

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

Injury No.: 03-084699

Employee: Donna Johnson
Employer: Good Humor – Bryers (Settled)
Insurer: Broadspire (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 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 July 15, 2009. The award and decision of Administrative Law Judge Matthew W. Murphy, issued July 15, 2009, 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 26th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Donna Johnson Injury No. 03-084699
Dependents: N/A
Employer: Good Humor - Bryers
Additional Party: Second Injury Fund
Insurer: Broadspire
Hearing Date: 4/20/2009 Checked by: MM/kh

SUMMARY OF FINDINGS

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? July 10, 2003
5. State location where accident occurred or occupational disease contracted: Sikeston, Scott 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 happened or occupational disease contracted: Employee was injured while working as a hand packer for the above

Employee: Donna Johnson

Injury No. 03-084699

referenced employer. A co-employee slipped in popsicle juice, collided with a table and the table collided with Employee resulting in an injury to her left knee and lower back.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left knee and lower back.
14. Nature and extent of any permanent disability: 15% PPD to the left knee and 17.5% PPD to the body as a whole referable to the lower (lumbar) back.
15. Compensation paid to date for temporary total disability: \$0.00
16. Value necessary medical aid paid to date by employer-insurer: \$17,414.85
17. Value necessary medical aid not furnished by employer-insurer: \$0.00
18. Employee's average weekly wage: \$349.60
19. Weekly compensation rate: \$233.07 for TTD and PTD benefits and \$233.07 for PPD benefits.
20. Method wages computation: Stipulation.
21. Amount of compensation payable: \$1,957.79
22. Second Injury Fund liability: \$1,957.79
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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: Kim Heckemeyer.

FINDINGS OF FACT AND RULINGS OF LAW

On April 20, 2009, the employee, Donna Johnson, appeared in person and by her attorney, Kim Heckemeyer, for a hearing for a final award. The employer was not represented at the hearing. The Missouri State Treasurer as custodian of the Second Injury Fund was represented at the hearing by Assistant Attorney General Frank Rodman. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. Covered Employer - Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully funded by: Broadspire.
2. Covered Employee - On or about the date of the alleged accident or occupational disease, the employee was an employee of Good Humor-Bryers and was working under the Workers' Compensation Act.
3. Accident/Occupational Disease - On or about Thursday, July 10, 2003 the employee sustained an accident arising out of and in the course of her employment.
4. Notice - Employer had notice of Employee's accident.
5. Statute of Limitations - Employee's claim was filed within the time allowed by law.
6. Average Weekly Wage and Rate - Employee's average weekly wage rate was \$349.60. The rate of compensation for temporary total disability and permanent total disability was \$233.07. The rate for permanent partial disability was \$233.07.
7. Medical Causation - Employee's injury was medically causally related to the accident.
8. Medical Aid Furnished - Employer/Insurer has paid medical aid in the amount of \$17,414.85.
9. Temporary Total Disability Paid - Employer/Insurer has paid \$0.00 as temporary total disability benefits for 0 weeks of disability.
10. Previously Incurred Medical - There is not claim for previously incurred medical.
11. Mileage or other medical (287.140 RSMo) - There is no claim for mileage or other medical expenses under 287.140 RSMo.
12. Additional or Future Medical - There is no claim for additional or future medical aid.

ISSUES

1. Permanent Total Disability - Employee is claiming permanent total disability benefits.
2. Permanent Partial Disability - Employee is claiming permanent partial disability benefits.
3. Liability of the Second Injury Fund

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical Records
- B. Deposition of Dr. Cohen
- C. Deposition of Susan Shay
- D. Stipulation

Second Injury Fund's Exhibits

None

SUMMARY OF EVIDENCE

Testimony of Ms. Donna Johnson

Donna Johnson, hereinafter referred to as "Employee", testified at the final hearing of this matter. Employee testified that she was 47 years old and resides in Scott County with a Sikeston address. She attended Bell City High School in Bell City, Missouri. She completed the 10th grade at the age of 17. Upon completion of the 10th grade, Employee left school because she got married. She has not returned to school nor attained a GED. She has not obtained any vocational training or certification. She left school in 1979.

While Employee was attending Bell City High, she was employed at the Bell City Café as a cook and waitress. The dates of employment are from 1977 through 1978. She believes she was employed at Bell City Café for approximately two years. Her duties included waiting tables, cooking burgers, doing dishes, cleaning up, sweeping and mopping. She was approximately 15 to 16 years old at this time period.

While employed at Bell City Café, Employee was suffering from bunions and hammertoe on both feet. She was not under a doctor's because she did not have health insurance. Employee modified her activities by sitting whenever she had the chance and wore shoes that accommodated her condition as much as possible. Employee testified that she could stand for approximately for 30-60 minutes before she had to sit down.

The aforementioned foot problems prevented Employee from participating in volleyball or softball in school. The shoes which she was required to wear were a hindrance to this type of activity. While in high school she could not help out in performing household chores because of her feet. She was working at Bell City Café when she left school and for a few months thereafter. Employee left the work force while she was pregnant. She believes she re-entered the workforce in approximately 1980.

In approximately 1980, Employee moved to New Orleans, Louisiana to work at her sister's bar. Her job duties included waiting on tables, cleaning, vacuuming, sweeping, mopping and cleaning the bathrooms. She did not cook. At the time of this employment, her physical complaints were limited to her feet. Her feet were worse than when she was employed at Bell City Café.

Employee had surgery performed on her feet. She could not recall whether this surgery was performed before or after she moved to Louisiana. Upon further reflection, Employee believed that the surgery did not happen prior to moving to Louisiana because she did not have insurance.

While working with her sister in Louisiana, Employee testified that she had to sit after working for an hour. Employee testified that her average daily foot pain was approximately a 7 or 8 on a scale of 10 during this period. She testified that she did not take any medication and worked at this bar for approximately two years. She then moved back to Missouri.

Upon returning to Missouri, Employee began working at Tri-Con. She made seat covers for Chrysler. Her specific job duties consisted of attaching foam padding to the seat covers. She believes the period of employment was from 1983 through 1984. During this time, her foot complaints were worse than while working in Louisiana. Employee testified that she was unable to perform job duties that required pushing carts too far. She had to modify her duties by not putting as much in each cart. During this time, Employee also had difficulty performing household duties. She had difficulty cooking, doing the laundry, and getting down on her knees to clean the bathtub. She was not under a doctor's care. She stated that the foot problems interfered with her resting and engaging in recreational activities or hobbies. She explained that the sensation she felt was similar to someone trying to pull her toes off. She was unable to wear shoes for a long time and could not go outside to play with her children.

After working at Tri-Con, Employee began working at Smith's Grocery Store. She was employed as a cashier. Her job duties included taking money for purchases, slicing lunchmeat, sweeping and mopping. She states that her foot pain was worse at this time. She believes that her average daily foot pain was approximately an 8 on a 10 point scale. She was not under the care of a doctor because she did not have insurance and she testified that she did not take any pain medication because she could not afford it. She testified that her foot complaints interfered with her ability to sleep and engage in hobbies. She gave the example that when playing with her children outside she had to go barefoot. She believes she left Smith's Grocery Store in approximately 1985.

For a short time, Employee stayed home with her niece and nephew. She continued to have feet problems and described burning and hurting, which was worse than before.

Employee believes that she sought treatment for her feet in approximately 1985. She acknowledges that the records may disagree with her recollection regarding the date of treatment. Dr. Ritter performed a bunion surgery at St. Francis. Employee was shown records that suggested the surgery was performed in 1990 and Employee did not disagree with those dates. She states that she did not undergo physical therapy. Employee complained that her foot problems did not go away after being released by the surgeon. Her post surgical complaints included burning and aching in her toe joints. Her feet continue to interfere with daily activity

after the surgery as they did prior to the surgery. She testified that she could not stand for more than 30 minutes at any one time after the surgical procedure.

Employee testified that she was out of the workforce for some period of time and then began working at the Toddle Inn in Chaffee, Missouri. Employee explained that the Toddle Inn was a bar and she performed bartending duties. She continued to complain of feet problems and had a difficult time wearing shoes. The employee described "the hide was peeling off of" her feet. She continued to have problems performing household chores. She testified that her complaints while working at the Toddle Inn were approximately an 8 on a scale of 10. She had a difficult time standing for any period of longer than 20-30 minutes.

Employee testified that she had a difficult time caring for herself during this period of employment. She gave the examples of difficulty cooking, giving her children baths, sweeping, putting the kids to bed, etc. She worked at the Toddle Inn for approximately one year. She describes her bilateral foot pain as approximately equal on both sides. She did testify that there were periods when one foot would hurt worse than the other.

In 1996, Employee suffered a back injury. She was cooking at home when she bent over to get a pan out of the oven when she felt her back pop. She sought treatment with Dr. Mills. She complained of lower back pain and left lower extremity pain. She treated with Dr. Mills for approximately two months with conservative care and was then referred to Dr. Tellow, a surgeon. Dr. Tellow referred Employee to Dr. Ray. Dr. Ray performed surgery at L4/L5. Employee does not recall any hardware implantation. She did not undergo any physical therapy after the surgery. She believes the surgery was performed in October of 1997. She testified that her back complaints did not go away after the surgery. She continued to have trouble doing work at home and that her back ached all the time. She described her back pain as approximately 6 or 7 on scale of 10. She also testified that she continued to have foot complaints and her feet were getting worse. Employee testified that her left leg pain did subside after the back surgery.

After the back surgery, Employee opened her own restaurant/bar named Red's. The business served beer and food. She did not have any employees. Employee performed all the duties necessary to run the business. Employee does not recall having back pain at this time. She did describe some aching. Employee was experiencing foot pain. Employee stated that she had the same problems as she had previously described plus the additional problem with lifting. Apparently, she self limited the amount of lifting she did as a precautionary measure. She gave the example of lifting beer. She periodically needed assistance stocking the cooler. Her husband would help out at the business approximately three out of every four days. Employee described difficulty with standing for prolonged periods of time. She could not stand for any longer than an hour before she had to sit. She could only walk 30 to 40 feet before she began experiencing problems. Her foot complaints were worse. Red's was open from 1997 to 2001.

During this period her foot and back interfered with her home duties. She had an average daily foot pain of approximately an 8 out of a 10 point scale. Her foot pain interfered with her ability to rest, she felt pain, her feet throbbed, burned, and felt like someone was pulling them apart. She got two to three hours of sleep per night at most. When she couldn't sleep she would get up

and take Tylenol. She described her average daily back pain of approximately a 4 or 5 on a 10 point scale. She had the same problems resting due to her back. Employee closed Red's in 2001. She stated she needed to get a job with medical benefits. Employee describes her foot and back pain as worse at the time of closing Red's as it was when she opened the business. When closing Red's she applied for unemployment, however she was denied.

After closing Red's, Employee began working at Good Humor-Bryers. She was hired as a hand packer. She stood at a line and put ice-cream bars in a box. Her job would rotate to various positions. Sometimes she put boxes in other boxes and other times she counted. When she began working at Good Humor-Bryers, she was experiencing pain in her feet and back. She experienced a burning sensation and corns in her feet. Her back was aching. Employee describes this pain as worse than when she was at Red's Tavern. The above described pain was continuous throughout her tenure at Good Humor-Bryers. She described her average daily foot pain as "sometimes a 9 but mostly close to a 7 or 8 during the day". She was not under the care of a doctor. Employee took ibuprofen every four hours of everyday. She described her average daily back pain as approximately 6 or 7 on a 10 point scale.

Employee suffered her primary injury while working at Good Humor-Bryers. A co-worker by the name of Billy was getting bars off the line to weigh them. Billy slid in popsicle juice, hit a table, and the table hit Employee on the left side knocking her about five feet. Employee immediately felt pain in her left knee and lower back. She described the back pain as being in the same area as the 1997 surgery. Employee reported in the injury and requested medical care on the following day. Pain immediately after the injury to the knee was approximately a 10 point scale. Employee received medical treatment and eventually underwent a surgery performed by Dr. Knight in October of 2003. Eventually, Employee was released at MMI. Employee describes her complaints at MMI as difficulty walking around and aching all the time. She was on light duty for some amount of time during her course of treatment. Employee describes her knee condition as worsening since the surgery. She has problems with household chores because of the knee. The knee injury interferes with her ability to care for herself, i.e. grocery shopping, getting in and out of the shower and dressing herself. Employee describes her average daily knee pain as a 6 on a 10 point scale and continues to take Celebrex.

Employee requested additional care from employer for her back. Employer denied Employee's claim. Employee received care on her own from Dr. Cheung. Dr. Cheung performed a surgery on her lower back which required internal fixation. The surgery was performed in 2003. Since the surgery, Employee's complaints have remained the same. She describes her average daily back pain as a 6 on a 10 point scale. She has difficulty performing household chores because of her back. She states that she cannot operate a vacuum cleaner, grocery shop, sleep or bend over to get laundry. Her husband performs these duties. Her last day of work was October of 2004, at which time she was terminated. Employee applied for unemployment benefits but she was denied. She did not appeal. Employee is currently receiving social security benefits.

Employee was cross examined by Attorney Rodman. Employee had previously submitted to a discovery deposition. While Employee testified at the hearing that she was continuing to have back problems, she testified that she was "doing fine" with no complaints at the time of her

deposition. Employee agreed with Attorney Rodman that her testimony on direct was inconsistent with her deposition testimony.

Employee also was cross examined on the issue of medication. On direct examination, Employee testified that she was taking ibuprofen every four hours of everyday shortly before her primary injury. However, during her deposition, Employee testified that she was only taking blood pressure medication. Again, Employee conceded that the testimony on direct examination was inconsistent with the deposition testimony.

Employee's only full time jobs were with Good Humor-Bryers, Tri-Con and Red's. The rest of Employee's employment was part-time. Employee ran Red's Tavern for about four years as owner, manager and business manager. Employee performed accounting duties including counting the money and keeping the books. Again, Employee acknowledged that her testimony on direct examination was inconsistent with her deposition testimony in that at her deposition she testified that she had an employee while operating Red's. On direct examination, she stated that she had no employees.

Employee closed the business to obtain a job with less hours. She began working at Good Humor-Bryers. Employee testified that she was required to remain on her feet eight hours per day while working Good Humor-Bryers, however, when operating the tavern she had the luxury of sitting or standing at her own schedule since she was the owner.

The primary injury (knee injury) occurred in July of 2003. Employee remained at Good Humor-Bryers through the end of 2004 or early 2005. While at Good Humor Breyer, Employee was required to lift 20 pounds or more. She lifted tubes, boxes and cartons. Until July of 2003, Employee was able to perform these duties without accommodations. Dr. Cheung gave Employee a 15 pound lifting restriction. Dr. Ray gave Employee a 50 pound restriction but it does not appear that that restriction was permanent. Employee testified that the blood pressure medication did not interfere with her ability to work.

When cross examined regarding her feet, Employee testified that her pain was between a 7 and 9 on a 10 point scale, however she did not take any pain medication. She also testified that she had not received any treatment since the treatment rendered by Dr. Ritter in 1990.

Employee described her examination with Dr. Cohen. Dr. Cohen examined Employee for approximately 45 to 60 minutes. Dr. Cohen did not provide any treatment. Employee testified that she could read and write and had no problems with her arms. Employee testified that she could drive.

Employee has undergone an additional surgery to her feet since the July 2003 primary injury. Dr. Protzel has treated Employee's hammertoe. The surgery included internal fixation.

On redirect examination, Employee testified that periodically required the assistance of co-workers prior to her 2003 injury. For example, if the line got backed up or Employee was required to push heavy buckets, she would then seek the assistance of her co-workers. Employee testified that she could only push the light buckets.

This concluded Employee's testimony.

Dr. Raymond Cohen

Dr. Cohen testified by deposition on behalf of claimant. Dr. Cohen did not treat Employee.

Dr. Cohen met and examined Employee. Employee gave a history of a knee and lower back injury occurring on July 10, 2003. She explained that a co-worker slipped and fell on some popsicle juice, slid into a stainless steel table causing the table to collide with Employee. Another co-worker caught Employee preventing her from falling to the ground. Employee described the areas of concern as her low back and left knee. She complained that she continued to have pain in her low back and was on a 15 pound lifting restriction imposed by Dr. Cheung. She continued to take Tylenol and ibuprofen for pain in her knee. She stated that she could not kneel or squat and she had constant aching in her left knee. The pain increased with inclement weather.

Employee also gave a history of pre-existing conditions. Employee described the 1991 lumbar surgery to Dr. Cohen. She told Dr. Cohen that she had recovered from the surgery and had no ongoing problems referable to her back. She had no back or leg symptoms after her 1991 surgery. Employee described her prior feet problems. Employee told Dr. Cohen that she had bunions on both feet for 13-14 years. She had had surgery many years ago for the bunions and she had no problems until 2003. Her feet started to bother her at that time. She had hammertoes and bone spurs. She had the hammertoes and bone spurs repaired in March of 2004 by Dr. Protzel and had surgery on the right foot in May of 2004.

In addition to taking the history, Dr. Cohen reviewed the numerous medical records relative to Employee's care.

Dr. Cohen provided the opinion that the knee injury and resulting surgery as well as the low back injury and resulting surgery were substantially caused by her employment at Good Humor-Bryers. Dr. Cohen also opined that Employee had a 35% permanent partial disability of the whole person at the level of the lumbar spine, 25% permanent partial disability at the left knee, a pre-existing 15% body as a whole disability due to the lumbar spine and 20% permanent partial disability at the left foot and right foot for her pre-existing feet problems.

Ms. Susan Shea

Ms. Susan Shea, a vocational expert, testified by deposition on behalf of Employee. Ms. Shea met with Employee and took a social and family history from Employee as well as an educational and vocational history from Employee. These histories revealed information similar to that which Employee testified to live at the hearing of this matter. Ms. Shea opined that Employee is unemployable in the open labor market.

Medical Records

Employee offered numerous medical records to support her claim. These records document the post-injury treatment for her knee, back and foot complaints. Additionally, there are records which document her pre-injury back complaints and treatment. The Court has reviewed the entire medical record, however, they will not be summarized herein. The records speak for themselves. Those portions of the medical records that are found to be salient to the issues before the Court will be discussed in the Findings of Fact and Rulings of Law, *infra*.

FINDINGS OF FACT AND RULINGS OF LAW:

Issues 1, 2 and 3: Liability of Second Injury Fund and Nature and Extent of that Liability/Disability

The issues presented for consideration are the issues of Second Injury Fund liability and whether that liability is for PPD benefits or PTD benefits. Second Injury Fund liability is found at **§287.220**¹. As the parties are well aware, in order for an administrative law judge or the commission to find Second Injury Fund liability, “a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have result from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability.” **Uhlir v. Farmer, Treasurer of the State of Missouri**, 94 S.W.3d 441, 444 (Mo App. 2003) (*internal citations omitted, overruled on other grounds*). With regard to the first enumerated way to establish Second Injury Fund liability, the claimant must establish that the prior injury and the subsequent injury meet a minimum thresholds which, “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”. **§287.220**. With regard to the second enumerated way of establishing Second Injury Fund liability, the aforementioned minimum thresholds do not apply. *Id.*

Employee has previously settled her primary or subsequent injuries against Employer for 15% PPD of the left knee at the 160 week level and 17.5% of the body as a whole referable to the lower (lumbar) back. Said settlement was memorialized on a Stipulation for Compromise Settlement and approved by Judge Tilley on June 12, 2008. There is nothing in the record which would provide any basis for disturbing those PPD settlements. Therefore, it is found that the disabilities suffered by Employee as a result of the subsequent or primary injuries are consistent with the June 12, 2008 settlement. The disabilities for the primary or subsequent injuries clearly meet the statutory minimum threshold required by **§287.220**.

The remaining questions to be decided by the Court are:

1. Do either or both of the previous disabilities (prior feet problems and prior back surgery) meet the statutory minimum threshold and combine with the subsequent injuries resulting in a greater overall disability than that which would have resulted from the new injury alone and of itself, or;

¹ The primary injuries giving rise to this claim occurred on July 10, 2003. Therefore, this claim is governed by the Workers' Compensation Law prior to the 2005 amendments. All statutory references, unless otherwise specified, are to RSMo. (2000).

2. Do either or both of the previous disabilities combine with the subsequent injuries to render Employee permanently and totally disabled?

Since the burden of proof rests with the claimant, benefits can only be awarded if the Court is persuaded to answer either question in the affirmative. After considering the live testimony of the claimant, the testimony of the experts and the medical records admitted, the Court finds that Employee is entitled to PPD benefits from the Second Injury Fund.

For foundational purposes regarding the remainder of this award, it is important that the timing of Employee's injuries/disabilities is discussed. Employee testified that she had complained of feet problems for some number of years prior to 1990. In 1990 she had a bilateral bunionectomy performed by Dr. Ritter. In 1996, Employee suffered a back injury while bending over in her kitchen. As a result of this injury, she underwent a left L4-L5 laminectomy, left L4 and L5 foraminectomy, and L4-5 discectomy/fusion without graft in 1997. These procedures and their associated disabilities are found to be preexisting injuries/disabilities for the purpose of this claim.

The primary or subsequent injuries for the purpose of this claim are the left knee injury and the L4-5 injury and fusion performed in 2003 and 2004, respectively.

Finally, on March 19, 2004, Dr. Protzel performed a right foot bunionectomy with metatarsal osteotomy and screw fixation, hammertoe correction right fifth toe, and exostectomy right fourth toe. Clearly this procedure was performed after the date of the primary injuries. If, however, the procedure was performed to cure a disability or injury that predated the primary injuries, the disability associated with it would be considered preexisting. The evidence in the record does not support such a finding. Employee testified that she had severe and chronic foot pain throughout her entire working career. This pain was rated between 7 and 9 on a 10 point scale. However, that testimony is not consistent with the other evidence presented at the hearing. On cross examination, Employee testified that in spite of the severe pain that she reports, she did not seek any treatment or take any pain medication. On direct examination, Employee testified that after her 1990 feet procedures, her feet prevented her from standing for any period longer than 20-30 minutes, she had a difficult time caring for herself, could not sweep, she could not put the kids to bed. However, on cross examination, Employee was reminded of her deposition testimony during which she testified that prior to the primary injuries, Employee routinely engaged in activities such as shooting pool, swimming, yard work, and playing ball with the grandkids. Furthermore, the testimony of Dr. Cohen revealed the history given to Dr. Cohen by Employee. Employee told Dr. Cohen "that she was extremely active prior to [the July 2003] injury." She also told Dr. Cohen, "She had surgery many years ago for the bunions and she had no problems until 2003. Her feet started to bother her at that time." Finally, the record contains the records of Dr. Colleen Hunter. On 2/25/2004, Dr. Hunter recorded the following subjective information: "Donna is a 42-year-old female who comes in as a new patient. She is requesting a complete physical exam today and refill on her medications. She has no complaints." A week and a half later, Employee sees Dr. Hunter a second time with the following subjective provided: "Donna is a 42-year-old female who comes in today for complete exam. She also complains of pain in her right shoulder, which has been present for several months. She has tried ibuprofen and naproxen without much relief. She does not remember injuring the shoulder in any way, but

she does have a physical job working at Good Humor as a packer. Otherwise she is without complaints today.” For these reasons, the Court finds Employee’s testimony regarding preexisting foot pain as not credible. Her statements during deposition, to her treating physician and her expert physician are found to be more credible. The March 19, 2004 procedure, the symptoms necessitating the procedure and any disability associated therewith are found to be subsequent to the primary injury. Therefore, such disability shall not be considered for the purpose of this Second Injury Fund claim.

Permanent Total Disability

Claimant introduced the expert testimony of Ms. Susan Shea, a vocational expert. Ms. Shea opined in during her deposition that “[Employee] is unemployable in the open labor market.” While that opinion seems to demonstrate permanent total disability, that is only half of the analysis. In order for there to be Second Injury Fund liability, the permanent total disability must result from the combination of previous disability(ies) with the subsequent or primary injuries. Even if Ms. Shea’s opinion is taken at face value, the deposition testimony does not provide any insight into this part of the analysis. It is unclear as to which disabilities or limitations resulted in the assessment of permanent total disability. Ms. Shea’s testimony does not distinguish between permanent total disability due to the primary injuries alone, the primary injuries combined with one or more of the previous disabilities, the primary injury combined with the subsequent foot procedures and implantation of hardware in one of Employee’s feet or any combination or permutation thereof.

Dr. Cohen testified, “That due to the combination of disabilities, that [Employee] is permanently and totally disabled.” Once again, this opinion does not demonstrate that the permanent total disability is necessarily due to the combination of the primary and preexisting disabilities. As with Ms. Shea’s testimony, it is unclear if the permanent total is due to some combination of the primary injuries, the preexisting injuries, the subsequent foot surgery or some combination thereof. In order for the Employee to establish PTD benefits against the Second Injury Fund, she must demonstrate that the PTD is due to the combination of the preexisting disability and the primary injuries/disability. Dr. Cohen acknowledges that his opinion does not distinguish the preexisting foot disability from the subsequent foot disability: “Q: ... Now, you say 20 percent per foot. You didn’t outline though what part of that was per-existing and what part of that was subsequent to the primary, did you? A. It does not state specifically a division between the two.” Therefore, the reasonable interpretation of his opinion is that the permanent total disability is due, in some part, to the subsequent problems with Employee’s foot. In order for Employee to establish Second Injury Fund liability, Employee must demonstrate that the permanent total disability is due to the preexisting disability combined with the primary injuries and associated disability without regard to the subsequent disability. Dr. Cohen does not provide such an opinion.

Finally, Employee’s presentation at the hearing was not consistent with her testimony. The hearing of this matter took approximately 1.5 hours. Employee sat during the entire hearing. She was made aware of the fact that she could get up to walk around at any time if it was necessary. Employee did not take any such opportunity to do so. When observed standing and

walking, Employee did not exhibit any pain manifestations that would be consistent with the severe foot pain that was alleged.

For the foregoing reasons, Employee's claim against the Second Injury Fund for permanent total benefits is denied.

Permanent Partial Disability

In quoted, *supra*, in order for a claimant to establish a right to Second Injury Fund benefits for permanent partial disability, the claimant must satisfy two requirements for each preexisting disability: (1) it is of sufficient severity to meet the statutory minimum requirements and, (2) the preexisting disability combines with the primary injuries resulting in a greater overall disability than that which would have resulted from the new injury alone and of itself.

Dr. Cohen opined that Employee had a preexisting 20% disability to each foot due to the bunionectomy performed in 1990. However, Dr. Cohen also testified that, with regard to the right foot, some portion of that disability is due to the subsequent foot procedure. Therefore, it is unclear as to how much preexisting disability Dr. Cohen assigns to the right foot. That issue aside, the Court is not persuaded that Employee had a 15% or more disability to each foot due to bilateral bunionectomies. Certainly, Employee's live testimony, taken on its face would provide a basis for finding the statutory minimum thresholds were satisfied, however, as stated, that testimony is found to be not credible. Employee had not sought any treatment for her feet. Employee was not taking any medication for the reported complaints. Employee denied any complaints to her treating general practitioner. Employee denied any complaints to her expert physician (at least until the time of the primary injuries). Employee testified in her deposition that she played sports outside with the children, worked full time on her feet, engaged in standing recreational activities such as billiards, etc. For these reasons, this Court cannot and does not find that the alleged preexisting disabilities of the feet meet the statutory minimum threshold.

Dr. Cohen testified that the preexisting disability to the back due to the 1997 injury and surgery was 15% of the body as a whole. The Court finds that Employee's preexisting disability to the lower back is 15% of the body as a whole due to the injury and the surgical repair and, therefore, meets the statutory minimum threshold. However, the Court also finds that the preexisting back disability only combines with the primary knee injury resulting in a greater overall disability than that which would have resulted from the new injury alone and of itself.

The parties are certainly aware of the so-called "Back on Back Rule". "Indeed, as a general rule where the first and second injuries are to the same part of the body, as in this case, the second supplements the first rather than combining to create a greater disability than the sum of the two." **Searcy v. McDonnell Douglas Aircraft Co.**, 894 S.W.2d 173 (Mo. App. 1995) (*overruled on other grounds*). While that is the general rule, the same body part limitation is not found in **§287.220**. If the claimant can demonstrate the two injuries to the same part of the body do, in fact, produce a synergistic effect, compensation will lie. **Uhlir, supra**. "In the instant case, Respondent's two injuries combined to produce a synergistic effect of greater overall disability pursuant to Section 287.220, despite the fact that the two injuries were to the same part of his body." **Id.** at 445. Although the rule is still applicable in most cases, there are clearly

special circumstances that may justify a finding of a synergistic combination in certain cases. One example of such an exception is when an employee has a pre-existing low back injury that causes pain to radiate down one lower extremity and then subsequently has another accident that injures the employee's low back with pain that radiates down the opposite lower extremity. Under those facts, the evidence might justify a conclusion that the pre-existing injury and the primary injury did cause a synergistic combination because of the involvement of two opposite extremities. Such circumstances do not exist in this case. Prior to the 1997 surgery, Employee complained of radicular pain down her left leg. After the surgery, Employee complained of no pain. Prior to the surgery on the primary back injury, Employee had left leg pain. The situation at hand clearly falls into the general rule that the two back injuries supplement each other but do not combine to create a greater disability than their simple sum.

The combination of the prior back injury and the primary knee injury, based on the testimony of Dr. Cohen, is found to result in disability that is greater than the simple sum of the two disabilities. It is also found that a 10% load factor is appropriate to quantify that synergistic effect. Therefore, the combined disability of the prior back and primary knee is found to be: $(0.15(400) + 0.15(160)) * 1.1 = 92.4$ weeks. The sum of the preexisting disability and the primary knee is found to be: $0.15(400) + 0.15(160) = 84$ weeks. The Second Injury Fund is liable to Employee for the amount of disability over and above the preexisting disability and the primary disability. Therefore the Second injury fund is liable for: $92.4 - 84 = 8.4$ weeks of disability. Using the stipulated compensation rate of \$233.07, the Second Injury Fund is ordered to pay Employee: $8.4 * 233.07 = \$1,957.79$.

CONCLUSION

Based on the live testimony of Employee, the deposition testimony of expert witnesses, and the medical records admitted into evidence, the Court finds that Employee is entitled to, and hereby awards, \$1,957.79 against the Missouri State Treasurer as Custodian of the Second Injury Fund. The award is based on the a combined disability associated with a preexisting permanent partial disability of Employee's back and a primary permanent partial disability of Employee's left knee.

ATTORNEY'S FEE

Kim Heckemeyer, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Donna Johnson

Injury No. 03-084699

Date: _____

Made by:

Matthew W. Murphy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation

Employee: Donna Johnson

Injury No. 03-084699