

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying the Award of the Administrative Law Judge)

Injury No.: 04-135871

Employee: Janice Ervin  
Employer: Health Management Associates (Settled)  
Insurer: Liberty Insurance Corporation (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have read the briefs, reviewed the evidence, and considered the whole record. 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 affirming the March 6, 2013, award and decision of the administrative law judge, as modified herein. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Preliminaries**

The administrative law judge found that employee sustained a 25% permanent partial disability of the left upper extremity at the 210-week level (elbow) as a result of the primary injury in this matter.

The administrative law judge found that employee had the following preexisting permanent partial disabilities as rated by Dr. Woiteshek:

- 35% of the right lower extremity at the 160-week level;
- 25% of the body as a whole referable to the lumbar spine;
- 35% of the right upper extremity at the 175-week level;
- 35% of the left upper extremity at the 175-week level; and,
- 35% of the right upper extremity at the 232-week level.

The administrative law judge found that no employer would reasonably be expected to hire employee in her present condition. The administrative law judge concluded that employee is permanently and totally disabled as a result of a combination of her primary injury and pre-existing disabilities.

**Discussion**

Does employee's back condition constitute a preexisting permanent partial disability?

We disagree with the administrative law judge's finding that employee has produced competent and substantial evidence to establish that as of the date of the primary injury

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2004, unless otherwise indicated.

Employee: Janice Ervin

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employee had a low back condition that constituted a preexisting permanent partial disability as contemplated by § 287.220.1 RSMo. In particular, we do not believe employee's low back condition constituted a hindrance or obstacle to her employment before she sustained her 2004 elbow injury.

Employee offered no medical records to substantiate that she has a preexisting permanent partial disability of her back. Employee's testimony does not support a finding that employee's back condition was a hindrance to her employment or that employee's back condition was a permanent disability as of the date of the elbow injury. Employee could not remember if she received treatment for her back condition. Employee does not think she ever missed time from work because of her back condition. Employee's descriptions of her back condition included that "from time-to-time it hurt" and that she had problems with her back "a little bit off and on" at which times her back would "just hurt and flare up."

As regards her low back surgery, employee testified she first saw her surgeon shortly before the surgery (which occurred in 2010 according to employee and in 2007 according to Mr. England). Employee testified that the symptoms that led to her surgery were incontinence and pain down her right leg. As employee understands it, her surgeon performed surgery because she believed employee had degeneration in her low back that was causing a disc problem.

Dr. Woiteshek opined employee had a preexisting permanent partial disability of her lumbar spine but his opinion is unsupported. Dr. Woiteshek examined employee on October 27, 2010 – almost 6 years after employee's work-related knee injury. Dr. Woiteshek testified he did not review any medical records related to the alleged low back injury or surgery before forming his expert opinions. Dr. Woiteshek did not know when employee underwent low back surgery or what symptoms led employee's surgeon to perform the surgery. Dr. Woiteshek's opinion that employee had a permanent back condition that preexisted her elbow injury is not supported by any medical records reviewed by Dr. Woiteshek or by any medical records in evidence. More importantly, Dr. Woiteshek's opinion that employee's back condition constituted a 25% permanent partial disability as of the date employee sustained the 2004 elbow disability is belied by employee's own testimony that the extent of her back problem was that it would hurt from time to time.

We find that employee's back condition was not a hindrance or obstacle to employment on the date of the primary injury. We find that employee's back condition did not constitute a permanent partial disability as of the date of the primary injury.

Is employee permanently and totally disabled?

Next, we must consider whether employee is permanently and totally disabled without considering the effects of her back condition. Dr. Woiteshek recommended the following:

- 1) [Employee] is advised to avoid all bending, twisting, lifting[,] pushing, pulling, carrying, climbing, and other similar tasks as needed.

Employee: Janice Ervin

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- 2) [Employee] should not handle any weight greater than 10-15 pounds and limit this task to an occasional basis assuming proper lifting techniques.
- 3) [Employee] should not handle weight over her head or away from her body, nor should she carry weight over long distances or uneven terrain.
- 4) [Employee] is advised to avoid remaining in a fixed position for any more than 20-30 minutes at a time including both sitting and standing.
- 5) [Employee] should change positions frequently to maximize comfort and rest in a recombinant fashion when needed.
- 6) [Employee] is advised to pursue appropriate stretching, strengthening, and range of motion exercises in addition to nonimpact aerobic conditioning such as walking, biking, or swimming to tolerance daily.

(Tr. 103)

Dr. Woiteshek attributed the first, fourth, and fifth recommendations to employee's low back condition. We disregard those restrictions for purposes of our analysis. Dr. Woiteshek's sixth recommendation – that employee should stretch and exercise – is not a restriction or limitation on employee's physical activity.

That leaves us to consider whether employee is able to compete in the open labor market in light of the following restrictions: a) employee should not handle any weight greater than 10-15 pounds on an occasional basis; b) employee should not handle weight over her head or away from her body; and, 3) employee should not carry weight over long distances or on uneven terrain.

Mr. England provided the only vocational opinion in this matter. Mr. England expressed his belief that Dr. Woiteshek's back-related restrictions (restrictions # 1, 4, and 5), considered alone, render employee unable to perform work activities. That opinion is unhelpful to our present inquiry in light of our determination that the low back condition is not a preexisting permanent disability. Mr. England also expressed his opinion that if one considers all of Dr. Woiteshek's physical restrictions, employee is unable to compete in the open labor market. Again, Mr. England's opinion is not helpful in light of our determination that the low back condition is not a preexisting permanent disability.

Neither Mr. England nor any other witness expressed an opinion regarding employee's vocational prospects if one considers only restrictions # 2 and 3 in light of employee's age, work history, and education. Employee has failed to persuade us that she is permanently and totally disabled.

What is the extent of Second Injury Fund liability for permanent partial disability?

In light of our findings above, we must determine the liability of the Second Injury Fund without regard to the alleged low back condition. We find that as of the date of the primary injury, employee had the following pre-existing permanent partial disabilities: 35% of the right lower extremity at the 160-week level (56 weeks); 35% of the right upper extremity at the 175-week level (61.25 weeks); 35% of the left upper extremity at the 175-week level (61.25 weeks); and, 35% of the right upper extremity at the 232-week level (81.2 weeks).

Employee: Janice Ervin

We affirm the administrative law judge's finding that as a result of the primary injury, employee sustained a 25% permanent partial disability of the left upper extremity at the 210-week level (52.5 weeks).

Because employee's combining disabilities affect all four extremities, we believe the disabilities combine to enhance employee's overall permanent partial disability by 20%.<sup>2</sup>

**Award**

We modify the award of the administrative law judge. We reverse the administrative law judge's conclusion that employee sustained her burden of proving she is entitled to permanent total disability benefits from the Second Injury Fund. We believe employee has only established entitlement to permanent partial disability benefits from the Second Injury Fund. We award from the Second Injury Fund to employee permanent partial disability benefits in the amount \$14,776.43.<sup>3</sup>

We further approve and affirm 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.

The award and decision of Administrative Law Judge Carl Strange issued March 6, 2013, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 22<sup>nd</sup> day of November 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

<sup>2</sup> The enhancement percentage is commonly referred to as a "load factor."

<sup>3</sup> 62.44 weeks X \$236.65 = \$14,776.43.

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Janice Ervin

Injury No. 04-135871

Dependents: N/A

Employer: Health Management Associates

Additional Party: Second Injury Fund

Insurer: Liberty Insurance Corporation

Hearing Date: December 3, 2012

Checked by: CS/rm

**SUMMARY OF FINDINGS**

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? December 30, 2004.
5. State location where accident occurred or occupational disease contracted: Butler 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 happened or occupational disease contracted: Employee was adjusting a bed and injured her left elbow.
12. Did accident or occupational disease cause death? N/A

13. Parts of body injured by accident or occupational disease: Left elbow.
14. Nature and extent of any permanent disability: 25% permanent partial disability of her left upper extremity at the 210 week level.
15. Compensation paid to date for temporary total disability: N/A.
16. Value necessary medical aid paid to date by employer-insurer: N/A.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate: \$236.65 for temporary total disability, permanent total disability, and permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable:
  - a. Employee's claim against the employer-insurer previously settled by compromise settlement agreement.
  - b. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$236.65 per week beginning March 21, 2009 (See Findings).
22. Second Injury Fund liability: Yes.
23. Future requirements awarded: N/A.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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 costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Edward Gilkerson.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On December 3, 2012, the employee, Janice Ervin, appeared in person and by her attorney, Edward Gilkerson, for a hearing for a final award. The Second Injury Fund was represented by Assistant Attorney General, Jonathan Lintner. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

### **UNDISPUTED FACTS:**

1. On or about December 30, 2004, Health Management Associates was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Liberty Insurance Corporation.
2. On or about December 30, 2004, the employee was an employee of Health Management Associates and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about December 30, 2004, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total disability, permanent total disability, and permanent partial disability is \$236.65.
7. The employee's injury is medically causally related to the work injury occurring on or about December 30, 2004.
8. Employee reached maximum medical improvement on March 17, 2008.
9. Employee suffered a 25% permanent partial disability of the left upper extremity at the 210 week level with regard to the primary injury.
10. Second Injury Fund liability, if any, for permanent total disability benefits will begin on March 21, 2009 at a rate of \$236.65 per week.

### **ISSUES:**

1. Nature and Extent of Disability.
2. Liability of the Fund.

### **EXHIBITS:**

The following Employee's Exhibits were offered and admitted into evidence:

- A. Deposition of Dr. Dwight Woiteshek;
- B. Deposition of Mr. James England;
- C. Award on Injury No. 95-192892;
- D. Stipulation for Compromise Settlement Injury No. 96-004830;
- E. Stipulation for Compromise Settlement Injury No. 97-438902;

- F. Stipulation for Compromise Settlement Injury No. 01-163147;
- G. Stipulation for Compromise Settlement Injury No. 04-135871;
- H. Medical records of Kneibert Clinic;
- I. Medical records of Dr. W.H. Elliott;
- J. Medical records of Physical Assessment and Rehab Center;
- K. Medical records of Dr. Raymond Ritter;
- L. Medical records of Orthopaedic Associates;
- M. Medical records of Missouri Surgery Center;
- N. Medical records of Restart HealthSouth;
- O. Medical report of Dr. J.H. Morrow;
- P. Medical records of Dr. Steven Winters;
- Q. Medical records of Dr. Gregory Tobin;
- R. Medical records of Dr. Steven Winters;
- S. Medical records of Dr. Austin Tinsley;
- T. Medical records of Kneibert Clinic;
- U. Medical records of Dr. Raymond Ritter;
- V. Medical records of Dr. Richard Howard;
- W. Medical records of Dr. Brian Dickson;
- X. Medical records of The Pain Center;
- Y. Medical records of NEA Clinic Pain Management; and
- Z. Medical records of Outpatient Surgery Center of Jonesboro.

**APPLICABLE LAW:**

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:
  - “All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, 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 pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.
- Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase "the 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.1992). 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 the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

***Issue 1. Nature and extent of disability. & Issue 2. Liability of the Second Injury Fund.***

Janice Ervin (“Employee”) has requested an award of permanent total disability benefits against the Second Injury Fund. In support of her position, Employee has offered her medical records along with the opinions of Dr. Dwight Woiteshek and Vocational Rehabilitation Expert, James England. The Second Injury Fund did not offer any contradictory expert opinion in support of their position that they are not liable for benefits. If Employee is permanently and totally disabled, the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing disabilities and Employee's last injury occurring on December 30, 2004. The Second Injury Fund is also not liable if the last injury alone caused Employee to be permanently and totally disabled.

Employee quit school in the eighth grade and was unable to complete her GED although she attempted it. Her past work history included cleaning printing presses, placing items in boxes from an assembly line, and packing Christmas bulbs. Employee worked for Health Management Associates (“Employer”) as a housekeeper. On December 30, 2004, Employee was adjusting a bed and injured her left elbow. In order to address continuing complaints and problems, Employee’s elbow required two surgical repairs.

On November 2, 2010, Dr. Dwight Woiteshek examined Employee and opined that due to the December 30, 2004 primary injury that Employee suffered a 35% permanent partial disability of left upper extremity at the 210 week level. With regard to pre-existing injuries, Dr. Woiteshek opined Employee had a 35% permanent partial disability of the right lower extremity at the 160 week level, a 25% permanent partial disability of the body as a whole referable to the lumbar spine, a 35% permanent partial disability of each upper extremity at the 175 week level, and a 35% permanent partial disability of the right upper extremity at the 232 week level. After opining that “Janice Ervin is no longer employable in the open labor market”, Dr. Woiteshek opined that within a reasonable degree of medical certainty, Employee “is permanently and totally disabled from a combination of the injury on September 24, 2004 while working for Health Management Associates and pre-existing disabilities” (Employee's Exhibit A).

Mr. James England, a vocational rehabilitation expert, examined Employee on April 28, 2011. At that time, Mr. England opined that “considering her presentation as well as the combination of the restrictions noted by Dr. Woiteshek in combination with her limited academic background and poor performance in testing, I believe that she is likely to remain totally disabled from a vocational standpoint”. Mr. England further opined that “absent significant improvement in her overall functional ability I feel that she is likely to remain totally disabled from a vocational standpoint and would not really benefit from vocational rehabilitation services” (Employee's Exhibit B).

After carefully reviewing all of the evidence, I find Employee and the opinions of Dr. Woiteshek and Mr. England to be credible and fully supported by the evidence. In accordance with those opinions, the evidence indicates that Employee is permanently and totally disabled as a result of the combination of all of her disabilities. On October 8, 2010, Employee settled her primary claim against Employer in this matter for 25% permanent partial disability of the left

elbow at the 210 week level. Based on the evidence, I find Employee suffered a 25% permanent partial disability of the left elbow at the 210 week level as a result of the December 30, 2004 work injury. With regard to Employee's pre-existing conditions, I find that Employee's permanent partial disability equals the percentages as identified by Dr. Woiteshek's report and that Employee met her burden of proving that her pre-existing conditions amounted to actual and measurable disability at the time of the work injury and were of such seriousness as to constitute a hindrance or obstacle to employment. In accordance with Dr. Woiteshek's opinion, I find that the combination of Employee's impairments create a greater disability than the simple total of each separate injury.

Based on the evidence, I find that no employer would reasonably be expected to hire Employee in her present condition and that Employee is permanently and totally disabled as a result of a combination of her primary injury and pre-existing injuries. Further, I find that Employee reached maximum medical improvement on March 17, 2008. In accordance with my above findings, I find that the Second Injury Fund's liability for permanent and total disability benefits at a rate of \$236.65 per week began on March 21, 2009. The Second Injury Fund is therefore directed to pay to Employee the sum of \$236.65 per week commencing on March 21, 2009, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of Employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which Employee is restored to her regular work or its equivalent as provided in Section 287.200.2. Since part of the Second Injury Fund's liability has accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for the appropriate amount that is past due.

**ATTORNEY'S FEE:**

Edward Gilkerson, attorney at law, is allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

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Carl Strange  
*Administrative Law Judge*  
*Division of Workers' Compensation*