

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

Injury No.: 08-076096

Employee: Judith Harlan
Employer: Kritter Tracks & Mel's Hard Luck Diner (Settled)
Insurer: Guarantee Insurance Company (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 December 3, 2013. The award and decision of Administrative Law Judge Margaret Ellis Holden, issued December 3, 2013, 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 2nd day of May 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Judith Harlan Injury No. 08-076096
Dependents: N/A
Employer: Kritter Tracks & Mel's Hard Luck Diner
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Guarantee Insurance Company
Hearing Date: 8/22/13 Checked by: MEH

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: 8/16/08
5. State location where accident occurred or occupational disease was contracted: TANEY 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:
CLAIMANT FELL OFF A LADDER LANDING ON HER LEFT HAND.
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: LEFT WRIST
14. Nature and extent of any permanent disability: 50%
15. Compensation paid to-date for temporary disability: \$30,769.75
16. Value necessary medical aid paid to date by employer/insurer? \$147,392.15

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$330.69
- 19. Weekly compensation rate: \$220.46
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: N/A

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

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$0) payable by SIF for 87.5 weeks, beginning 10/11/11,
and, \$220.46 thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded:

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:

RYAN MURPHY

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Judith Harlan Injury No. 08-076096
Dependents: N/A
Employer: Kritter Tracks & Mel's Hard Luck Diner
Additional Party: Treasurer of Missouri, as the Custodian of the Second Injury Fund
Insurer: Guarantee Insurance Company
Hearing Date: 8/22/13 Checked by: MEH

The parties appeared before the undersigned administrative law judge on August 22, 2013, for a final hearing. The claimant appeared in person represented by Ryan Murphy. The employer and insurer did not appear as the claim against the employer and insurer was previously settled. The Second Injury Fund appeared represented by Catherine Goodnight.

The parties stipulated to the following facts: On or about August 16, 2008, Kritter Tracks & Mel's Hard Luck Diner, was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Guarantee Insurance Company. On the alleged injury date of August 16, 2008, Judith Harlan was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. On or about August 16, 2008, the claimant sustained an accident which arose out of and in the course and scope of employment. The accident occurred Branson, Missouri. The claimant notified the employer of her injury as required by Section 287.420 RSMo. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the accident, the claimant's average weekly wage was \$330.69, sufficient to allow a compensation rate of \$220.46 for temporary and permanent total disability compensation, and for permanent partial disability compensation. Temporary disability benefits have been paid by the employer and insurer to the claimant in the amount of \$30,769.75. The employer and insurer

have paid medical benefits in the amount of \$147,392.15. The parties agree that claimant reached maximum medical improvement on October 11, 2011. The employer and insurer settled their claim with the claimant for permanent disability as a result of the August 16, 2008, injury for 50% of the left wrist. The attorney fee being sought is 25%.

ISSUES:

1. The nature and extent of permanent disabilities.
2. The liability of the Second Injury Fund for permanent total disability or enhanced permanent partial disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant is 66 years old. She graduated from high school but has no college or post high school training. She is married and lives in Sherwood, Arkansas. She was ambidextrous before August 16, 2008.

After her husband retired, they decided to come to Branson, Missouri and work at Silver Dollar City. They would rent a condo and each worked during the season the park was open. She did this from 1999 to 2008. He worked there longer. Due to some physical difficulties, she went to work for Kritter Tracks, the employer, after leaving Silver Dollar City. The employer has several shops in a complex. She worked in the same position in different shops, mostly the Villages and the Bookstore. Her duties included being a clerk, cashier, and working on the displays. Working on the displays included setting them up, taking them down, replenishing them, periodic cleaning, and special displays of new merchandise.

She said that she had trouble doing these displays because of the condition of her hands. She had trouble handling some of the larger pieces and trouble picking up some of the smaller pieces.

On August 16, 2008, she was working on a display. She had to climb onto a six foot ladder to reach the display. She was putting a piece on the display to her left when she lost her balance and fell backwards onto her left hand, bending it backwards. This injured her left fingers, hand, wrist and elbow.

As a result of her work injury she had a total of five surgeries to her left wrist and injections. She settled her claim with the employer and insurer for 50% of the left wrist.

Prior to the injury she was ambidextrous and used both hands. Now she cannot use her left hand and mainly uses her right. She has not been able to return to work since the injury.

Prior to the work injury, she had several preexisting conditions, bilateral carpal tunnel syndrome, gout, a thyroid condition, high blood pressure, and rheumatoid arthritis.

The bilateral carpal tunnel problems began in the 1980's. She had bilateral carpal tunnel release surgery to both wrists. This relieved her symptoms somewhat, but she continued to have pain and weakness. This affected her daily activities and changed the way she worked in that she could not lift as much and her hands would get tired. I find that her bilateral carpal tunnel syndrome condition constituted a hindrance or obstacle to employment at the time of the last injury.

She was diagnosed with gout about 2003. She has taken daily medication since. This does not control her condition all the time and she will have flare ups. When this happens her foot becomes very painful, swollen and red. She cannot stand anything to touch it and she has to elevate it. She cannot wear shoes and socks during these flare ups. There is no set pattern to these flare ups and the frequency varies. Sometimes she will have two to three a year and sometimes more. These flare ups last three days to a week. This affected her ability to do her job in that she would miss work and could not wear shoes during the flare ups. I find that her gout condition constituted a hindrance or obstacle to employment at the time of the last injury.

The thyroid condition developed in the 1970's. She has had surgery and takes daily medication. If her thyroid gets imbalanced she will have to have blood work performed every three months and adjust her medication. When it is out of balance the symptoms vary, depending on whether it is too high or too low. These include hair loss, rapid heart beat, feeling jittery, swelling, and extreme fatigue. Sometimes her fatigue will cause her to fall asleep when she sits down. This affected her employment before August 2008. She would have to work shorter hours and take more breaks when she was tired. She also missed work because of it. I find that her thyroid condition constituted a hindrance or obstacle to employment at the time of the last injury.

She was diagnosed with high blood pressure about ten years ago. She takes three different medications for this condition. Her symptoms are controlled to a point. If she is under stress it will flare up. If she overexerts it will cause her to be short of breath. She was working at Silver Dollar City when she was diagnosed. Walking up the hills or stairs at the park caused her shortness of breath as well as chest pain. She would have to stop and rest until her heart beat slowed. She asked permission to work shorter hours, take extra breaks, and not work every day. I find that her high blood pressure condition constituted a hindrance or obstacle to employment at the time of the last injury.

She was diagnosed with rheumatoid arthritis in the 1990's. This affects her neck, shoulders, elbows, wrists, hands, fingers, hips, both knees, both ankles, and both feet. It has caused her hands to become deformed. She is in constant pain and has trouble getting out of a chair. Also, she cannot stand very long and has trouble walking and climbing stairs. She cannot lift her arms and it is difficult for her to bend. She takes daily medication for this condition. Before August 2008 it affected her employment and it got to the point she could not do her duties at her job. Her doctor gave her restrictions. She had to take shorter hours, be off her feet

every 30 to 45 minutes, and take several breaks. The doctor put her restrictions in a letter to her employer and the employer accommodated her. I find that her rheumatoid arthritis condition constituted a hindrance or obstacle to employment at the time of the last injury.

Before the last injury of August 16, 2008, claimant's husband had taken over the household duties. Because it was hard for her to pour milk or to handle the pans, her husband would help her and lift and pour contents from the pans. He did the cooking, sweeping, mopping, and changed the bed.

Claimant worked between thirty to forty hours a week for the employer. The employer was very accommodating. She testified that she cannot go back to work because she cannot use both of her hands. The rheumatoid arthritis has worsened since her injury and continues to progress. She has had treatments since late 2006. She does this in Little Rock, Arkansas and would have to miss work to attend.

Claimant reached MMI on October 11, 2011.

On September 27, 2012, Dr. Robert Paul examined claimant. He testified by deposition. Dr. Paul found that as a result of her work injury the claimant is left with a "virtually useless left arm except for carrying 5 pounds or less. The fine motor skills have been diminished secondary to disuse as well as to restrictions with respect to her wrist and hand actions. Her condition in her left wrist is complicated by the inception of traumatic osteoarthritis." He imposed permanent disability of 50% of the left wrist as a result of her work injury and preexisting disability of 25% of the body as a whole for rheumatoid arthritis, 10% of the body as a whole for metabolic problems including high blood pressure and thyroid, and 15% to the right wrist for carpal tunnel. Nevertheless, he concluded that the claimant was 100% permanently and totally disabled by virtue of the last injury and her preexisting disabilities.

Dr. Paul testified that as part of his report he prepared a Functional Ability Statement. In this he limited her standing or walking to 30 minutes continuously; continuous sitting for 45 minutes; change position every 15 minutes; lift less than one pound with her left hand; lift less than eight pounds with her right hand; to never climb, balance, stoop, kneel, crawl, or crouch; to reach, handle, finger, or feel occasionally with her right hand only, but never on the left. He also said that she is to lie down for approximately 30 minutes during the day to relieve pain.

Phil Eldred, a certified vocational rehabilitation counselor, evaluated the claimant on January 15, 2013. In addition to his interview of the claimant he reviewed medical records and performed testing. Mr. Eldred testified that claimant was at the less than sedentary work level according to the restrictions imposed by Dr. Paul. Mr. Eldred pointed out two special considerations applicable to the claimant. The first is that the alternating sitting and standing and walking is due to her rheumatoid arthritis and that “she would not be able to sit long enough to fully incorporate the activities of sedentary employment.” The second special consideration was the reaching, handling, fingering and feeling restrictions. He said “approximately 92 percent of all jobs require the reaching and handling and fingering. And this is required in just about all jobs.”

He testified that claimant had impairment that was vocationally disabling prior to August 16, 2008, “she had an impairment based on her rheumatoid arthritis which would have prevented her from doing certain things in regard to her jobs, irregardless of restrictions given by medical physicians.” He found this to be a hindrance or obstacle to employment. Mr. Eldred concluded that the claimant was permanently and totally disabled as a result of the last injury in 2008 combined with her preexisting disabilities.

After carefully considering all of the evidence I make the following rulings:

1. The liability of the Second Injury Fund for permanent total disability.

Section 287.220.1 RSMo states that when an employee has a preexisting permanent partial disability sufficient to constitute a hindrance or obstacle to employment and subsequently sustains a compensable work injury resulting in additional disability, and these disabilities combine to create an additional permanent disability, the employer, at the time of the last injury, shall be responsible only for the degree or percentage of disability resulting from the last injury. After the disability from the last injury, standing alone, has been determined, the degree of disability attributable to all the injuries sustained is determined. The degree of disability from the last injury is deducted and the Second Injury Fund is liable for the balance. If the last injury, combined with prior injuries or disabilities, results in the claimant being unable to compete in the open labor market, and is thus permanently and totally disabled, the minimum standards for disability do not apply. If the claimant is found to be permanently and totally disabled, the Second Injury Fund is liable for benefits after the completion of payment by the employer for the disability due to the last injury.

I find that prior to August 16, 2008, claimant had injuries that constituted a hindrance or an obstacle to employment; namely, bilateral carpal tunnel syndrome, gout, a thyroid condition, high blood pressure, and rheumatoid arthritis. As a result of the last injury of August 16, 2008, she sustained an injury to her left wrist. The extent of disability of claimant for the last injury of 50% of the left wrist as reflected in the Stipulation for Compromise Settlement entered into by the claimant and employer and insurer.

Based upon the testimony of Dr. Paul and Mr. Eldred, I find that the claimant is unable to compete in the open labor market as a result of the combination of these prior injuries and the injury to his back that is the subject of this claim. Therefore, I find that the Second Injury Fund is liable for permanent total disability. The claimant settled his claim against the employer and insurer for a total of 87.5 weeks representing 50% of the left wrist at the 175 -week level. I find

that the claimant was at maximum medical improvement as of October 11, 2011. Accordingly, the Second Injury Fund shall pay no weekly differential for 87.5 weeks beginning October 11, 2011, and then \$220.46 weekly for claimant's lifetime.

Attorney for the claimant, Ryan Murphy, is awarded an attorney fee of 25%, which shall be a lien on the proceeds until paid. Interest shall be paid as provided by law.

Made by: /s/ Margaret Ellis Holden
Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation