

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

Injury No.: 03-038800

Employee: Elizabeth Garlock
Employer: Haines Finishing Company
Insurer: Westport Insurance Corporation
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 May 21, 2012. The award and decision of Chief Administrative Law Judge Grant C. Gorman, issued May 21, 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 19th day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Elizabeth Garlock

Injury No. 03-038800

Dependents: None

Employer: Haines Finishing Company

Additional Party: Second Injury Fund

Insurer: Westport Insurance Corporation

Hearing Date: January 11, 2012

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

Checked by: GCG/ln

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: April 28, 2003
5. State location where accident occurred or occupational disease was contracted: Franklin 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: Claimant injured her low back while lifting in the course and scope of employment.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Lumbar Spine & Psychiatric Injury
14. Nature and extent of any permanent disability: 31% of the body as a whole.
15. Compensation paid to-date for temporary disability: \$7,475.13
16. Value necessary medical aid paid to date by employer/insurer? \$34,281.37
17. Value necessary medical aid not furnished by employer/insurer? None

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- 18. Employee's average weekly wages: \$688.51
- 19. Weekly compensation rate: \$459.00 Total Disability/\$340.12 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: None

0 weeks of temporary total disability

124 weeks of permanent partial disability from Employer \$42,174.88

Mileage reimbursement \$680.19

- 22. Second Injury Fund liability: Yes

66.28 weeks of permanent partial disability from Second Injury Fund \$22,543.15

TOTAL: \$65,398.22

- 23. Future requirements awarded: None

Said payments to begin as of the date of this award 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:

Mark Rudder

Employee: Elizabeth Garlock

Injury No. 03-038800

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Elizabeth Garlock

Injury No: 03-038800

Dependents: None

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Haines Finishing Company

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

Additional Party Second Injury Fund

Insurer: Westport Insurance Corporation

Checked by: GCG/ln

PRELIMINARY STATEMENT

Hearing in this case was held before the undersigned Administrative Law Judge on January 11, 2012, in Franklin County, Missouri. Elizabeth Garlock (Claimant) was represented by Mark Rudder. Haines Finishing Company (Employer) and its Insurer, Westport Insurance Corporation, were represented by Nanci Martin. The Second Injury Fund was represented by Assistant Attorney General Jennifer Sommers. Mr. Rudder requested a fee in the amount of 25%. The parties submitted post-trial briefs.

The parties stipulated to the following:

1. On or about April 28, 2003, Claimant sustained an occupational disease arising out of and in the course of employment that resulted in injury to Claimant. The injury occurred in Franklin County, Missouri.
2. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.
3. Venue is proper in Franklin County.
4. Employer received proper notice of the claim.
5. Claimant filed the claim within the time allowed by law.
6. Claimant earned an average weekly wage of \$688.51 resulting in applicable rates of compensation of \$459.00 for temporary total disability (TTD) and permanent total disability (PTD) benefits, and \$340.12 for permanent partial disability (PPD) benefits.
7. Employer has paid to date \$34,281.37 in medical expenses for care and treatment provided to Claimant.
8. Employer paid \$7,475.13 in TTD benefits to Claimant from May 8, 2003 through June 18, 2003 and from July 15, 2003 through September 21, 2003, for a total of 16 2/7 weeks.

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The issues to be determined are:

1. Nature and extent of disability;
2. Whether Employer owes additional TTD;
3. Past medical;
4. Future medical;
5. Liability of the Second Injury Fund;
6. Date Claimant reached maximum medical improvement (MMI); and
7. Whether Claimant is owed mileage reimbursement.

SUMMARY OF THE EVIDENCE

Only evidence necessary to support this Award will be summarized. Any objections not expressly ruled on during the hearing or in this Award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Claimant offered the following exhibits, which were received into evidence without objection: Exhibits A through XXX. On February 13, 2012, at the time Claimant's brief was filed, Claimant also filed a motion to submit an additional exhibit. The exhibit was received via email at the Administrative Law Judge's individual email address, and printed by the Court and marked as Exhibit YYY. The admission of Exhibit YYY into the record is denied.

Employer offered the following exhibits, which were received into evidence without objection: Exhibits 2 through 8.

The Second Injury Fund did not offer any exhibits.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the competent and substantial evidence presented, including the testimony of Claimant, my personal observations, expert medical and vocational testimony, and all other exhibits received into evidence, I find:

1. Claimant sustained a compensable injury to her low back while working for Haines Finishing Company on April 28, 2003, resulting in a 31% permanent partial disability of the body as a whole (BAW); specifically, 30% permanent partial disability of the BAW for the low back, and 1% permanent partial disability of the BAW for psychiatric injury. 31% PPD of the BAW totals 124 weeks of compensation, or \$42,174.88.

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2. Claimant reached MMI on December 8, 2003 for the primary work injury of April 28, 2003.
3. Claimant has failed meet her burden of proof that she is permanently and totally disabled as a result of the last injury alone.
4. Prior to the April 28, 2003 work injury, Claimant suffered an injury to her right eye resulting in permanent disability of 90% of the right eye which was a hindrance or obstacle to employment.
5. Prior to the April 28, 2003 work injury, Claimant suffered an injury to her right shoulder, resulting in permanent disability of 20% of the right shoulder which was a hindrance or obstacle to employment.
6. Prior to the April 28, 2003 work injury, Claimant suffered an injury to her right wrist, resulting in permanent disability of 20% of the right wrist which was a hindrance or obstacle to employment.
7. As a result of the work-related injury of April 28, 2003 Claimant is entitled to receive \$680.19 for mileage reimbursement from Employer.
8. Claimant has failed to prove she is entitled to payment for past medical expenses.
9. Claimant has failed to prove Employer is liable for future medical benefits.
10. Claimant has failed to meet her burden of proof that she is permanently and totally disabled due to a combination of the last injury and her pre-existing injuries and conditions for a PTD award against the SIF.
11. Claimant has met her burden of proof that she is entitled to an award of PPD benefits against the SIF.
12. The credible evidence establishes the last injury, combined with the pre-existing permanent partial disabilities, causes 20% greater overall disability than the independent sum of the disabilities.
13. Second Injury Fund liability is calculated as follows: 124 weeks for last injury + 207.4 weeks for pre-existing injuries = 331.4 weeks x 20% = 66.28 weeks of overall greater disability. 66.28 weeks x \$340.12 = \$22,543.15.

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ANALYSIS

Claimant suffered a compensable work injury to her lumbar spine on April 28, 2003 while lifting a box. Claimant received authorized treatment, including a microdiscectomy at L4-5 performed by Dr. Heim on July 15, 2003. She testified she returned to work in September of 2003, and worked until February 24, 2004, at which time she voluntarily left her employment at Haines Finishing Company. Claimant testified she left because she could not continue to perform her work duties due to the pain in her low back and right leg. She underwent another low back surgery on September 8, 2006, performed by Dr. Rogers. The second surgery was a fusion at the levels of L4-5 and L5-S1. Claimant also suffered a staph infection at the surgical site from the September 8, 2006 surgery.

Ultimately, the outcome of this case depends on the determination of the date at which Claimant reached MMI for the April 28, 2003 work injury. There is little disagreement that Claimant is currently permanently and totally disabled. However, if the fusion surgery performed by Dr. Rogers in 2006 is not causally related to the primary work injury, then the PTD opinions in evidence are of little value, as they are based on restrictions relevant to that surgery. It should be noted the exception to this is the psychiatric opinion provided by Dr. Stillings, which opines Claimant is PTD from pre-existing psychiatric conditions alone, and the work injury resulted in 1% PPD for psychiatric injury.

Date of MMI

After the 2003 surgery performed by Dr. Heim, a neurosurgeon, Claimant continued to make complaints of back pain with right sided radicular symptoms. Based on these complaints, there were post surgical MRI's performed in late August and in December 2003, and a myelogram/CT performed on April 23, 2004. After providing treatment and seeing the two MRI's, Dr. Heim released Claimant at MMI on December 8, 2003 with no restrictions.

Dr. Bernardi, a neurosurgeon, reviewed the medical records, imaging studies, and examined Claimant on January 6, 2004 on behalf of Employer. Based on his exam and review he found Claimant to be at MMI and rated her PPD at 10% of the body. Dr. Bernardi again examined Claimant on April 1, 2009, which included a records review of all the subsequent medical treatment including the 2006 surgery. Dr. Bernardi opined that the treatment rendered by Dr. Rogers and the subsequent limitations were not causally related to the work injury. He reiterated that Claimant reached MMI in December 2003 and that his previous PPD rating remained unchanged.

Dr. Kitchens, a neurosurgeon, examined Claimant on May 13, 2004 on behalf of Employer. He reviewed medical records, including the April 2004 CT, and performed a physical exam. Based on his findings, including the imaging study performed almost one year after the initial surgery, he found no residual or recurrent disc herniation. He also opined Claimant was at MMI and rated 10% PPD.

Dr. Cohen examined Claimant on January 5, 2006 on behalf of Claimant. He performed a physical examination and reviewed medical records including the imaging studies. Regarding

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the primary work injury, Dr. Cohen recommended no additional treatment, gave a rating of 45% of the body at the lumbar spine, and placed some restrictions on Claimant. He also rated her pre-existing disabilities as follows: 20% of the right shoulder, 20% of the right wrist for carpal tunnel syndrome, and 90% of the right eye due to almost complete blindness. He did find her to be permanently and totally disabled. Dr. Cohen again examined Claimant on January 10, 2008, which included a physical exam and a review of the subsequent medical records. He opined that the medical condition of Claimant's lumbar spine in 2006 was causally connected to the primary work injury of April 28, 2003. He found her PPD to now be 60% of the body at the lumbar spine as a result of the work injury and that Claimant was permanently and totally disabled as a result of a combination of the primary injury and her pre-existing conditions. His ratings of the pre-existing conditions remained unchanged.

On May 5, 2006, Claimant had another MRI of the lumbar spine. This revealed, among other things, a disc herniation at L4-5 with a central and left distribution. There was also a central disc protrusion at L5-S1. These are the same levels which were operated upon by Dr. Rogers in September, 2006.

The opinions of Dr. Bernardi and Dr. Kitchens are more credible than those of Dr. Cohen regarding the date Claimant reached MMI for the primary injury of April 28, 2003. The opinions of Dr. Bernardi are more credible than the opinions of Dr. Cohen regarding the causal relationship between the work injury of April 28, 2003 and the condition of Claimant's lumbar spine in 2006 which led to the surgery performed by Dr. Rogers. Both Dr. Bernardi and Dr. Kitchens are neurosurgeons who perform the types of surgery at issue in this case. Dr. Cohen is a neurologist that does not perform spine surgery, and most of his practice is devoted to providing medical/legal evaluations.

Dr. Bernardi credibly described that the recurrent herniation which occurred at L4-5 was too remote in time to be causally related to the injury and treatment from the April 28, 2003 injury. He also credibly described that the recurrent herniation did not need to be caused by an intervening acute traumatic event, but was caused by the natural degenerative process, which was demonstrated by the fact that the post-operative scans performed up to ten months after the 2003 surgery did not reveal any recurrent herniation. He opined the recurrent herniation occurred at least one to two years after the 2003 surgery. He also credibly explained the distribution of the recurrent disc herniation was left-sided, which is not likely to result from the original right-sided disc herniation.

Dr. Cohen on the other hand, did not give a credible explanation how the recurrent herniation in 2006 was causally related to the work injury. He opined that after a right-sided disc herniation repair, the recurrent herniation can be left, right, or central, but did not provide any evidence to demonstrate that the distribution of this recurrent herniation was such that it would have caused Claimant's right-sided subjective complaints. He merely explained that the disc could have collapsed in any distribution and that MRI's are not 100% accurate.

As a result, the credible evidence has established Claimant was at MMI in December 2003 for the primary work injury of April 28, 2003; and the primary work injury was not a

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substantial factor in causing the recurrent disc herniation diagnosed in 2006 or the treatment provided by Dr. Rogers in 2006.

Permanent Partial v. Permanent Total Disability

This is not to say Claimant is not now permanently and totally disabled as addressed in the opinions and testimony of the experts presented in this case. However, those opinions, as they relate to PTD from the primary work injury, or a combination of the primary work injury and pre-existing disabilities, are flawed.

Dr. Stillings opines Claimant is PTD as a result of her pre-existing psychiatric condition alone. He believes she was basically on a timer, and sooner or later the psychiatric conditions she has had for years would render her PTD. He rates her psychiatric permanent partial disability from the primary work injury at 1%. This opinion does not support an award for PTD benefits as it attributes PTD to the post-accident worsening of a pre-existing condition. Dr. Stillings was the only psychiatric expert to provide a report and testimony outside of some treatment records.

Karen Kane-Thaler finds Claimant PTD, primarily based on Dr. Stillings' psychiatric opinions. As previously mentioned, those opinions would not support an award for PTD.

Dr. Cohen finds Claimant PTD only after he determines the 2006 recurrent disc herniation and fusion surgery are related to the primary work injury. In fact, in his first report in January 2006, which is more than two years after the initial injury and surgery, he does not make any recommendations for additional diagnostic studies or treatment, nor did he find Claimant to be PTD. Dr. Cohen's reports and opinions regarding PTD are not credible and do not support an award of PTD. Dr. Cohen provided the only PPD ratings for Claimant's pre-existing disabilities.

James England's vocational report is based on Dr. Cohen's recommended restrictions after the 2006 fusion surgery in combination with Claimant's psychiatric condition. However, the 2006 fusion surgery is not causally related to the primary work injury. In addition, the only psychiatric opinion states Claimant is PTD based on her pre-existing psychiatric conditions alone. Therefore, Mr. England's report and opinions are not credible.

Dr. Bernardi even opined Claimant was now PTD, but in his analysis, he included not only her lumbar condition after the 2006 fusion and her psychiatric condition, but also her subsequent 2007 cervical fusion. So his opinion does not support a PTD award based on the primary injury alone or in combination with her pre-existing conditions.

The credible evidence establishes that Claimant is entitled to an award of PPD for the April 28, 2003 work injury. Based on the competent evidence and Missouri law, Claimant suffered a 30% PPD to the BAW related to her lumbar spine. Based on only expert opinion offered regarding psychiatric injury, Claimant also sustained a 1% PPD to the BAW for psychiatric injury.

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SIF Liability

The Credible evidence establishes that Claimant is entitled to an award of PPD for the April 28, 2003 work injury in combination with her pre-existing disabilities from the SIF. Ratings for Claimant's pre-existing disabilities were provided only by Dr. Cohen, and those ratings were un rebutted. Dr. Cohen's ratings regarding pre-existing disability are found to be credible.

Past Medical

The claim for past medical was based on treatment provided after December 8, 2003. The treatment provided after December 2003 was not necessary to cure and relieve the effects of the April 28, 2003 primary work injury. The claim for payment of past medical is denied.

Future Medical

Dr. Cohen's opinions regarding future medical benefits are primarily related to Claimant's condition subsequent to December, 2003. Claimant has failed to prove her need for future treatment flows from the primary work injury of April 28, 2003.

Mileage Reimbursement

Claimant reached maximum medical improvement on December 3, 2003; Employer/Insurer is liable to Claimant for reimbursement of miles traveled for related medical treatment from the date of her injury through the date of maximum medical improvement. Exhibit WWW indicates Claimant traveled 1,491.48 miles during that period, at the prevailing mileage rate for 2003 of \$.36 per mile; Employer/Insurer is liable for \$536.93 in mileage reimbursement.

Exhibit WWW also indicates miles traveled by Claimant to her medical evaluations with Doctors Kitchens and Bernardi. As those evaluations were done pursuant to Employer/Insurer's request, Employer/Insurer would be liable for reimbursement of mileage incurred in Claimant's attending those visits. Exhibit WWW indicates Claimant traveled 215.84 miles in 2004 and 113.3 miles in 2009. At the prevailing mileage rates for those years, Employer/Insurer is liable for an additional \$143.26 in mileage reimbursement.

TTD

The claim for additional TTD is based upon the period of time after Claimant left her employment at Haines until she reached MMI from the 2006 fusion surgery. Since Claimant reached MMI for the primary work injury of April 28, 2003 in December of 2003, she has not met her burden of proof that she is entitled to any additional TTD benefits.

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Attorney Mark Rudder is granted a lien in the amount of 25% of this Award as attorney fees for necessary legal services provided.

Made by: /s/ GRANT C. GORMAN
GRANT C. GORMAN
Chief Administrative Law Judge
Division of Workers' Compensation