

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

Injury No.: 06-121135

Employee: Candace Fry  
Employer: Christian Foods, LLC  
Insurer: American Family Mutual Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

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 April 3, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued April 3, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of November 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Candace Fry Injury No.: 06-121135  
Dependents: N/A Before the  
Employer: Christian Foods, LLC **Division of Workers'**  
**Compensation**  
Additional Party: Second Injury Fund (Open) Department of Labor and Industrial  
Relations of Missouri  
Insurer: American Family Mutual Insurance Company Jefferson City, Missouri  
Hearing Date: March 18, 2009 Checked by: EJK/ch

### 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? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: October 19, 2006 (alleged)
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri (alleged)
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? No
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 operated a fry station preparing fried foods for a fast food restaurant and alleged that her work caused an injury to her right hand, wrist, and forearm.
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: Right wrist and forearm (alleged)
14. Nature and extent of any permanent disability: 30% permanent partial disability to the right wrist
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

Employee: Candace Fry

Injury No.: 06-121135

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$195.00
- 19. Weekly compensation rate: \$130.00/\$130.00
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

None

22. Second Injury Fund liability: Open

**TOTAL:**

None

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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jack J. Adams, Esq.

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

Employee:	Candace Fry	Injury No.: 06-121135
Dependents:	N/A	Before the
Employer:	Christian Foods, LLC	<b>Division of Workers'</b>
Additional Party: Second Injury Fund (Open)		<b>Compensation</b>
Insurer:	American Family Mutual Insurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/ch

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a fry station operator at a fast food restaurant, developed pain in her right wrist and forearm. The issues for determination are (1) Medical causation, and (2) Permanent disability. The Second Injury Fund claim remains open pursuant to an agreement among the attorneys. The evidence compels an award for the defense, because the claimant failed to present a prima facie case that her disability is compensable.

At the hearing, the claimant testified in person and offered a deposition of Robert P. Poetz, D.O., and medical records from SSM St. Joseph Hospital West. The defense offered a deposition of David M. Brown, M.D.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, as amended, because the accident was alleged to have occurred in Missouri.

### **SUMMARY OF FACTS**

This thirty-six year old claimant, a fry station operator for a fast food restaurant, is 5' 2" tall and has weighed 220 pounds for at least ten years. She now complains of right arm pain. She began working for this employer in June 2006 as a counter person taking orders and bagging food. She had no difficulties with her right arm in her work as a counter person.

The claimant then moved to the fry station. She worked the fry station for 1 ½ to 2 months before she began to experience problems with her right hand and arm. She testified she began to experience pain in the right ring finger up into the right forearm four to five inches below the elbow. She testified that her symptoms began with shooting pains from the palm of her hand up to the elbow and sometimes into the shoulder area.

The claimant testified she worked four to five hours daily with shifts from 9:00 a.m. to 3:00 p.m. or 11:00 a.m. to 4:00 p.m. On the days that the claimant arrived at 9:00 a.m., she did not begin working at the fry station. Her duties would include breaking down the hash brown station, cleaning up the area, and disposing of any unused hash browns. When the claimant worked the fry station, she normally worked the noon rush which included the hours of 11:30

a.m. to 2:30 p.m. The claimant would begin her work at the fry station by retrieving boxes of frozen fries from the freezer. The claimant would lift the fry boxes with both hands and carry them to the fry station. The claimant estimated she would lift thirty to forty pounds. She then opened the frozen fry bags which contained four to five paper bags of fries with a plastic lining inside the bag. She opened the fry bags with both hands, and used both hands to pour the fries into a dispenser. The claimant testified that the dispenser held seven to eight bags at a time. She would continue to fill the dispenser throughout her shift, as needed.

The claimant would then use the dispenser to fill fry baskets. She described the fry baskets, including the handle portion, to be shorter than a yard stick. She would fill the fry basket and put them near the fryer to be used, as needed. The claimant stated she normally lifted the fry baskets into the fryer using her right hand. She stated she was not coordinated enough to use her left hand to perform this task. She would then drop the fry baskets in the grease and remove them when the fries were finished cooking. She then picked up the fry basket and dumped the fries into the "holdover" area and salted the fries. She then used a fry scooper to fill boxes of fries and set them in the holding area for purchase. She estimated she went through three baskets every thirty minutes during the lunch rush. For the portion of her shift when she was not at the fry station, she worked the cash register.

The claimant testified that after three weeks at the fry station, she noticed pain in the right ring finger which she described as a sharp pain in the center of the knuckle area. She then had gradual pain into the palm of her hand into her wrist and into her forearm. She described it as a tingling feeling with pain that would increase when grabbing things like the fry basket. She testified she asked to be removed from the fry station, and was advised by the supervisor that no other worker could perform the task as well.

The claimant initially sought treatment at St. Joseph's Health Center on October 19, 2006, and reported pain in the right elbow. See Exhibit A. The attending physician diagnosed tendonitis and carpal tunnel syndrome, gave her a brace, and recommended physical therapy. See Exhibit A. However, she never attended due to the lack of funds.

Since leaving her position with this employer, the claimant's symptoms have not improved. She experiences tingling and pain at night. She has also sought additional treatment with a specialist in Columbia, Missouri, whose name she could not recall. She testified that the physician is primarily providing treatment for her right shoulder.

The claimant testified that she has difficulty tying her shoes and fastening her bra. She describes pain which goes up the right arm and into the shoulder. She testified her husband does most of the household chores. The claimant testified she drives for short distances, but the vibration of the wheel bothers her symptoms. In April 2008, she was diagnosed with diabetes.

### **MEDICAL CAUSATION**

Generally, a claimant must also establish, through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). The claimant has the burden to prove that the claimant's "occupational exposure was the prevailing factor in causing both the resulting

medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable." Section 287.067.3, RSMo Supp. 2008. The standard of the claimant's burden of proof is to establish that such proposition is more likely to be true than not true. Section 287.808, RSMo Supp. 2008.

Dr. Poetz examined the claimant on April 10, 2007, and took a medical history:

Well, she said that her right arm was injured because of working at a French fry station. She said that this job entailed lifting fry baskets from the fry dispenser to vats of oil, lifting them back out of the oil, and then flipping the fries from the basket onto the fry warmer. She said initially she was trained in this position and then moved to the position of cashier. After two or three months of employment, she was instructed to go back to the fry station and she was required to work during the lunch rush hour, which involved making fries continuously for three or four hours. Within several weeks of working the lunch period she began to develop pain in her right hand and forearm. She ... sought treatment at St. Joseph's Hospital West because of right elbow pain. She was diagnosed with tendonitis or tenosynovitis and carpal tunnel syndrome of the right upper extremity. See Dr. Poetz deposition, pages 6, 7.

Dr. Poetz diagnosed "right upper extremity tendonitis and possible carpal tunnel syndrome on the right." See Dr. Poetz deposition, page 9. Dr. Poetz opined that the claimant suffered from "a thirty percent permanent partial disability to the right hand and wrist directly resulting from the October 19, 2006, work-related injuries." See Dr. Poetz deposition, page 9.

In reviewing whether the claimant's work was the primary factor causing her medical condition and disability, Dr. Poetz testified on direct examination, "She had some other health issues in the past but none that would be related in any way to her right upper extremity." See Dr. Poetz deposition, page 8. On cross examination, he testified that women are at greater risk of developing carpal tunnel syndrome than men, that increased body mass index is a risk factor in the development of carpal tunnel syndrome, and that the claimant was obese. See Dr. Poetz deposition, pages 12, 13. Thus, Dr. Poetz' testimony appears to be contradictory as to the factors that caused or contributed to the claimant's condition.

Six months later, on October 10, 2007, Dr. Brown examined the claimant and opined, "Based on the history obtained from Ms. Fry that the symptoms began after working there for only three weeks and continued to have progressed after she had stopped working there, I don't think her work at McDonald's would be considered the prevailing cause of her condition." See Dr. Brown deposition, page 9. He also opined that the claimant had other risk factors for carpal tunnel syndrome, which was his working diagnosis:

She has two identifiable non-occupational risk factors. One, the fact she's a woman puts her at risk for carpal tunnel syndrome. ... Carpal tunnel syndrome is more common in women for some reason than men. The ratio is about three to one. The medical condition that she has that puts her at an increased risk is she does have an increased body mass index weighing 219 pounds at a height of five-

foot, two-inches tall. ... It's been shown that increased body mass puts patients at four times the risk of developing carpal tunnel syndrome than those who don't have an increased body mass index. So it's a very important factor. See Dr. Brown deposition, pages 9, 10.

Thus, the two forensic medical experts testified that the claimant had two risk factors for her medical condition other than her work conditions: gender and body mass index. Neither expert opined that the claimant's work was the prevailing factor or the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. This is a key finding, because the claimant has the burden under the Workers' Compensation Statute to prove that the claimant's working conditions were the prevailing factor or the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Sections 287.020, 287.067, and 287.808, RSMo Supp. 2008. Dr. Poetz testified that the claimant's disability directly resulted "from the October 19, 2006, work-related injuries." Although his medical history and the record in this case do not reflect any "October 19, 2006, work-related injuries," a fair reading for the overall deposition suggests that Dr. Poetz intended to refer to the claimant's work as a fry station operator given the medical history he recorded.

Notwithstanding, Dr. Poetz' forensic medical opinion did not meet the claimant's burden of proof after he identified three factors that could cause the claimant's medical condition (work, gender, and body mass index), because he did not offer any opinion whether the claimant's work for this employer was the prevailing factor or the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. While Dr. Poetz testimony may have been sufficient under prior versions of the Workers' Compensation Statute (an actual triggering factor or a substantial factor), the version of the statute in effect at the time of the occurrence requires an evaluation of all factors and a determination that the working conditions were the prevailing factor or the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Dr. Poetz did not offer such an opinion, and his opinion on direct examination was impeached by conflicting testimony on cross examination regarding the various factors that can cause or contribute to the claimant's medical condition. Dr. Brown testified unequivocally that the claimant's work for this employer was not the prevailing factor causing her medical condition or need for additional medical care. See Dr. Brown deposition, pages 9, 11. Therefore, Dr. Brown's forensic medical opinion is more cogent, consistent, and credible than that of Dr. Poetz.

Based on the above, the claimant's claim must be denied for failure to prove that the claimant's work was the prevailing factor causing her medical condition and disability.

### **PERMANENT DISABILITY**

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to

work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

Dr. Poetz found that the claimant had pain in her right ring finger, pain that shoots up her right hand and forearm, right palm and forearm pain, and numbness and tingling that wake her up at night. See Dr. Poetz deposition, page 6. He opined that the claimant has a 30% permanent partial disability to her right wrist and hand. See Dr. Poetz deposition, page 9. Dr. Brown did not evaluate the extent of the claimant's disability.

Based on the evidence of record, the claimant suffered a 30% permanent partial disability to her right wrist and hand, but failed to establish that the claimant's work for this employer was the prevailing factor causing the claimant's condition or her disability as discussed above.

Date: April 2, 2009

Made by: /s/ EDWIN J. KOHNER  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/ NAOMI PEARSON  
NAOMI PEARSON  
Division of Workers' Compensation