

Injury No.: 03-109934

Employee: Kathleen Elmore
Employer: Cox Health Systems (Settled)
Insurer: N/A
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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 25, 2010. The award and decision of Administrative Law Judge Robert H. House, issued May 25, 2010, 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 23rd day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD Second Injury Fund Only

Employee:	Kathleen Elmore	Injury No. 03-109934
Dependents:	N/A	
Employer:	Cox Health Systems	Before the DIVISION OF WORKERS' COMPENSATION
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	N/A	
Hearing Date:	April 7, 2010	Checked by:

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 27, 2003
5. State location where accident occurred or occupational disease was contracted: GREENE 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:
REPETITIVE TRAUMA TO RIGHT HAND, FINGERS AND THUMB, WRIST AND RIGHT ARM
USING COMPTUER KEYBOARD FOR DATA ENTRY
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: RIGHT ARM, WRIST, HAND AND THUMB
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-
17. Value necessary medical aid not furnished by employer/insurer? -0-

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- 18. Employee's average weekly wages:
- 19. Weekly compensation rate: \$347.05 / \$662.55
- 20. Method wages computation: AGREED

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: -0-

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

- 22. Second Injury Fund liability: YES – 40 weeks of compensation for a total of \$13,882.00

TOTAL: \$13,882.00

- 23. Future requirements awarded: NONE

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 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Randy Alberhasky

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kathleen Elmore

Injury No. 03-109934

Dependents: N/A

Employer: Cox Health Systems

Additional Party: Second Injury Fund

Insurer: N/A

Hearing Date: April 7, 2010

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by:

AWARD

The parties presented evidence at a hearing on April 7, 2010. Claimant appeared in person and through her attorney, Randy Alberhasky. The Second Injury Fund appeared through its attorney, Cara Harris. Only one issue was presented for determination: The liability of the Second Injury Fund, with claimant alleging that she is permanently and totally disabled. The parties agreed that the workers' compensation rate was \$662.55 for permanent total disability and \$347.05 for permanent partial disability.

Claimant was five days short of her 60th birthday on the date of the hearing. She is a high school graduate and completed nursing school. She has been a registered nurse since 1981. She was last employed on February 19, 2004, at Cox Health Systems South. Her job was as an in-patient obstetrics nurse. Her job included being on her feet more often than not and involved heavy lifting. Claimant worked full time at Cox Health Systems, working at least 36 hours per week and at times significant overtime. In 1999 claimant had back surgery which included a fusion at L4-5. Claimant also suffers from fibromyalgia being diagnosed in 2003 about the same time as her initial problems with her right hand. Claimant reported her problem to her employer and began treatment on October 27, 2003. Ultimately, claimant underwent two surgeries

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performed by Dr. Scott Swango, an orthopedic surgeon. Claimant's first surgery was in February 2004 when Dr. Swango performed a suspension arthroplasty with resection of the trapezium. Claimant continued to have pain; and on July 9, 2004, Dr. Swango performed what was termed an "anchovy procedure," pinning the thumb. Dr. Swango released claimant on October 6, 2004, concluding that he did not believe that claimant was disabled from her thumb injury and released her to full duty. Nevertheless, the claimant believed that she could not perform her duties as a nurse as she had before. Dr. Swango opined that Cox may need to consider placing claimant in a different nursing role. Dr. Swango also opined that claimant was employable "from her thumb point of view." Nevertheless, claimant did not work following her first surgery and sought additional treatment on her own from Dr. Michael Grillot, of Parkview Orthopedic. Dr. Grillot performed a third surgery on claimant on March 10, 2005. That surgery involved an arthrodesis of the right thumb which included bone grafting with pinning.

Claimant believes that she cannot work because of a combination of her fibromyalgia and lumbar disk fusion with her disability from her last injury at work.

Claimant obtained the services of Dr. David Paff, an occupational medicine specialist who testified by deposition. Dr. Paff concluded that claimant had a preexisting disability to the body as a whole as a result of her lumbar spine problem including fusion surgery resulting in a 15 percent permanent partial disability to the body as a whole. Additionally, Dr. Paff concluded that claimant had a 10 percent body as a whole permanent partial disability because of her fibromyalgia. Dr. Paff also found that claimant had a 35 percent permanent partial disability to her right upper extremity at the 175-week level because of her injury to the right thumb from her injury at work. Dr. Paff ultimately concluded that claimant also suffered a greater overall disability as a result of the combination of the preexisting disability and her occupationally

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related disabilities beyond the simple sum of those disabilities in the amount of 10 percent permanent partial disability to the body as a whole. Dr. Paff noted that claimant's lumbar condition and fibromyalgia had worsened over time. That was also the testimony of claimant at trial. Dr. Paff testified that he doubted claimant could perform the job she had before with Cox. He limited her activities to no repetitive or heavy use of the right wrist including not using a mouse. He also opined that claimant should not do heavy use of the right wrist. In regard to her lumbar spine, Dr. Paff found that claimant should not bend frequently at the waist, should not stay in one position more than an hour and should not lift over 15 pounds. Dr. Paff gave her no restrictions concerning her fibromyalgia. Dr. Paff also noted that claimant should not do very much handwriting or computer keyboarding.

Claimant's attorney hired Philip Eldred, a vocational rehabilitation counselor, to assess claimant's condition vocationally. Mr. Eldred found that claimant was permanently and totally disabled occupationally as a result of a combination of her preexisting disabilities and her last injury at work. Mr. Eldred used as the basis for his opinions the restrictions of Dr. Paff, Dr. Swango, Dr. Shumaker, and Dr. Lennard. Dr. Shumaker's and Dr. Lennard's records were not offered or admitted into evidence. Consequently, their restrictions are only referenced in the record through the assessment of Mr. Eldred. Additionally, Mr. Eldred admitted that the restrictions of Dr. Shumaker occurred prior to Dr. Grillot's surgery and had not taken into consideration any increase or decrease in symptoms since that time. Apparently Dr. Lennard issued his report on May 17, 2007, following Dr. Grillot's surgery. Eldred's opinion is clouded by claimant's testimony that her fibromyalgia and lumbar condition has worsened over time. Consequently, it is unclear what claimant's lumbar and fibromyalgia condition was at the time of her last injury at work. Indeed, claimant was able to work in what Mr. Eldred found to be

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classified as a medium category job but which in fact was in the heavy category based upon the actual duties claimant performed at work as expressed to Mr. Eldred and as claimant testified at trial. Claimant noted at hearing that she was able to do her job with certain self-restrictions including asking for help in lifting patients and her ability to schedule her work so that she often would not have to work more than two days in a row. Nevertheless, claimant testified she was able to perform her duties other than not scrubbing in surgery or working with C-sections. Claimant testified that she would be in pain and have difficulty performing her duties but that she was able to work until her first surgery on her right hand in February 2004. Claimant testified she was up and running most of the time and would sit only occasionally, performing her job until the additional computer work including the mouse caused her hand problem.

The Second Injury Fund employed the services of James England, a vocational rehabilitation counselor. He opined that claimant could perform work and would be employable in a variety of alternative nursing settings along with other occupations including work as a security guard or receptionist. However, Mr. England thought that claimant, based upon her many years of work as a registered nurse, would be better suited to “a variety of alternative nursing settings as well as others that would not be related to nursing.” He further opined:

It would not make much sense, however, for her to simply accept some sort of entry-level employment such as being a receptionist or a security guard, etc., which I believe that within the doctors’ restrictions there would still be alternatives within nursing that she could consider. This would include working in a doctor’s office as a nurse, working in medical clinic office settings, being an office manager for a medical service company, doing utilization review or medical records review work, etc. Someone with her background is in my opinion, highly marketable if one considers her overall work background, experience, training and considering the restrictions recommended by the doctors. I certainly saw no medical evidence that would lead me to believe that she is totally disabled from all forms of employment.

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Based upon all of the evidence in this case, it is clear that claimant is currently suffering from significant problems relating to her low back and her fibromyalgia. Claimant also has restrictions as noted by Dr. Paff as a result of her right hand injury at work. It is difficult to determine claimant's condition at the time of her last injury at work other than from her testimony. It is clear that claimant was undergoing treatment for fibromyalgia (diagnosed slightly before her hand injury) and had significant symptoms that caused her to self-limit her work at Cox Hospital, such as not scrubbing in for surgeries, not working C-sections, and asking other employees to assist her when having to lift patients. Claimant also testified that she was taking medication after her work shift in order to live through her pain. Nevertheless, it is clear that claimant was able to perform her job duties to the satisfaction of her employer until her first surgery on her right hand. This case is further complicated by the fact that claimant has testified that her lumbar and fibromyalgia complications have worsened over time. Nevertheless, the only physician's records in evidence rating claimant's disability is Dr. Paff. Dr. Paff did not find claimant to be permanently and totally disabled. He rated claimant as having a 35 percent disability to the right upper extremity at the wrist. Apparently, claimant was additionally rated by Dr. Lennard whose report is not in evidence to the extent of 20 percent to the right hand as noted in the stipulation for compromise settlement on her right hand injury approved by Judge Margaret Holden on October 17, 2008. Claimant settled her right hand injury for a disability of 33 1/8 percent to the right hand at the 175-week level. Dr. Paff's rating of disability also included 15 percent to the body as a whole based upon her lumbar spine injury including her L4-5 fusion and degenerative disk disease along with a 10 percent disability to the body as a whole for her fibromyalgia. Dr. Paff concluded that claimant had an additional disability for the combination of her preexisting and last disability to the extent of 10 percent to the body as a

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whole. It is clear that claimant's significant preexisting disability and from her disability from her last injury at work are a hindrance or obstacle to employment or reemployment based upon the significant nature of her complaints and restrictions given by Dr. Paff.

Claimant asserts that she is permanently and totally disabled. Total disability, as defined in Section 287.020, ". . . shall mean inability to return to any employment and not merely mean inability to return to employment in which the employee was engaged at the time of the accident." As stated in *Gordon v. Tri-State Motor Transit Co.*, 908 S.W. 2d 849, 853 (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 v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.E.D.1992). 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.* 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 v. Treasurer of State of Mo.*, 837 S.W.2d at 367. See also *Thornton v. Haas Bakery*, 858 S.W.2d 831, 834 (Mo.App.E.D.1993); *Kowalski v. M-G Metals and Sales*, 631 S.W.2d at 922.

A claimant's ability to return to any reasonable or normal employment or occupation does not mean claimant's returning to a demeaning and undignified occupation such as selling peanuts, pencils or shoestrings on the street. *Vogle v. Hall Implement Company*, 551 S.W.2d 922 (Mo.App. 1977).

Section 287.220, RSMo, determines the liability of the Second Injury Fund for disability. Applying that statute, I must first determine claimant's disability from the last

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injury alone and of itself. The court in *Vaught v. Vaughts, Incorporated*, 938 S.W.2d 931

(Mo.App. S.D. 1997) stated:

As explained in *Stewart [v. Johnson, 398 S.W.2d 850, 854 (Mo.1966),]* . . . §287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is less than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. §287.220.1.

Is claimant permanently and totally disabled from her last injury alone? Mr. Eldred also recognizes that as claimant admits, her lumbar and fibromyalgia complaints have worsened over time since her injury at work. Mr. Eldred’s opinion was that claimant could perform one-handed work only, although he did not specifically list any such employment . That could cause doubt as to whether claimant was permanently and totally disabled from her last injury alone. However, that was not the opinion of Dr. Paff; and clearly the opinion of Mr. England was that claimant could perform various types of activity with all of her conditions including her right hand being considered. Consequently, I find that claimant is not permanently and totally disabled from her last injury alone.

Whether claimant is permanently and totally disabled as a result of the combination of her preexisting disability and the disability from her last injury alone is not an easy question to answer. Claimant clearly can perform work only of a sedentary nature based upon her condition as a result of the combination of her disabilities. Her age, as testified by Mr. Eldred and Mr.

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England certainly is a detriment to her finding employment. However, Mr. England opined that claimant's long experience as a registered nurse would aid her in finding alternative nursing employment. Mr. England also indicated that the demand for nurses is greater than the current supply. Nevertheless, it is clear that claimant has significant restrictions concerning the use of her right arm as well as in needing to change positions at least hourly according to Dr. Paff along with restrictions in the sedentary listing capacity because of her lumbar condition. Dr. Paff gave no restrictions for claimant's fibromyalgia; however, it is clear from claimant's testimony about the problems she experienced at work because of her fibromyalgia prior to her right hand injury that that condition created significant problems for claimant. Dr. Paff, after examining claimant in 2008, opined that she had a preexisting disability of 10 percent to the body as a whole based upon her fibromyalgia, noting that claimant's treatment for fibromyalgia began near the same time as her last injury at work to the right hand. Claimant admits and Mr. Eldred recognizes that claimant's lumbar and fibromyalgia conditions have worsened since her last injury at work. Dr. Paff in his deposition also noted that it would be typical for claimant's fibromyalgia and lumbar conditions to worsen over time, and he noted in the medical records that claimant continued to treat for those conditions following her injury to her hand in 2003 through July of 2008 when he last examined claimant. Any additional disability caused by the worsening of claimant's lumbar and fibromyalgia conditions since her last injury at work is not the responsibility of the Second Injury Fund. *Lawrence v. Joplin R-VIII School District* 836 SW 2d 789 (Mo.App SD 1992).

Based upon all of the evidence in this case, I find that claimant is not permanently and totally disabled. I find more persuasive the opinion of Dr. Paff concerning the nature of claimant's disability and restrictions. I also find more persuasive the opinions of Mr. England, who I find to be more persuasive than Mr. Eldred because Mr. England applies the restrictions of

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Dr. Paff which are in evidence as opposed to Mr. Eldred who bases his opinion in part upon the restrictions Dr. Shumaker's report which is not in evidence and was made before claimant's last surgery. I find and conclude that claimant is not permanently and totally disabled as defined in §287.020 since she does not have the "inability to return to any employment...." I find that claimant is capable of performing the tasks of a nurse in the workplace generally as described by Mr. England and can compete in the open labor market. I find and conclude that claimant has sustained a permanent partial disability of 33 1/8 percent to her right arm at the 175-week level from her last injury at work. I further find and conclude that she had preexisting disabilities of 15 percent to the body as a whole for her lumbar fusion and related problems and 10 percent to the body as a whole for her fibromyalgia. I find that claimant has sustained an enhanced disability as a result of the combination of her preexisting disabilities when combined with the disability from her last injury alone. I agree with Dr. Paff's that claimant's greater overall disability as a result of that combination beyond the simple sum of the preexisting disability when combined with the disability from the last injury is 10 percent to the body as a whole (40 weeks of compensation). As a result, I order the Second Injury Fund to pay to claimant 40 weeks of compensation at the agreed upon rate of \$347.05 for a total of \$13,882.00.

I allow claimant's attorney, Randy Alberhasky, an attorney's fee of 25 percent of all amounts awarded herein which shall constitute a lien upon this award.

Date: May 25, 2010

Made by: /s/ Robert H. House
Robert H. House
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation