

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.¹ 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 21st day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

¹ 15.9% X 175 = 27.825 weeks per wrist.

AWARD

Employee: Darlana Jones

Injury No.: 01-164815

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Mother of Good Counsel (Settled)

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

Additional Party: Second Injury Fund Only

Insurer: Healthcare Facilities of Missouri (Settled)

Hearing Date: February 2, 2010

Checked by: MDV

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: on or about March 1, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Claimant developed carpal tunnel syndrome as a result of repetitive work.
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: Left and right wrists
14. Nature and extent of any permanent disability: 15.9% of the left wrist and 15.9% of the right wrist previously paid by Employer: Permanent and total disability against the Second Injury Fund.
15. Compensation paid to-date for temporary disability: N/P
16. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? -0-
- 18. Employee's average weekly wages: \$224.64
- 19. Weekly compensation rate: \$149.76/\$149.76
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

55.69 weeks of permanent partial disability from Employer	(previously paid)
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22. Second Injury Fund liability: Yes. The Second Injury Fund shall pay \$149.76 per week beginning 55.69 weeks after January 1, 2004 and continuing thereafter for Claimant's lifetime. (All use of an (*) asterisk denotes a contingent lifetime benefit)

*

TOTAL:

*

23. Future requirements awarded: None

Said payments to begin 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: Susan Kelly

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Darlana Jones	Injury No.:	01-164815
Dependents:	N/A	Before the	
Employer:	Mother of Good Counsel (Settled)	Division of Workers'	Compensation
Additional Party:	Second Injury Fund (only)	Department of Labor and Industrial	Relations of Missouri
		Jefferson City, Missouri	
Insurer:	Healthcare Facilities of Missouri (Settled)	Checked by:	MDV

ISSUES PRESENTED

The sole issue to be resolved is the nature and extent of SIF liability.

STIPULATIONS

1. On the date of her primary injury, Claimant’s average weekly wage was \$224.64 yielding TTD, PTD and PPD rates of \$149.76.
2. Claimant reached MMI from her primary injury on January 1, 2004.

FINDINGS OF FACT

Based upon all of the competent and substantial evidence adduced at trial, my observations of Claimant at trial, the reasonable inferences to be derived therefrom, I find:

1. Claimant is a 52-year-old woman. She is a widow and lives with her daughter and grandson in a rented ranch style home.
2. Claimant attended Vashon High School in St. Louis until 1975. She dropped out in the 11th grade. Claimant earned her Certified Nurse Assistant Certificate from Vatterott in 1977. She had no additional educational or vocational training. Upon receiving her certificate, she worked as a nurse’s aide for six months and then stayed home to raise her two children.
3. Claimant has severe asthma. Claimant has required emergency room treatment for her asthma and bronchitis on numerous occasions. Employee was hospitalized ten times for asthma prior to her work at Mother of Good Counsel and the heat and smoke in the kitchen exacerbated her asthma while at Employer.
4. In 1982, when she was 17, Claimant was diagnosed with pseudotumor cerebri and was declared totally disabled by the Social Security Disability Administration.

Claimant was awarded disability benefits for the medical condition, pseudo brain tumor as the disability was determined to last for more than one year. As a result of this disease, cerebrospinal fluid builds up in her brain cavity and requires spinal taps every six months to a year to relieve the pressure. She has been hospitalized numerous times for this condition. Claimant also takes a daily prescription, Diamox, to control the headaches she suffers as a result of the headaches caused by the buildup of cerebral fluid.

5. Claimant developed bilateral knee problems while working on hard floors for Employer. Prolonged standing, walking and bending cause pain. These problems developed in 2000, before her carpal tunnel syndrome.
6. Claimant worked full time for Employer from April 3, 2000, until August 24, 2001. Claimant was hired by Employer as a dietary aide. Her duties involved preparing breakfast, lunch, dinner and snacks for over 100 patients at the nursing home. She pushed and pulled carts of food, cleaned stoves, food trays, refrigerators and freezers.
7. In 2001, Claimant was demoted to dishwasher as she was unable to perform the required duties of dietary aide. In August 2001, she was terminated as dishwasher due to her inability to perform those duties.
8. In 2000, Claimant developed carpal tunnel syndrome. Employer and the treating doctor agreed the condition was work related and Employer provided treatment. She underwent bilateral carpal tunnel surgical releases in 2003.
9. Claimant credibly testified the surgery did not help. Her hands feel the same as they did before surgery. She continues to have pain, numbness and tingling in both hands and wrists. Her hands are red and swollen in the morning. She is frequently awakened with pain and numbness at night. She drops things.
10. On December 2, 2004, Claimant and Employer settled her carpal tunnel claim for 15.9% of each wrist.
11. Claimant has not been able to work since she left Employer. She believes she cannot work due to her carpal tunnel, asthma, tumor and knee problems.
12. Claimant's expert, Dr. Volarich, examined Employee on July 8, 2008. He explained a pseudotumor is a condition of hypertension within the brain with excretion of excess cerebral/spinal fluid. It causes pressure inside the brain cavity. The pressure is partially controlled with a prescription drug, Diamox, but it still relentlessly builds until it is relieved by a spinal tap. Symptoms are recurring, including headaches and blurred vision necessitating spinal tap. Dr. Volarich rated Claimant's disability at 35% of the body as a whole relative to this condition.
13. Dr. Volarich also diagnosed Claimant with chronic asthma, which requires daily medications and bilateral degenerative arthritis and chondromalacia in her knees. He

rated her disability at 25% of the body as a whole referable to her pulmonary system and 15% of each knee.

14. Dr. Volarich also diagnosed Claimant with overuse syndrome of her right and left upper extremities and bilateral carpal tunnel syndrome as a result of her repetitive work for Employer. He rated Claimant's disability at 40% of each upper extremity and 15% due to the combination. He permanently restricted Employee from impact and vibratory trauma to her hands, lifting no more than 1-3 pounds away from the body and no more than 5-10 pounds close to the body.
15. Dr. Volarich opined Claimant is permanently and totally disabled as a result of her work injury combined with her preexisting disabilities.
16. Claimant's vocational expert, Barbara Parker, reviewed Claimant's records, interviewed her and issued a report. She opined Dr. Volarich's limitations restrict Claimant to less than sedentary work, which does not exist in the open labor market. Ms. Parker opined that considering her work restrictions, advanced age, lack of academic achievement, brief work history and lack of transferable skills, Claimant is unable to compete in the open labor market.
17. James England, the SIF's vocational expert, did not personally interview Claimant or have the opportunity to perform any vocational testing. He reviewed the records and issued a report. He opined Claimant had no transferable skills. He agreed Claimant is unable to perform even sedentary work under Dr. Volarich's restrictions to her hands. He opined Claimant's hand condition was the primary problem that kept her from returning to work regardless of her preexisting disabilities. He agreed Claimant's limited education and work history negatively affect her ability to compete in the open labor market. He opined these two factors would make it difficult to convince an employer to hire her. He did not have sufficient information regarding Claimant's tumor and asthma to consider the impact of those disabilities or her work ability. Mr. England testified if Claimant's preexisting conditions caused her to have headaches and difficulty with a multitude of physical activities, she could be totally disabled and unable to compete in the open labor market.
18. Mr. England agreed that if Claimant had restrictions in all physical activities, lifting, walking and debilitating headaches, it would be significant. Mr. England agreed if she was having those problems, those symptoms could prevent her from working.
19. The Claimant's medical expert, David Volarich, D.O., opined on 7/11/08 that Ms. Jones is permanently and totally disabled from competing in the open labor market based on a combination of her work injury (bilateral wrists) and her preexisting asthma, pseudotumor and bilateral knee degenerative arthritis and chondromalacia.

RULINGS OF LAW

With careful consideration of the entire record, based upon the facts as found above, the reasonable inferences to be derived therefrom and the applicable law, I rule:

1. Claimant is permanently and totally disabled as a result of the combination of her primary injury and prior disabilities.

DISCUSSION

Section 287.220 RSMo provides that in cases of permanent total disability against the Second Injury Fund, there must be a determination of the percentage of disability resulting from the last injury alone; that there was a preexisting permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment; and that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant has established she has 15.9% PPD to her right and left wrists as a result of her work-related carpal tunnel syndrome. There is no evidence otherwise.

Claimant had significant physical disability from childhood forward. She was declared totally disabled for Social Security purposes at age 17. While not binding upon me, the Social Security finding is cogent evidence of a hindrance or obstacle to employment caused by the pseudotumor. Claimant credibly testified the pseudotumor and asthma limited her ability to work because of the debilitating headaches and shortness of breath, that she was not able to move at a decent pace due to the tumor and the knee problems. She was able to work as a dietary aide and nurse's aide in a full-time capacity for two years before her primary injury.

Claimant's preexisting injuries and medical conditions caused a hindrance or obstacle to her employment or to obtaining re-employment. The final question is whether the combination of Claimant's injuries rendered her permanently and totally disabled.

The test for permanent total disability is whether a worker has the ability to compete in the open labor market. The question is whether an employer would reasonably be expected to hire an individual, given the extent of their disability. *Reese v. Gary and Roger Link, Inc.*, 5 S.W. 3d, 0522, 526 (Mo. App. 1999).

Claimant was limited to the type of work she could perform due to her pseudotumor, asthma and knee injuries. She worked as a low-level kitchen helper. The wrist injuries, in combination with the prior disabilities sapped Claimant of the last remaining work she could perform. She was eventually terminated by her employer for inability to perform these tasks.

Prior to the primary work injury, the Claimant's choices on employment were severely limited. She was able to perform her duties at Mother of Good Counsel albeit with some restrictions. The severity of her hand injuries combined with her preexisting difficulties

combine to render her totally disabled. No reasonable employer could be expected to hire Claimant in her current condition and it is not going to change for the better.

While Claimant's hands were the primary reason she could not return to work as a dietary aide or nurse's aide, the test is whether she could compete in the open labor market, not whether she could return to her former job.

The only evidence presented by the Second Injury Fund is in the form of a report prepared by vocational expert, Jim England, and it supports the finding of permanent total disability. Mr. England, in his original report, concludes this permanent total disability would be as a result of the hand injury alone. However, on cross-examination Mr. England admitted he was not provided with all of the complaints of the Employee. He did not interview the Employee. The only information he was provided was the deposition of the Employee. The deposition did not cover all of the Claimant's complaints and disabilities. Claimant was not asked about any problems with her asthma, and her pseudotumor condition was not explored in depth during her deposition. None of that information was provided to Mr. England. He admits on cross-examination that this is information he would like to have researched when forming his opinions regarding Employee's ability to work. He admits that if the Employee has headaches, shortness of breath, etc., those conditions would factor in to the Employee's ability to compete in the open labor market.

I find neither all the prior injuries nor just the last injury, considered apart from the others, would produce the current inability to work. It is the totality of the injuries that is causing the inability to work. As such, liability is imposed on the Second Injury Fund. I find Employee is permanently and totally disabled as of January 1, 2004, the date Claimant reached maximum medical improvement related to her carpal tunnel syndrome. Employer thereafter paid Claimant 55.65 weeks of permanent partial disability. The Second Injury Fund is liable for permanent total disability benefits of \$149.76 per week beginning 55.65 weeks after January 1, 2004, and thereafter, \$149.76 per week for Claimant's lifetime.

Date: _____

Made by: _____

MATTHEW D. VACCA
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation