

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

Injury No.: 05-052472

Employee: Kim Fugate
Employer: North Village Park, LLC (Settled)
Insurer: Missouri Retailers Insurance (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 3, 2012. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued July 3, 2012, 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 25th day of January 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kim Fugate

Injury No.: 05-052472

Dependents: N/A

Employer: North Village Park, LLC

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: N/A

Hearing Date: May 17, 2012

Checked by: HDF/scb

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: June 13, 2005.
5. State location where accident occurred or occupational disease was contracted: Randolph 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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See award
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: Cervical spine
14. Nature and extent of any permanent disability: 17.5% body as a whole
15. Compensation paid to-date for temporary disability: N/A
15. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$352.08
- 19. Weekly compensation rate: \$234.72
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
- 22. Second Injury Fund liability: Yes.

Permanent total disability benefits as of August 18, 2009 (70 weeks from April 15, 2008)
(From August 18, 2009 through July 3, 2012 = 150 weeks)
(150 weeks x \$234.72 = \$35,208.00)

- 23. Future Requirements Awarded: Second Injury Fund benefits = \$234.72 per week from August 18, 2009 forward

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: Allen and Nelson, P.C.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kim Fugate

Injury No: 05-052472

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: North Village Park, LLC

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

Insurer: N/A

Checked by: HDF/scb

The above-referenced workers' compensation claims were heard before the undersigned administrative law judge on May 17, 2012. Memoranda were due by June 8, 2012.

The parties stipulated that on or about June 13, 2005, the claimant, Kim Fugate, was in the employment of North Village Park, LLC, (North Village) and on July 7, 2006, Ms. Fugate was employed by Carrollton Specialty Products. The parties stipulated that with the exception of the issue of the causation of the injuries alleged, all facts relevant to the claimant's relationship with either of her employers are resolved in the claimant's favor in her claims against the Second Injury Fund. With regard to the June 13, 2005 claim, Ms. Fugate's average weekly wage was \$352.08, with a corresponding compensation rate of \$234.72 per week; with regard to the July 7, 2006 claim, Ms. Fugate's average weekly wage was \$221.87, with a corresponding compensation rate of \$147.91 per week.

The issues to be resolved by hearing in both claims are 1) the causation of the injuries alleged, and 2) the liability of the Second Injury Fund (permanent total disability is alleged).

The parties stipulated that the June 13, 2005 injury settled based on a permanent disability of 17.5 percent of the body referable to the cervical spine and the July 7, 2006 claim settled based on a permanent disability of five percent of the body; the parties did not stipulate that either settlement figure represents the permanent disability resulting from the respective underlying injury.

The parties stipulated that Ms. Fugate reached maximum medical improvement as the result of either injury on April 15, 2008.

FACTS

The claimant, Kim Fugate, testified that she was 48 years old as of the date of hearing, having been born in 1964. Ms. Fugate completed the 11th grade in school and has not received her GED or any specialized training. Ms. Fugate's work history includes waitressing, filleting fish, work as

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an assistant manager at Pizza Hut, and work at Carrollton Specialty Products making greeting cards and albums.

Ms. Fugate did not work from the early 1990s through about the year 2000 because she was suffering from Crohn's disease, an inflammatory bowel disease. Ms. Fugate had five surgeries during the 1990s to remove parts of her large intestine resulting in the eventual complete removal of the large intestine and now has a colostomy. As a result of the Crohn's disease Ms. Fugate wears a colostomy bag and cannot lift due to the strain lifting puts on her small intestine. Ms. Fugate has continued to have bowel issues with a commensurate need to have ready and frequent access to bathroom facilities.

Ms. Fugate described suffering from depression prior to 2005, but says that she was taking no anti-depressants at the time of the June 13, 2005 motor vehicle accident. Ms. Fugate described her depression as triggered by life events and that her mental status was "pretty good" as of the time of the motor vehicle accident.

Ms. Fugate also suffered from back pain prior to 2005.

Ms. Fugate worked as a dietary aide and later as assistant manager of the dietary department at North Village. Ms. Fugate reported to her sister who was the kitchen manager at North Village. While employed at North Village, Ms. Fugate was involved in a motor vehicle accident in the parking lot when a co-employee hit her vehicle on the driver's side while she was driving the vehicle as he was attempting to get to the hospital for respiratory issues. Ms. Fugate's husband drove her to the hospital where x-rays were taken and pain medication and muscle relaxants were prescribed. Ms. Fugate described one authorized follow-up visit and then received treatment on her own with Doctors Stitzer and Rampton. Ms. Fugate also saw a pain management doctor, Dr. Noble, in Columbia, Missouri, for her neck pain from the motor vehicle accident. As the result of the motor vehicle accident, Ms. Fugate complains of constant neck pain and sporadic back pain.

Ms. Fugate's employment at North Village ended in October of 2005 when Ms. Fugate was fired for misappropriating cake mix.

Ms. Fugate worked at Carrollton Specialty Products and stated that her pain from her motor vehicle injury at North Village was aggravated while she worked at Carrollton Specialty Products where she had to look down to work for extended periods of time but then "slacked off" when she left Carrollton Specialty Products.

Dr. David Volarich evaluated Ms. Fugate on October 27, 2008, and issued reports pertaining to his evaluation on October 27, 2008, April 30, 2009, and June 19, 2009. Dr. Volarich opined that as the result of Ms. Fugate's June 13, 2005 motor vehicle accident she suffered a permanent disability of 20 percent of the body referable to the cervicothoracic spine and a five percent disability attributable to the lumbosacral spine. Dr. Volarich found a seven and one-half percent disability of the body referable to the cervicothoracic spine as the result of Ms. Fugate's work at Carrollton Specialty Products in 2006. Dr. Volarich found preexisting disability due to Crohn's disease to be 50 percent of the body referable to the abdomen, five percent of the body at the

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thoracic spine due to scoliosis and five percent of the body attributable to a 1989 disc herniation. Dr. Volarich went on to find that the “combination of [Ms. Fugate’s] disabilities creates a substantially greater disability than the simple sum or total of each separate injury or illness...” (Volarich depo) Dr. Volarich also recommended that Ms. Fugate undergo a vocational assessment to determine her ability to return to the labor market.

Dr. A. E. Daniels, psychiatrist, evaluated Ms. Fugate on June 17 and 23, 2009. Dr. Daniels identified Ms. Fugate as suffering from a Mood Disorder and a Pain Disorder and opined that Ms. Fugate has a 15 percent psychiatric disability attributable to the June 13, 2006 motor vehicle accident, a 15 percent psychiatric disability resulting from her July 2006 work at Carrollton Specialty Products, a ten percent psychiatric disability preexisting both of these alleged work injuries with a 45 percent total psychiatric disability.

Gary Weimholt, vocational rehabilitation consultant, evaluated Ms. Fugate on September 24, 2010, and authored a report pertaining to Ms. Fugate’s labor market access on January 24, 2011. Mr. Weimholt opined that based on Ms. Fugate’s “cervicothoracic sprain/strain, somatic dysfunction and myofascial pain syndrome related to the injury of 6/13/05 and pre-existing cervicothoracic myofascial pain syndrome, thoracic strain and scoliosis, Crohn’s disease and depression...[including] the further aggravation of her cervical, thoracic and lumbar myofascial pain syndrome leading up to 7/7/06” (Weimholt report) that Ms. Fugate is totally vocationally disabled.

Dr. Cantrell, physical medicine and rehabilitation specialist, evaluated Ms. Fugate for her neck and upper back complaints on June 19, 2007, and authored a report of the same date addressing his evaluation. Dr. Cantrell found Ms. Fugate to have a permanent disability of seven percent of the body referable to a cervical strain and sprain and left parascapular strain attributable to the June 13, 2005 accident and injury.

APPLICABLE LAW

RSMo Section 287.020.3(1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

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(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

RSMo Section 287.220.1. 287.220. 1. 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 preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting 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 preexisting 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. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury 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 employer at the time of the last injury is liable is less than the 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 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers'

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compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

AWARD

The claimant, Kim Fugate, has sustained her burden of proof that she injured her neck as the result of the motor vehicle accident of June 13, 2005, while Ms. Fugate was working for North Village. Dr. Cantrell and Dr. Volarich agree that Ms. Fugate sustained permanent disability to her cervical spine as the result of her accident.

Ms. Fugate has also sustained her burden of proof that she is permanently and totally disabled as the result of her cervical spine injury resulting from her June 13, 2005 accident and injury combined with her preexisting Crohn's disease. Ms. Fugate's testimony in conjunction with the testimonies of Dr. Volarich and Mr. Weimholt is sufficiently convincing that Ms. Fugate is incapable of returning to gainful employment as the result of the combination of her injury from the June 13, 2005 accident and injury and the Crohn's disease preexisting 2005. Dr. Volarich testified with regard to the significant disability sustained by Ms. Fugate as the result of her June 13, 2005 cervical spine injury and the sequelae of Ms. Fugate's preexisting Crohn's disease. Mr. Weimholt found Ms. Fugate to be permanently and totally disabled based on the June 13, 2005 accident and injury combined with preexisting Crohn's disease along with cervicothoracic pain, scoliosis and depression. I find that an analysis of all the evidence is conclusive that Ms. Fugate is permanently and totally disabled from employment and that it is the combination of her cervical injury combined with her Crohn's disease that is the cause of her inability to be gainfully employed. Permanent disability of 17.5 percent of the body referable to the cervical spine is found as of the injury of June 13, 2005. Permanent total disability is found as of April 15, 2008 and a credit of 70 weeks of permanent partial disability benefits is applied to the determination of Second Injury Fund benefits.

Ms. Fugate has failed to sustain her burden of proof that the Second Injury Fund is liable for benefits as the result of her July 2006 work at Carrollton Specialty Products in combination with her preexisting disability where the work at Carrollton Specialty Products is found to have been only a temporary aggravation of her cervical injury of June 13, 2005.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation