

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

Injury No.: 04-028875

Employee: Carolyn Jones
Employer: Missouri Western State College
Insurer: Missouri Office of Administration (CARO)
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. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the December 28, 2010, award and decision of Chief Administrative Law Judge Nelson G. Allen. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties stipulated the following issues in dispute: (1) employer's liability for temporary total disability; (2) employer's liability for future medical treatment; (3) the nature and extent of employee's disability; and (4) Second Injury Fund liability.

The administrative law judge made the following findings: (1) employer is liable for temporary total disability benefits from August 24, 2005 through October 6, 2005, and January 7, 2008 through July 26, 2008; (2) employee sustained a 25% permanent partial disability of the body as a whole referable to the multiple injuries she sustained as a result of the accident on March 26, 2004; (3) the Second Injury Fund is liable for 29 weeks of permanent partial disability benefits owing to the combination of disability from employee's preexisting conditions and primary injuries; and (4) employee does not require any future medical treatment as a result of the accident of March 26, 2004.

Employee submitted a timely Application for Review alleging the administrative law judge erred: (1) in denying permanent total disability benefits; (2) in finding employee sustained only 25% permanent partial disability of the body as a whole as a result of the accident on March 26, 2004; (3) in failing to award temporary total disability benefits for the entire period of June 20, 2005 through July 8, 2008; and (4) in denying future medical treatment. In her brief to this Commission, employee withdrew her contention that the administrative law judge erred in his award of temporary total disability benefits and concurred with the administrative law judge's findings on that issue.

For the reasons set forth below, the Commission modifies the award and decision of the administrative law judge.

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Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the disputed issues. We have incorporated those findings to the extent that they are not inconsistent with the modifications set forth in our award. Therefore, we address only those findings of fact pertinent to our modification herein.

Preexisting conditions

In 2002, a drunk driver crashed into employee's vehicle, leaving her with injuries to her cervical spine including herniated discs at C5-6 and C6-7 and spinal stenosis. Conservative measures failed to relieve employee's symptoms but doctors advised against surgery due to employee's obesity. Employee experiences constant neck pain and radicular symptoms and can't do any overhead work or lifting.

The primary injuries

On March 26, 2004, employee tripped and fell at work and injured both arms, her left knee, and right shoulder. The accident also aggravated employee's cervical spine injury. We consider the administrative law judge's finding of 25% permanent partial disability of the body as a whole a fair and reasonable rating of the permanent disability resulting from the primary injuries and do not disturb it herein.

Employee failed, in both her Application for Review and her brief, to identify the date she reached maximum medical improvement or to direct us to any evidence on the issue. It appears the last day employee received treatment connected with the March 2004 accident was July 25, 2008, when she saw Dr. DePriest for follow-up in connection with her bilateral carpal tunnel surgeries. We find employee reached maximum medical improvement on July 26, 2008.

Expert medical and vocational testimony

Dr. P. Brent Koprivica testified for employee and opined that employee suffered preexisting permanent partial disability of 12.5% of the body as a whole referable to obesity, and that this condition constituted a hindrance or obstacle to employment. We find this opinion and rating credible and adopt it. Dr. Koprivica also credibly opined that employee remains in need of future medical care in connection with the injuries she sustained in the accident of March 26, 2004. We find that employee remains in need of future medical care from the effects of the primary injuries.

Dr. Koprivica believes employee is permanently and totally disabled due to the combination of her preexisting disabling conditions and the effects of the primary injuries. Mary Titterington, who offered her expert vocational opinion for employee, agreed. Neither the employer nor the Second Injury Fund offered testimony from any expert to contradict the findings of Dr. Koprivica and Ms. Titterington on the issue of permanent total disability.

Faced with this record, it appears to us the administrative law judge inappropriately substituted his own opinions for those of the experts when he found that employee's obesity could not be considered because it was "self-inflicted." We find no basis in the

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law or the facts of this case for the administrative law judge's findings on this issue. To the contrary, it is well-established that obesity can be a permanent disability and—where the uncontested expert opinions so establish—it cannot be ignored when resolving the issue of permanent total disability. See *Garibay v. Treasurer of Mo. as the Custodian of the Second Injury Fund*, 964 S.W.2d 474, 480 (Mo. App. 1998). Accordingly, we specifically disclaim the administrative law judge's findings—and his gratuitous remarks—as to claimant's obesity, its causes, its permanency, and its effect on her permanent total disability. And, because we discern no basis for rejecting the uncontradicted expert opinions from Dr. Koprivica and Ms. Titterington, we credit their opinions and find that employee is permanently and totally disabled due to the combination of her preexisting disabling conditions and permanent disability resulting from the primary injuries.

Conclusions of Law

Future medical treatment

We conclude employee has met her burden on the issue of future medical treatment. Section 287.140.1 RSMo provides, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

We have credited Dr. Koprivica's opinion that employee will need future medical treatment as a result of her work injuries sustained on March 26, 2004. Accordingly, we conclude that employer is liable for any future medical treatment that may reasonably be required to cure and relieve from the effects of the work injury.

Liability of the Second Injury Fund

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that she suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

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We are convinced that employee's preexisting disabilities were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220 RSMo. We have adopted the administrative law judge's findings that employee suffered preexisting disability of 15% of the body as a whole referable to her lumbar spine, 12.5% referable to her cervical spine, and 20% referable to her coronary artery disease. In addition, we have found employee suffered preexisting disability of 12.5% of the body as a whole referable to obesity, and credited Dr. Koprivica's opinion that this condition constituted a hindrance or obstacle to employment. Accordingly, we conclude that at the time she sustained the primary injuries in this matter, employee suffered from preexisting permanent partial disabilities referable to her cervical spine, coronary artery disease, and obesity, and that each of these conditions constituted hindrances or obstacles to her employment or reemployment.

We now proceed to the question whether employee met her burden of establishing entitlement to compensation from the Second Injury Fund. Section 287.220.1 RSMo provides, in relevant part, as follows:

If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, ... the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the "Second Injury Fund" ...

The foregoing section requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, and not the Second Injury Fund, is responsible for the entire amount of compensation. See *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). We have found that, as a result of the last injury, employee sustained a 25% permanent partial disability of the body as a whole. Dr. Koprivica and Ms. Titterington agreed that employee is permanently and totally disabled as a result of the permanent disability resulting from her work injuries in combination with employee's preexisting conditions of ill, and we have found these experts credible. We conclude that employee did not sustain enhanced permanent partial disability, but rather that employee is permanently and totally disabled due to a combination of her preexisting disabilities in combination with the effects of the primary injuries.

In sum, we are persuaded that employee has met her burden of establishing Second Injury Fund liability for permanent total disability under § 287.220.1. The Second Injury Fund is liable for permanent total disability benefits.

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Award

We modify the award of the administrative law judge on the issue of Second Injury Fund liability. The Second Injury Fund is not liable for enhanced permanent partial disability, but rather permanent total disability. Accordingly, the Second Injury Fund is ordered to pay to employee weekly payments of \$90.49, the difference between employee's permanent total disability rate (\$437.54) and employee's permanent partial disability rate (\$347.05) for 100 weeks (the extent of employer's liability for the work injury) beginning July 26, 2008 (employee's date of maximum medical improvement). Thereafter, the Second Injury Fund is liable to employee for weekly permanent total disability benefits in the amount of \$437.54 for her lifetime, or until modified by law.

The award and decision of Chief Administrative Law Judge Nelson G. Allen issued December 28, 2010, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award, and decision herein.

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 September 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: **CAROLYN JONES** Injury No. **04-028875**
Employer: **MISSOURI WESTERN STATE COLLEGE**
Insurer: **MISSOURI OFFICE OF ADMINISTRATION (CARO)**
Add'l Party: **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN
OF THE SECOND INJURY FUND**
Hearing Date: **OCTOBER 4, 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: **March 26, 2004**
5. State location where accident occurred or occupational disease was contracted: **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 attending a department meeting on campus and fell.**
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: **Both wrists, cervical spine, left knee, and right shoulder.**

- 14. Nature and extent of any permanent disability: **25% of the body as a whole combining with a prior industrial disability of 47.5% body as a whole resulting in a combined disability rating of 79.75% body as a whole, which is 7.25% greater than the individual disabilities considered alone.**
- 15. Compensation paid to-date for temporary disability: **No.**
- 16. Value necessary medical aid paid to date by employer/insurer? **\$28,328.49**
- 17. Value necessary medical aid not furnished by employer/insurer? **None.**
- 18. Employee's average weekly wages: **N/A**
- 19. Weekly compensation rate: **\$437.54 / \$347.05**
- 20. Method wages computation: **By Stipulation**

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:

32 2/7 weeks of temporary total disability (or temporary partial disability) x **\$437.54**=**\$14,126.29**
100 weeks of permanent partial disability from Employer x **\$347.05**= **\$34,705.00**

- 22. Second Injury Fund Liability:

29 weeks of permanent partial disability from the Second Injury Fund x **\$347.05**=**\$10,064.45**

TOTAL: \$58,895.74

- 23. Future requirements awarded: **None.**

Each of said payments to begin **March 27, 2004** 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: **Ronald L. Edelman.**

FINDINGS OF FACT and RULINGS OF LAW

Employee: **CAROLYN JONES** Injury No. **04-028875**

Employer: **MISSOURI WESTERN STATE COLLEGE**

Insurer: **MISSOURI OFFICE OF ADMINISTRATION (CARO)**

Add'l Party: **TREASURER OF THE STATE OF MISSOURI AS CUSTODIAN
OF THE SECOND INJURY FUND**

Hearing Date: **OCTOBER 4, 2010**

Checked by: **NGA**

ISSUES

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

1. Liability of the employer for temporary total disability benefits from June 30, 2005 through July 8, 2008 with the exception of those dates the employer and claimant stipulated;
2. Liability of the employer for future medical treatment;
3. Nature and extent of Claimant's disability;
4. Liability of the Second Injury Fund.

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. Employment Contract
- B. March 25, 2010 Deposition of Mary Titterington w/Exhibits
- C. May 12, 2010 Dr. Koprivica w/Exhibits

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

- 1 Work Status
- 2 Health South FCE
- 3 Dr. Stechsulte Rating
- 4 May 4, 2005 Termination Letter
- 5 KC Neurosurgery Letter

- 6 October 7, 2005 Evaluation Note
- 7 November 18, 2005 Evaluation Note
- 8 Dr. DePriest Rating
- 9 Job Duties
- 10 August 31, 2004 Dr. Stechschulte Note w/Medical
- 11 Dr. DiStefano 60-Day w/Medical
- 12 Carolyn Jones Deposition

All objections contained in the admitted depositions are overruled unless otherwise noted.

STIPULATIONS

The parties agreed that on March 26, 2004, Carolyn Jones was an employee of Missouri Western State College and was fully insured by Missouri Office of Administration (CARO).

The parties also agreed that on March 26, 2004, Carolyn Jones sustained an injury by accident or occupational disease arising out of and in the course of her employment. The parties further agreed that the employer had proper notice of claimant's injury and that a timely claim for compensation had been filed.

The parties also agreed the correct rate of compensation is \$437.54 per week for temporary total disability and \$347.05 per week for permanent partial disability.

Medical aid has been provided in the amount of \$28,328.49. The claimant is not asking for any payments for any past medical aid.

The employer and the claimant also agreed that the claimant is entitled temporary total disability from August 24, 2005 through October 6, 2005 and January 7, 2008 through July 26, 2008, a total of 32-2/7 weeks. The claimant is asking for temporary total disability from June 30, 2005 through July 8, 2008.

The claimant testified in person. She is 63 years old. She was using a walker with wheels and a seat on it. The claimant is an extremely large woman. She is morbidly obese.

The claimant testified that on March 26, 2004, the claimant was an employee of Missouri Western State College where she worked in the Human Resources Department. She was on campus going to a department staff meeting when she fell.

She said the fall injured both her hands and arm, her right shoulder, her left knee, and neck.

She has had a long working career mostly in the secretarial field.

In 1974, she was in an automobile accident. As a result of this accident she had a lumbar discectomy and laminectomy. She was given lifting restrictions of no lifting over 20 pounds and no extensive bending, pushing, pulling, twisting. She had to alternate between sitting and standing to alleviate her back pain.

She said when she worked at the prosecutor's office between 1979 and 1991. She would go home at lunch and lay down to relieve pain and pressure on her back. During her years at Missouri Western, she would close her door and lay down for the lunch hour.

Around 2000, she was diagnosed with coronary artery disease. She said this slowed her down in her employment. She had to use an elevator because she couldn't walk the steps.

In 2003, she had a cervical injury that she said affected her employment. She was prevented from performing overhead lifting and reaching tasks.

She said she continued to work for more than a year before she was terminated because she was precluded from performing her work duties by her health difficulties caused by her accident, combined with her pre-existing disabilities.

Mrs. Jones stated she is totally disabled because of her injuries. She uses a walker or motorized cart to shop at Wal-Mart. She has no energy. Her left knee is painful and not stable. Her right shoulder hurts. She has numbness in both hands. She must lie down frequently. She said she needs surgery on her right shoulder and left knee but is unable to have surgery because of her weight and heart condition.

Dr. P. Brent Koprivica testified by deposition on May 12, 2010. Dr. Koprivica's deposition was admitted into evidence as Claimant's Exhibit C. All objections thereto are hereby overruled.

Dr. Koprivica examined the claimant on April 25, 2009. At that time, the claimant was five-foot, six-inches tall and weighed 401 pounds. The claimant testified she lost 130 pounds while being hospitalized later. She did not testify what her highest weight was when she started her hospitalization or what her weight was on the date of the hearing. Dr. Koprivica noted she weighed 270 pounds in 2002.

Dr. Koprivica noted the claimant had a carpal tunnel release on her right wrist by Dr. DiStefano on August 24, 2005 and her left was performed by Dr. DePriest on January 7, 2008. Dr. Koprivica causally related these to the accident of March 26, 2004. He also related to the accident, a chronic impingement of the right shoulder, internal derangement of the left knee, and aggravating cervical spinal stenosis. He also blamed the progression of her obesity on the accident.

Dr. Koprivica rated the claimant as 20% of both wrists, 10% of the right shoulder, 15% of the left knee, 12-1/2% body as a whole for the cervical stenosis, and 5% body as a whole for the weight gain. He combined these to be 50% body as a whole.

Dr. Koprivica found Mrs. Jones had a pre-existing industrial disability of 15% body as a whole for her prior back surgery, 12-1/2% body as a whole for pre-existing neck injury, 20% body as a whole for her heart problem, and 12-1/2% for body as a whole for her prior obesity.

Dr. Koprivica found that the combination of her pre-existent industrial disability with the additional disability attributable to the March 26, 2004 work injury resulted in Mrs. Jones being permanently totally disabled.

Mary Titterington testified by deposition taken on March 25, 2010 and admitted into evidence as Claimant's Exhibit B. All objections thereto are hereby overruled.

Mrs. Titterington is a vocational expert. She evaluated Mrs. Jones on September 28, 2009 and found that when Mrs. Jones' physical and emotional impairments are considered, she is not employable in the open labor market.

Dr. Daniel J. Stechschulte, Jr. found that the claimant had 10% disability to her right shoulder and 5% to her left knee. Dr. Reintjes found that the claimant had 5% permanent partial disability to her body as a whole as a result of her neck injury. Dr. DiStefano rated the claimant as having 3% permanent partial disability to the right wrist. Dr. DePriest rated the claimant as having a 4% permanent partial disability of the left wrist.

I find and believe from the evidence that the claimant was temporarily totally disabled and unable to be gainfully employed and compete in the open labor market from August 24, 2005 through October 6, 2005 and January 7, 2008 through July 26, 2008 for a total of 32-2/7 weeks. I order and direct the employer to pay to the claimant the sum of \$437.54 per week for 32-2/7 weeks for a total of \$14,126.29.

I find and believe from the evidence that as a result of claimant's injury on March 26, 2004, the claimant has sustained a permanent partial disability of 10% of her right shoulder, 5% of her left knee, 5% of her body as a whole for her cervical injury and 10% of both wrists. While these add up to 86.2 weeks, I find that her multiple injuries combine to a permanent partial disability of 25% of the body as a whole. I order and direct the employer to pay to the claimant the sum of \$347.05 per week for 100 weeks for a total of \$34,705.00.

I agree with Dr. Koprivica in that the claimant had a pre-existing permanent partial disability of 15% of the body as a whole for her prior back surgery, 12-1/2% body as a whole for her pre-existing cervical injury and 20% of the body as a whole for her pre-existing cardiac condition. These total 47.5% body as a whole. I find that these disabilities were a hindrance and obstacle to the claimant's employment. I make no provision for the claimant's prior obesity. There was no evidence that the claimant's prior obesity was anything but self-inflicted.

I find and believe from the evidence that the claimant's disability of 25% of body as a result of her March 26, 2004 injury combined with her prior industrial disability of 47.5% of the body as a whole, combines in a permanent partial disability rating of 79.75% body as a whole, which is 7.25% greater than the individual disabilities considered alone.

I order and direct the Treasurer of the State of Missouri as Custodian of the Second Injury Fund to pay to the claimant the sum of \$347.05 per week for 29 weeks for a total of \$10,064.45.

The claimant claims that she is permanently totally disabled because of the combination of her prior and current disabilities. I disagree.

Dr. Stephen J. Reintjes wrote in his final report of March 4, 2006, "What is remarkable is she weighs 384 pounds." She later weighed at least 401 pounds. I do not know what her maximum weight was, nor do I know her current weight. She did testify she had lost 130 pounds in a hospital.

I do not know why the claimant gained at least 131 pounds from the date of her accident. She was already morbidly obese at the time of her accident. I do not believe the claimant has proven that her weight gain was caused by her accident. The accident of March 26, 2004 was not a significant factor in her current obesity and certainly not the prevailing factor.

There is no doubt the claimant is totally disabled and unable to compete in the open labor market. The claimant is still enormous. Even a lay person can see that weighing over 400 pounds would put a tremendous strain on her joints and her cardiovascular system.

The fact that the claimant lost 130 pounds in a hospital with a regular caloric intake is proof that it was possible for her to have brought her weight under control.

The reason the claimant can't walk without a walker and stays in her home without any energy is her enormous weight and morbid obesity.

I do not find that the claimant requires any future medical treatment as a result of her accident of March 26, 2004.

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

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 28th day of December, 2010.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation