

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

Injury No.: 01-164815

Employee: Darlana Jones

Employer: Mother of Good Counsel (Settled)

Insurer: Healthcare Facilities of Missouri (Settled)

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

**I. Introduction**

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, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of Administrative Law Judge Matthew D. Vacca, dated April 23, 2010, as supplemented herein.

**II. Findings of Fact**

The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the facts and stipulations listed below, they are incorporated and adopted by the Commission herein.

The parties stipulated that on March 1, 2001, employee sustained an accident which arose out of and in the course of her employment. The sole issue presented for resolution before the ALJ was the liability of the Second Injury Fund for enhanced permanent partial disability or permanent total disability.

Three experts provided opinions with regard to employee's condition. Dr. Volarich opined that employee is permanently totally disabled as a result of her work injury combined with her preexisting disabilities. Vocational rehabilitation expert, Barbara Parker, found that employee is unable to compete in the open labor market as a result of a combination of her disabilities, not just her hands. Contrary to Dr. Volarich and Ms. Parker's opinions, vocational rehabilitation expert, James England, found that if employee is excluded from the open labor market, it "would be due to the hands regardless of any other physical problems."

On July 11, 2008, Dr. Volarich evaluated employee for the purpose of an independent medical evaluation. Dr. Volarich based his independent medical evaluation on the history given to him by employee, a review of past medical records and tests, and a physical examination performed by him on July 11, 2008.

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Barbara Parker evaluated employee on October 2, 2009, for the purpose of assessing employee's potential for employment in the St. Louis Metropolitan area. Ms. Parker based her opinions on her personal interview of employee, a review of depositions of employee from October 2, 2002, and October 8, 2008, and a review of employee's medical records.

James England provided a report dated March 11, 2009, in which he evaluated the employability of employee in the open labor market. Mr. England based his opinions on a review of employee's medical records, doctors' reports, and a copy of a deposition taken of employee on October 8, 2008.

Unlike Dr. Volarich and Ms. Parker, Mr. England did not personally interview employee. The October 8, 2008, deposition that Mr. England reviewed did not include employee's complaints concerning her pseudotumor cerebri or her asthma. Mr. England admitted during his deposition that he would have a better assessment of someone if he could personally meet with them. Mr. England also conceded that it is possible that if not all of employee's physical problems were discussed in the October 8, 2008, deposition, he may not have a full understanding of employee's condition.

### **III. Conclusions of Law**

First of all, we must address the Second Injury Fund's argument that there is no evidence that employee's bilateral carpal tunnel syndrome was caused by an occupational disease. This argument contradicts facts stipulated to by both parties. As listed above, the parties stipulated that employee sustained an accident on March 1, 2001, which arose out of and in the course of her employment.

In *Boyer v. National Express, Co.*, 49 S.W.3d 700 (Mo. App. 2001), the Court determined that:

The rules of the Department of Labor and Industrial Relations, in particular, 8 C.S.R. 50-2.010(14), provide: 'hearings before the division shall be simple, informal proceedings. The rules of evidence for civil cases in the state of Missouri shall apply. Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues.' Therefore, the ALJ should confine the evidence during the hearing to the stated contested issues. *Lawson v. Emerson Electric Company*, 809 S.W.2d 121, 125 (Mo. App. 1991). Stipulations are controlling and conclusive, and the courts are bound to enforce them. *Spacewalker, Inc. v. American Family*, 954 S.W.2d 420, 424 (Mo. App. 1997). A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish. *Id.* In *Lawson*, our colleagues in the Southern District concluded that the Commission acted in excess of its powers in making its award on grounds not in issue. *Lawson v. Emerson Electric Company*, 809 S.W.2d at 126.

*Boyer*, 49 S.W.3d at 705.

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For the foregoing reasons, we determine that the Commission does not have jurisdiction to consider the Second Injury Fund's argument that employee failed to prove by substantial and competent evidence that she sustained an occupational disease. We agree with the ALJ that, based upon facts stipulated to by both parties, the sole issue presented for resolution is the liability of the Second Injury Fund. Therefore, we will confine our analysis to the same.

The Second Injury Fund also argues that employee is not permanently totally disabled. Based upon the testimony of employee, her medical records, and the reports and testimony of the aforementioned experts, we agree with the ALJ and find that employee is permanently and totally disabled. Therefore, the primary issues to be determined are: 1) At the time of employee's last injury, did she suffer from preexisting disabilities that posed a hindrance and obstacle to her employment or reemployment?; and 2) If employee suffered from such preexisting disabilities, did the last injury, considered alone, result in employee's permanent total disability, or was employee rendered permanently totally disabled as a result of the last injury combining with employee's preexisting disabilities?

With regard to the first issue, we find, based upon employee's testimony, her medical records, and the reports and testimony of Dr. Volarich and Ms. Parker, that employee's pseudotumor cerebri and asthma were preexisting disabilities that posed a hindrance and obstacle to her employment or reemployment. Employee's pseudotumor cerebri is a condition of hypertension within the brain that causes an excretion of excess cerebral/spinal fluid. This excess cerebral/spinal fluid causes pressure inside her brain cavity. It is partially controlled by her prescription drug, Diamox, but it still builds until the pressure is relieved by a spinal tap. Her symptoms are recurring, including headaches and blurred vision. In addition, employee's chronic asthma requires daily medications and often causes wheezing. Employee testified that her asthma limits her with any physical exertion.

Having come to the conclusion that employee suffered from preexisting disabilities, we turn to precedent for guidance in evaluating cases of this nature.

The court in *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. 1999), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) set out a step-by-step test for determining Second Injury Fund liability in cases involving preexisting disabilities:

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) the employer's liability is considered in isolation – 'the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability'; (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the

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combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund.

*Kizior v. Trans World Airlines*, 5 S.W.3d 195, 200 (Mo. App. W.D. 1999).

The Second Injury Fund argues that if employee is permanently and totally disabled, it is a result of the last injury alone. However, the Second Injury Fund largely bases this contention on Mr. England's opinion that if employee is excluded from the open labor market it is solely due to her hands. Both Dr. Volarich and Ms. Parker are of the opinion that it is a combination of employee's disabilities (bilateral carpal tunnel syndrome and her preexisting disabilities) that renders her permanently totally disabled and unable to compete in the open labor market. In addition, both Dr. Volarich and Ms. Parker had the benefit of personally interviewing employee and questioning her about her physical complaints associated with her pseudotumor cerebri and asthma; whereas Mr. England did not personally interview employee. In fact, Mr. England even conceded during his deposition that he would have a better assessment of someone if he could personally meet with them. Mr. England also conceded that it is possible that if not all of employee's physical problems were discussed in the October 8, 2008, deposition, he may not have a full understanding of her condition.

For the foregoing reasons, we find Dr. Volarich and Ms. Parker's opinions that employee is permanently totally disabled and unable to compete in the open labor market, due to a combination of employee's bilateral carpal tunnel syndrome and her preexisting disabilities, more credible than Mr. England's opinion that employee's exclusion from the open labor market would be solely due to her hands. We now turn to the assessment of the percentage or degree of disability resulting from the last injury.

In considering employer's liability in isolation, we are not bound by employee and employer's Stipulation for Compromise Settlement in which employee agreed to settle her claim against employer for 15.9% permanent partial disability to both her right and left wrists attributable to her work-related bilateral carpal tunnel syndrome. However, said agreement does serve as relevant evidence of the nature and extent of the employee's permanent disability attributable to the last injury. *Totten v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund*, 116 S.W.3d 624, 628 (Mo. App. 2003).

Dr. Volarich found that employee is 40% permanently partially disabled of the right and left upper extremities rated at the wrist, due to her bilateral carpal tunnel syndrome. While we agree with Dr. Volarich's conclusion that employee is permanently totally disabled as a result of a combination of employee's bilateral carpal tunnel syndrome and her preexisting disabilities, we disagree with the disability rating Dr. Volarich attributes to the last injury alone. We find, based upon the totality of the evidence, that employee and employer's Stipulation for Compromise Settlement more accurately reflects the percentage of disability attributable to the last injury. Therefore, we find, as did the ALJ, that employee is 15.9% permanently partially disabled to her right and left wrists solely as a result of her work-related bilateral carpal tunnel syndrome.

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Based upon the aforementioned, we agree with the ALJ's conclusions and find that employee's preexisting disabilities combined with the 15.9% permanent partial disability to her right and left wrists, resulting from the last injury, to render employee permanently totally disabled. In accordance with § 287.220.1 RSMo, we find the Second Injury Fund liable for employee's permanent total disability benefits.

We affirm the ALJ's award with supplementation as provided herein. Thus, employee is awarded permanent total disability benefits and liability is imposed on the Second Injury Fund.

We find that employee reached maximum medical improvement on January 1, 2004, as stipulated to by the parties. Therefore, going forward from January 2, 2004, the Second Injury Fund is liable for the difference between the permanent total disability benefits and the permanent partial disability benefits for 55.65 weeks.<sup>1</sup> Because both employee's permanent partial disability rate and permanent total disability rate are \$149.76, there is no difference for the Second Injury Fund to cover for the 55.65 weeks attributable to the last injury. However, after said 55.65 weeks, the Second Injury Fund shall be liable for employee's weekly permanent total disability benefit of \$149.76 for the remainder of employee's life, or until modified by law.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued April 23, 2010, is affirmed, and is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 21<sup>st</sup> day of December 2010.

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

<sup>1</sup> 15.9% X 175 = 27.825 weeks per wrist.