

FINAL AWARD DENYING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 03-028306

Employee: Paula Johnson  
Employer: Wal-Mart Associates, Inc. (Settled)  
Insurer: American Home Assurance 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 Act. Pursuant to §286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 6, 2008.

The administrative law judge concluded that employee was permanently and totally disabled as a result of the last accident alone and that the Second Injury Fund has no liability. The administrative law judge also indicated that on the date of hearing employer/insurer reached a tentative settlement with employee to resolve all issues for a lump sum.

The Commission approves and affirms the administrative law judge's decision denying Second Injury Fund liability. With regard to the alleged tentative lump sum settlement agreement entered into by employer/insurer and employee, the Commission concludes that there is no evidence in the record indicating that settlement has been approved by an administrative law judge pursuant to §287.390 RSMo.

Additionally, on November 21, 2008, employee filed a Motion to Admit Additional Evidence with the Commission.

The Commission has considered the request to submit additional evidence and finds that the request fails to meet the standards set forth in the Code of State Regulations, Title 8, 20-3.030(2). As stated above, there is no evidence in the record indicating an approved settlement agreement between employer/insurer and employee pursuant to §287.390 RSMo, therefore, the Commission finds the proffered evidence merely cumulative and inadmissible as provided in the Code of State Regulations, Title 8, 20-3.030(2)(A)-6.

Employee's Motion is denied.

Given at Jefferson City, State of Missouri, this 8th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Paula Johnson

Injury No. 03-028306

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: N/A

Employer: Wal-Mart Associates, Inc. (settled)

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

Insurer: American Home Assurance (settled)

Hearing Date: June 11, 2008

Checked by: VRM/meb

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
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: March 29, 2003.
5. State location where accident occurred or occupational disease was contracted: Camden 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 injured dislodging shopping carts.
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: Neck/Shoulder.
14. Nature and extent of any permanent disability: Permanent Total Disability from the last work accident; No liability by the Second Injury Fund.
15. Compensation paid to-date for temporary disability: Not applicable.
16. Value of necessary medical aid paid to date by employer/insurer? \$13,003.87.
17. Value necessary medical aid not furnished by employer/insurer? Not applicable.
18. Employee's average weekly wage: \$119.84.
19. Weekly compensation rate: \$79.90.
21. Method of wage computation: By agreement and evidence.

#### **COMPENSATION PAYABLE**

22. Amount of compensation payable: Not applicable.
23. Second Injury Fund liability: None.
24. Future requirements awarded: Not applicable.

### **FINDINGS OF FACT AND RULINGS OF LAW**

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COMPENSATION**

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

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## INTRODUCTION

The undersigned Administrative Law Judge heard this Workers' Compensation claim on June 11, 2008 in Springfield, Missouri. Jurisdiction is appropriate in Missouri and the parties agreed to venue in Springfield, Missouri, as the employee now resides here. On the date of hearing, Employer Wal-Mart Associates, Inc., and its Insurer American Home Assurance, through its attorney, reached a tentative settlement with Claimant and her counsel to resolve all issues for a lump sum. The parties advised the undersigned Administrative Law Judge that the settlement was awaiting a determination of a Medicare Set Aside. Claimant and the Second Injury Fund agreed to proceed to hearing solely on the issue of the Second Injury Fund's liability. As both entities were represented by counsel and appreciated the perils of moving forward without Employer, this case was tried solely against the Second Injury Fund. Claimant Paula Johnson appeared in person and with her counsel of record, Patrick Platter. The Treasurer of the State of Missouri, as custodian of the Second Injury Fund, appeared by Assistant Attorney General Susan Colburn. Claimant contends the Second Injury Fund is liable for Permanent Total Disability based on a combination of preexisting disabilities and disabilities sustained to her neck and left shoulder as a result of an accident that occurred while working for Wal-Mart and Associates, Inc., on March 29, 2003. The Second Injury Fund has alleged that Claimant was totally disabled before the work accident, or in the alternative, was totally disabled as a result of the last work accident, alone. Claimant offered 45 exhibits, all of which were admitted. The Second Injury Fund offered Claimant's deposition, which also was admitted. The parties agreed, and the evidence demonstrates, that Claimant's rate of compensation is \$79.90, based on an average weekly wage of \$119.84.

## FINDINGS OF FACT

- Fifty-two year old Paula Johnson dropped out of school after the ninth grade to get married. When she was in school she made Ds and Fs. She did not attain a GED. She had no formal vocational training. She has worked as a hotel maid, a machine operator, a cashier, and a stock clerk. At one point she worked for PenMac and was assigned to Banta Foods. She left that job after she injured her right arm lifting a trash container. She filed a claim for workers' compensation for a 1990 work injury due to carpal tunnel syndrome while employed by PenMac. Claimant underwent a carpal tunnel release. She received a lump sum to settle all issues related to that claim, but no specific degree of disability was set forth in the settlement document (Ex. 22).
- Claimant has a history of thoracic outlet syndrome with thoracic rib resection on the *right*, preexisting degenerative disc disease in the lumbar spine with some radiculopathy and chronic pain, and mild hypertension. The back condition is not amenable to surgery. Claimant applied for and obtained Social Security Disability in 1994, after which she never again worked full time. She has received Social Security Disability continuously through the date of the hearing in this case.
- In July 2001 Claimant was hired as a door greeter at Wal-Mart Associates, Inc. She specifically requested part-time work because she did not believe she could physically handle more than that. Phillip Eldred, Claimant's vocational expert, explained that Social Security allows disabled individuals to work some hours and still maintain their benefits.
- Claimant's job duties as a greeter included cleaning, pushing, and pulling shopping carts, cleaning the immediate work area, scanning bar codes on products that were returned, reading product codes on merchandise when an anti-theft alarm was activated, and lifting merchandise. The job required basic reading and writing and some physical stamina.
- A number of the full-time greeters are senior citizens in their mid to late 70s and 80s. Claimant knew at least one greeter in the Camdenton store that sat in a wheelchair. Another greeter used sign language or an electronic device to greet customers. But Claimant testified that, even if Wal-Mart had allowed her to sit, she did not believe she could have worked full time. This substantiates the testimony of Judy White, Wal-Mart's personnel director, who said that Claimant worked without accommodations in performing her part-time job.
- Wal-Mart originally hired Claimant to work three eight-hour shifts per week. She subsequently requested and received a reduction in her hours. At the time of her last work accident, Claimant was working 16 hours per week. Claimant said she reduced her hours because the three-day work schedule was too strenuous, even though she still worked two days consecutively. Asked why she went to work in the first place, Claimant explained that she needed the income and the insurance.

- According to Personnel Director Judy White, Claimant expressed the desire to work only part time due to back problems, but to Ms. White's knowledge, Claimant missed no work due to those back problems. Claimant received satisfactory work evaluations. And, Claimant reduced her work hours from 24 to 16 hours per week because she was watching her father who was gravely ill and not because she was having difficulty performing her work. Nancy Baez, Assistant Manager at the Osage Beach Wal-Mart, confirmed that Claimant's father had been ill and Claimant was providing care for him, including bathing, shaving, and lifting him.

- On the morning of March 29, 2003, while working as a greeter at Wal-Mart, Claimant injured her neck and *left* shoulder when she attempted to pull apart some shopping carts that had become stuck together. She underwent an open subacromial decompression with subacromial bursectomy for treatment of her left shoulder on June 23, 2003. The surgeon anticipated that Claimant would continue to have problems with bicep tendonitis. Claimant also underwent an anterior cervical discectomy with anterior cervical arthodesis on June 17, 2005.

- **Expert Opinions**

- **Dr. Shane Bennoch**

- Dr. Bennoch concluded that Claimant suffered the following disabilities as a result of the accident on March 29, 2003: 35 percent Permanent Partial Disability for cervical radiculopathy (140 weeks), 25 percent to the left shoulder (58 weeks), 20 percent for dermatological complications from the cervical radiculopathy (80 weeks), and 10 percent to the body as a whole for depression resulting from discomfort associated with radiculopathy (40 weeks), or a total of 318 weeks of disability.

- As to preexisting disabilities, Dr. Bennoch said Claimant suffered a 20 percent Permanent Partial Disability to the body as a whole related to multilevel disk disease in the lumbar spine (80 weeks), 5 percent permanent partial disability as a result of hypertension (20 weeks), and 15 percent body as a whole rated at the chest, secondary to an obstructive thoracic outlet syndrome, including intermittent right arm numbness (60 weeks), for a total of 160 weeks of preexisting disability.

- Dr. Bennoch also stated in his report that "the combination of her impairments does create a substantially greater impairment than the total of each separate injury and/or illness and a loading factor should be added." (Ex. 42, depo. ex. 2). He stated that it was unlikely that these disabilities are amenable to surgical reversal and in his opinion, "she should be considered for permanent and total disability." (Ex. 42, p. 24 of deposition exhibit 2).

- In his deposition Dr. Bennoch again indicated that Claimant was permanently and totally disabled due to a "combination effect." (Ex. 42, p. 110). He again indicated that Claimant's preexisting disabilities combined synergistically with the disabilities from the last accident. But he explained that the "combination" of disabilities that made Claimant permanently and totally disabled was the combination of the neck and *left* shoulder disabilities Claimant sustained from the last accident. He said, "I think it had to be both the neck and the left shoulder." (Ex. 42, p. 53). The following colloquy clarifies that the "combination" Dr. Bennoch was referencing was not a combination of work disabilities and preexisting disabilities:

- Q. Okay. And just so we're clear, had she not had the low back problems that you've referenced leading up to March of 2003, and had she not had that thoracic outlet syndrome – and I gather the only problem she had remaining from that was the intermittent numbness in the arm?

- A. Yes.

- Q. Okay. Had she not had those conditions, given the complaints she has from this March of 2003 injury, do you believe that she would be able to work?

- A. No.

- (Ex. 42, p. 97).

- Q. But to reiterate, you believe that even if she did not have any of the preexisting problems, she could not hold down a job now because of the neck and shoulder problems that we have been discussing from March of 2003?

- A. That is correct.

- (Ex. 42, p. 111).
- Dr. Bennoch recognized that Claimant had significant preexisting disability that “when you combine them all, that would add to it.” (Ex. 42, p. 52). But, he did not retract his opinion that Claimant was permanently and totally disabled as a result of the two injuries (neck and left shoulder) that she sustained while working at Wal-Mart in March 2003.
- At one point in his deposition Dr. Bennoch was of the mistaken impression that at the time of the last accident Claimant was working a 40-hour week. But, after he was reminded that Claimant had been working only part-time, Dr. Bennoch still indicated that the permanent and total disability came from the combination of the *left* shoulder and neck disabilities attributable from the last accident, alone. Dr. Bennoch indicated that most of Claimant’s postural limitations were due to her neck injury.
- **Phillip Eldred**
- Vocational expert Phillip Eldred testified that Claimant is unemployable. He described Claimant’s placement potential as very low based on her aptitude and physical restrictions. She has no transferable job skills. She is unable to perform in a light category of work due to her physical restrictions, such as housekeeping or in fast food operations. He said there were no sedentary job matches for Claimant.
- Mr. Eldred denied that Claimant was unemployable prior to the last work accident. He did not know why Claimant had reduced her work hours to 16 per week. He believed that a person working 16 hours per week could be employable on the open labor market, depending on the employer. He said in Claimant’s case, she had obtained a job on the open labor market.
- Mr. Eldred opined that Claimant was unemployable as a result of the combination of disabilities. He stated that Claimant was not permanently and totally disabled as a result the disabilities from the last accident, alone. In reaching his conclusion, Mr. Eldred relied on Dr. Bennoch’s report.
- As noted previously, Employer did not participate in this proceeding. The opinions of Employer’s experts were not offered or admitted into evidence.
- **RULINGS OF LAW**

The Second Injury Fund argues that it has no liability for Permanent Total Disability because Claimant had that degree of disability when she first went to work for Wal-Mart. The Second Injury Fund only has liability for Permanent Total Disability if the worker had Permanent Partial Disability at the time of the last accident.

This is not the first case in which such defense has been proffered by the Second Injury Fund. The Missouri Supreme Court rejected such contention in *Howell v. M. E. Morris*, 426 S.W.2d 353 (Mo. 1968). The Labor and Industrial Relations Commission likewise rejected the defense in *Lemair v. Lemair’s Seafood Restaurant*, Inj. No. 96-031657, which was affirmed on appeal in *Lemair v. Treasurer of Missouri*, 118 S.W.3d 283 (Mo. App. W.D. 2003), without a published opinion having been rendered. The Commission in this latter case noted that the employee had been working 40 hours per week prior to his last injury at his family restaurant but was not as active prior to his coronary artery disease. Nevertheless, the Commission found the employee provided valuable services to his employer.

What makes this case unique is that Claimant was drawing Social Security Disability at the time she went to work for Wal-Mart. And, there is no dispute that she self-limited her consideration for hours at the time of hire because of her back condition. The employee in the instant case was not working full time when she suffered the last work accident at Wal-Mart.

While “total disability” does not require that the Claimant be completely inactive or inert, *Siffeman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. 1995), it does require a finding that the Claimant is unable to work in any employment in the open labor market, and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Sullivan v. Mastgers Jackson Paving Co.*, 35 S.W. 3d 879, 884 (Mo. App. 2001). The central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire Claimant in her physical condition. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. 2000).

As Phillip Eldred commented, Claimant did obtain a job on the open labor market and did perform some work therein. I find no requirement that the work on the open labor market be full-time work. As noted by the personnel director for Wal-Mart, Claimant was not accommodated in her job. Claimant did not

perform her job sitting down. She received adequate performance reviews. Employer was unaware that Claimant took off time related to her back condition. And while Claimant contended that she had to reduce her hours because the physical demands of working three days per week were too much, that was not the understanding of the personnel director. Wal-Mart understood that Claimant needed to reduce her hours because she needed some time to care for her ailing father. Given the contrary testimony of the Wal-Mart employees, I do not find credible Claimant's testimony as to why she reduced her hours. I agree with Phillip Eldred that Claimant's job at Wal-Mart was work in the open labor market.

Further, the fact that Claimant was receiving Social Security Disability is not proof under Missouri law that an individual is permanently and totally disabled for purposes of Workers' Compensation. *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830 (Mo. App. W.D. 2001); *Ralph v. Lewis Bros. Bakeries*, 979 S.W.2d 509 (Mo. App. S.D. 1998).

In reviewing all of the evidence, I conclude that Claimant was working in the open labor market at the time she obtained the job at Wal-Mart. She was not permanently and totally disabled at the time of her last accident at Wal-Mart.

#### Degree of Disability from Last Work Accident

Having found that Claimant was not permanently and totally disabled at the time she sustained her work accident at Wal-Mart, the next step is to follow the formula set forth in *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1 (Mo. App. W.D. 2007). That formula requires that the Administrative Law Judge determine first the degree of disability attributable to the last employment accident.

Section 287.220 RSMo, provides that the Second Injury Fund has liability for Permanent Total Disability if the preexisting disability combines with the disability from the last injury to result in disability that is permanent and total. The problem in this case is that even Claimant's own experts do not agree on this issue. Vocational expert Phillip Eldred opined that Claimant was not totally disabled as a result of the last accident. Dr. Bennoch believed otherwise, based on his deposition testimony. In reaching his conclusion, Mr. Eldred relied on the report of Dr. Bennoch and the restrictions imposed by that physician. But Dr. Bennoch did not differentiate which restrictions were attributable to the last accident, alone, and which were attributable to Claimant's preexisting disabilities.

Having considered the whole record, I conclude that the most credible of the expert opinions is that of Dr. Bennoch expressed in his deposition. I read Dr. Bennoch's report and his deposition as stating that Claimant has a number of disabilities and when they are combined, Claimant is permanently and totally disabled. But, Dr. Bennoch goes further and states quite specifically in his deposition that if you first must look at those disabilities that emanate solely from the work accident, those two disabilities (neck and left shoulder) make Claimant permanently and totally disabled. The preexisting disabilities just add to the severity of the permanent total disability resulting from the work accident. As such, there is no further inquiry. The Second Injury Fund has no liability.

Date: August 6, 2008

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
Chief Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker  
Jeffrey W. Buker  
Director

