

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

Injury No.: 09-022133

Employee: Barbarita Espinosa Hernandez
Employer: Triumph Foods, LLC
Insurer: Traveler's Indemnity Company of America

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 September 3, 2010. The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued September 3, 2010, 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 17th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Barbarita Espinosa Hernandez

SEPARATE OPINION
CONCURRING IN PART AND DISSENTING IN PART

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to award more benefits to employee.

Employer concedes that employee's right hand and left shoulder injuries are compensable. The only issues at hearing were the nature and extent of disability and whether employee should receive an additional award for disfigurement. Given the credible medical evidence, expert opinions, and lay testimony, I believe the administrative law judge's award of only 22% permanent partial disability referable to the proximal joints of the right long and ring fingers is too conservative and fails to take into account the severity of employee's ongoing symptoms and their impact on her everyday life and ability to work. I also disagree with the administrative law judge's decision to deny employee's left shoulder claim. I am convinced the administrative law judge's ratings and award are contrary to the evidence and based on findings that are unsupported by the record.

Employee, a native of Cuba, is conversant only in Spanish. At the hearing before the administrative law judge, employee testified with the assistance of an interpreter. Employee worked on employer's meat-processing line. Her work involved the continuous gripping and forceful pushing of a wizard knife. She sustained right hand injuries as a result of this repetitive movement. Employee suffered pain in the palm of her hand and locking of her fingers. Employer put her on a different task and provided treatment in the form of ice packs and pain medications. When employee's symptoms failed to improve, employer sent her to Dr. DiStefano, who diagnosed triggering of the right long and ring fingers. Dr. DiStefano performed trigger finger releases on March 23, 2009, but employee continued to experience severe pain, swelling, and loss of strength in her right hand and arm. A month after surgery, employee was unable to move her fingers and was experiencing pain that she rated at 8 out of 10. Employee also began to experience pain in her left shoulder as a result of the modified work she was doing for employer. Employee reported left shoulder pain to Dr. DiStefano, as recorded in the notes from his April 17, 2009, examination. Employee also reported left shoulder pain to the medical department at employer's plant but was sent away with pain medications. No further treatment was authorized for the left shoulder.

Employee eventually left her job with employer because she was unable to keep up with the work due to her right hand and left shoulder symptoms. On July 1, 2009, employee went to work for another meat processing plant, where she is limited by her ongoing symptoms and disabilities to essentially one-handed work. To perform her duties, employee is relegated to using her left hand and arm to slide meat items weighing about 2 pounds along a table top. The heaviest work employee can manage with her right hand is to occasionally place a sticker on a meat product using only her right index finger and thumb.

Employee: Barbarita Espinosa Hernandez

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Employee last saw Dr. DiStefano on July 3, 2009. At that visit, employee was unable to make a fist with her right hand and had swelling on the top of her hand. The incisions from the surgery remained tender. There was no interpreter present at this visit, and Dr. DiStefano obviously misunderstood the severity of employee's ongoing symptoms, as his notes indicate he believed employee was "doing well" with only minimal pain. Employee credibly testified that she couldn't understand what was being said during the visit. As a result of his mistaken understanding of employee's symptoms, Dr. DiStefano provided a nominal rating of only 2% permanent partial disability of employee's long and ring fingers. Dr. DiStefano apparently did not do any grip strength testing.

Employee was evaluated by Dr. Zimmerman, who opined that employee suffered a significant loss of function of the right hand, which he rated as 50% permanent partial disability referable to the wrist. Dr. Zimmerman also examined employee's left shoulder and found that she sustained chronic capsulitis as a result of her work for employer. Dr. Zimmerman opined that employee sustained a 20% permanent partial disability of the left shoulder. Dr. Zimmerman's opinion that employee sustained permanent partial disability to her left shoulder has not been contested by any other medical expert.

According to § 287.190.6 RSMo, "[p]ermanent partial disability' means a disability that is permanent in nature and partial in degree ..." The court in *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo. App. 2001) stated that "[t]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." *Id.* at 626 (citations omitted), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). It is well established in Missouri that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. See *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo. App. 1989), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

I dissent because I believe the administrative law judge's award of only 22% permanent partial disability of the proximal joints of the right long and ring fingers is inadequate given the seriousness of employee's injuries and her ongoing complaints. I believe the administrative law judge overlooked competent, substantial, and uncontested evidence relevant to the nature and extent of employee's permanent partial disabilities. For example, employee testified that she remains symptomatic and significantly disabled in her daily activities as a result of her right hand injury. Employee takes 8 ibuprofen pills everyday for pain. She performs all of her work for her new employer using only her left hand and arm, as she is unable to fully extend the fingers on her right hand and is unable to make a fist. Employee had to learn to write with her left hand due to her inability to write legibly with the right hand, and is unable to dress herself or fix her hair using her right hand. She requires help with cooking and is unable to sweep with a broom. Employee's testimony as to her current complaints and medical condition was undiminished on cross-examination by the employer and the administrative law judge specifically found employee to be a credible witness.

Employee: Barbarita Espinosa Hernandez

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But the administrative law judge apparently ignored all of the foregoing evidence, as the award contains no discussion of the effect of employee's ongoing pain and disabilities on her daily life or on her work duties. Nor, for that matter, is there any real explanation or discussion as to why the administrative law judge chose 22% of the proximal joints of the right long and ring fingers as a proper rating of employee's conditions. As a result, the rating appears wholly arbitrary.

The administrative law judge also denied compensation for employee's left shoulder complaints, dismissing the findings of Dr. Zimmerman in favor of his own personal opinion that employee did not sustain any left shoulder disability. The administrative law judge reached this conclusion based, in part, on a finding that employee never sought treatment for her left shoulder. This finding is contrary to the evidence. Employee testified that she asked employer's medical personnel for left shoulder treatment but she was sent away with ibuprofen. As noted above, the administrative law judge expressly found employee to be a credible witness, so it appears that this portion of employee's testimony was overlooked or ignored. As a result, the administrative law judge's rejection of Dr. Zimmerman's opinion has no basis in the record and I am convinced it should be reversed. Employee testified that her left shoulder still bothers her and that it interferes with her sleep at night. While I find Dr. Zimmerman's rating somewhat excessive in light of the evidence, I believe employee is entitled to an award of 5% permanent partial disability of the left shoulder.

In sum, I am convinced the administrative law judge (and the majority) improperly minimized or wholly overlooked the uncontested evidence of employee's current complaints and their effects on her daily life and the performance of her work duties. Based upon the entire record, including Dr. DiStefano's records, Dr. Zimmerman's report, and employee's credible testimony, I find employee sustained a 50% permanent partial disability referable to the proximal joints of employee's right long and ring fingers. In addition, I find employee sustained a 5% permanent partial disability referable to the left shoulder.

I would modify the award of the administrative law judge to grant additional permanent partial disability benefits in accordance with the findings I have outlined above. For the foregoing reasons, I respectfully disagree with the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: **Barbarita Espinosa Hernandez** Injury No. **09-022133**

Employer: **Triumph Foods, LLC**

Insurer: **Traveler's Indemnity Company of America**

Hearing Date: **August 9, 2010** Checked by: **NGA**

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: **January 28, 2009**
5. State location where accident occurred or occupational disease was contracted: **St. Joseph, Buchanan 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: **Employee was using a Wizard Knife to cut meat and fat from the carcasses of hogs in a repetitive manner.**
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: **Claimant's middle and ring fingers of her right hand.**

14. Nature and extent of any permanent disability: **22% of proximal joints of long and ring fingers of right hand or 8.8% of right hand.**

15. Compensation paid to-date for temporary disability: **None**

16. Value necessary medical aid paid to date by employer/insurer? **\$3,222.32**

17. Value necessary medical aid not furnished by employer/insurer? **None**

18. Employee's average weekly wages: **N/A**

19. Weekly compensation rate: **\$352.07 / \$352.07**

20. Method wages computation: **By Stipulation**

COMPENSATION PAYABLE

21. Amount of compensation payable:	
for permanent partial disability 15.4 weeks x \$352.07 =	\$5,421.87
for disfigurement allowance: 2 weeks x \$352.07 =	<u>\$ 704.14</u>

22. Second Injury Fund Liability: **N/A**

TOTAL: \$6,126.01

23. Future requirements awarded: **N/A**

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: **Daniel L. Smith.**

FINDINGS OF FACT and RULINGS OF LAW:

Employee: **Barbarita Espinosa Hernandez** Injury No. **09-022133**

Employer: **Triumph Foods, LLC**

Insurer: **Traveler's Indemnity Company of America**

Hearing Date: **August 9, 2010** Checked by: **NGA**

EXHIBITS

Claimant offered the following exhibits which were admitted in evidence without objection, provided the depositions were admitted subject to objections contained in the depositions:

- A. St. Francis Hospital & Health Services / Dr. Thomas V. DiStefano Report
- B. St. Francis Orthopedic & Sports Medicine / Dr. DiStefano Medical
- C. Dr. Daniel D. Zimmerman Report
- D. WITHDRAWN / 4/10/09 Letter to Ins. Adjuster

Employer/Insurer offered the following exhibits which were admitted into evidence without objection:

- 1. St. Francis Orthopedic & Sports Medicine / Dr. DiStefano Report & Medical

ISSUES

Prior to presenting evidence, the parties stipulated the issues to be determined by this hearing are:

- 1. What is the nature and extent of claimant's disability;
- 2. Assessment of claimant's disfigurement allowance.

The parties agreed that on January 28, 2009, Barbarita Espinosa Hernandez was an employee of Triumph Foods, LLC. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation law and was fully insured by Traveler's Indemnity Company of America.

The parties further agreed that on January 28, 2009, the claimant sustained an injury by accident or occupational disease arising out of and in the course of her employment. The employer had proper notice of claimant's injury and a Claim for Compensation was timely filed.

The parties also agreed medical aid has been paid in the amount of \$3,222.32. The claimant is not asking for any past or future medical aid. The agreed rate of compensation was \$352.07 per week for both temporary disability and permanent partial disability.

The claimant is 43 years old. She is a native of Cuba and only speaks Spanish. She came to the USA in 2008 and started to work at Triumph on November 11, 2008. I found her to be a believable witness.

Her duties at Triumph required her to use a Wizard knife with her right hand. She would trim and cut meat and fat from the carcasses of hogs. She claimed that the cutting caused the knife to become dull and she would have to use considerable pressure with her right hand.

Mrs. Hernandez said that this caused her right hand and arm to hurt. On January 28, 2009, the ring and middle finger of her right hand locked up. She said her right arm hurt up to her shoulder.

The claimant reported her injury to the Triumph Health Services Department and was started on standard conservative treatment protocol. The employer claims the claimant was moved to a light duty position.

Mrs. Hernandez disputes that this was not a light duty position. She was required to use her left arm to reach above her head to remove grease from a carcass. She said this caused her left shoulder to become painful.

Triumph sent the claimant to Dr. Thomas V. DiStefano on March 13, 2009. At the visit, she was accompanied by a company nurse who spoke Spanish and would act as an interpreter.

Dr. DiStefano performed a trigger release to her right long and ring finger on March 23, 2009. Mrs. Hernandez returned to work at Triumph only two days later. She voluntarily quit her job at Triumph on April 19, 2009. On April 17, 2010, she did complain of shoulder pain to Dr. DiStefano. He said she never complained of shoulder pain to him prior to this.

The last time the claimant saw Dr. DiStefano was July 3, 2009. She attended the meeting without a company nurse or an interpreter because she was not employed at Triumph anymore. No doubt there was a communication problem but nevertheless, she was released to regular duty with no restrictions.

He said the claimant told him she was doing well with no problems or complaints. She said otherwise and said she advised him of her left shoulder problem.

Dr. DiStefano rated the claimant as having permanent partial disability of 2% of the right long finger and 2% of the right ring finger. He did not mention her shoulder.

Dr. Daniel D. Zimmerman, MD, examined the claimant on July 28, 2009. He found, due to permanent residual of triggering affecting the claimant's right hand with Dupuytren's

contractures and range of motion limitation, Mrs. Hernandez has sustained permanent partial disability of 50% of the right wrist.

He then found due to chronic capsulitis affecting the left shoulder causally related to attempting to perform work duties at Triumph Foods, the claimant has sustained a 20% permanent partial disability to the left shoulder.

He then combined the left shoulder and right wrist at around a permanent partial disability of 33.5% body as a whole.

Dr. Zimmerman found that Mrs. Espinosa's condition was stable. He did not believe further diagnostic or therapeutic intervention is warranted.

Neither Dr. Zimmerman nor Dr. DiStefano has provided a rating which I believe to be a realistic figure.

The claimant has never received any medical treatment to her left shoulder other than mentioning a sore shoulder to Dr. DiStefano on one occasion. She has never sought medical treatment to her left shoulder. I find it significant that Dr. Zimmerman did not recommend any medical treatment to her left shoulder. I do not believe there is any permanent partial disability to the claimant's left shoulder. Claimant's claim for disability to her left shoulder is denied.

I find and believe from the evidence that the claimant, as a result of her repetitive use of her right hand, while employed at Triumph Foods, has sustained a permanent partial disability of 22% of the proximal joints of her right long and ring fingers or 8.8% of the right hand.

I order and direct the employer to pay to the claimant the sum of \$352.07 per week for 15.4 weeks for a total of \$5,421.87.

I also assess two weeks of compensation or \$704.14 for disfigurement allowance for a grand total of \$6,126.01.

Daniel L. Smith is hereby assigned a lien in the amount of 25% of this award for necessary legal services provided to the claimant.

Date: September 3, 2010

Made by: /s/ Nelson G. Allen

Nelson G. Allen

Chief Administrative Law Judge

Division of Workers' Compensation

This Award is dated and attested to this 3rd day of September 2010.

/s/ Naomi Pearson

Naomi Pearson

Division of Workers' Compensation