

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

Injury No.: 05-072768

Employee: Karen Jones
Employer: Conoco Phillips 66 Company
Insurer: ACE American Insurance Company
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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 10, 2012. The award and decision of Administrative Law Judge Lisa Meiners, issued September 10, 2012, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 27th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Karen Jones Injury No: 05-072768
Dependents: N/A
Employer: Conoco Phillips 66 Company
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: ACE American Insurance Company
Hearing Date: July 18, 2012 Checked By: LM/pd

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: July 26, 2005
5. State location where accident occurred or occupational disease was contracted:
Kansas City, Clay 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, while in course and scope of her employment as a gas

station cashier was stepping onto cashier podium behind the cash register and slipped, twisting her left knee as she 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: Left knee
14. Nature and extent of any permanent disability: Permanent and Total Disability
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$38,607.66
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: \$407.68
19. Weekly compensation rate: \$271.79/\$271.79
20. Method wages computation: By stipulation
21. Amount of compensation payable: From the employer \$271.79 weekly for the remainder of Claimant's life beginning on the date of MMI, September 6, 2006
22. Second Injury Fund liability: No Fund liability
23. Future requirements awarded: The Employer is liable to the Employee for future medical care of the left knee based on Drs. Clymer and Frevert's opinions.

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Karen Jones Injury No: 05-072768
Dependents: N/A
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On July 18, 2012, the final hearing in this claim was held before Honorable Lisa Meiners, Administrative Law Judge. The employee, Ms. Jones, appeared in person and through counsel, David Slocum. The Employer/Insurer was represented by Michael Kaphusman and the Second Injury Fund was represented by Laura Van Fleet. The parties stipulated to the following:

STIPULATIONS

- 1) On 7/26/2005, Employee was employed by Conoco Phillips 66 Company;
- 2) On 7/26/2005 Employer was operating under and pursuant to the Missouri Workers' Compensation law;
- 3) Employer received proper notice; and
- 4) Permanent partial and permanent total disability rates

EXHIBITS

The Claimant offered the following exhibits:

Claimant's Exhibit A – Deposition of P. Brent Koprivica, MD, with exhibits
Claimant's Exhibit B – Deposition of Allan Schmidt, PhD, with exhibits
Claimant's Exhibit C – Deposition of Mary Titterington with exhibits
Claimant's Exhibit D – List of current left knee complaints
Claimant's Exhibit E – List of current psychological complaints
Claimant's Exhibit F – List of prior hand complaints
Claimant's Exhibit G – List of prior foot complaints
Claimant's Exhibit H – List of learning disability complaints
Claimant's Exhibit I -- List of prior psychological complaints

The Employer/Insurer offered the following exhibits:

Employer/Insurer Exhibit No. 1 – Deposition of Dr. Clymer dated 7/9/12
Employer/Insurer Exhibit No. 2 – Deposition of Terry Cordray dated 7/12/12
Employer/Insurer Exhibit No. 3 – Deposition of Dr. Larry Frevert dated 7/2/12

The Second Injury Fund offered the following exhibits:

Second Injury Fund Exhibit No. 1 – Deposition of Claimant
Second Injury Fund Exhibit No. 2 – Deposition of Michael Dreiling

ISSUES

The parties requested the Division to determine:

- 1) The nature and extent of permanent disability;
- 2) The liability of the Second Injury Fund; and
- 3) Future Medical

FINDINGS OF FACT

Karen Jones, the employee, is a 56-year-old white female from Raytown, Missouri. Ms. Jones graduated from Excelsior Springs High School in 1975. She reported having poor grades and problems in school including needing special assistance and difficulty reading. She has no vocational training or on-the-job training.

Ms. Jones has worked a variety of jobs including gas station cashier, acting as a stay at home mother, and as a file clerk at Sears. She most recently worked for Phillips 66 as a convenience store cashier from 2000 until her injury July 26, 2005. Her duties at Phillips 66 included running the cash register, ordering groceries, making concessions, cleaning bathrooms, and stocking cases of soda and other product. Ms. Jones reported that before her work injury she was picking up boxes that probably weighed 30-40 pounds (SIF Exhibit I, 18:16). Ms. Jones reported tingling in her hands and feet that slowed her down, but didn't cause her to miss work very often (SIF Exhibit I, 19:1). She reported problems lifting cases of soda when her hands were in pain.

Ms. Jones reported having pre-existing diabetes. It caused her to have some tingling in her hands and feet. Her physician never asked her to change her activities or issued any permanent restrictions because of her diabetes. The tingling she experiences does improve when she manages it with her prescription (SIF Exhibit I, 38:7). The tingling in her hands is worse now, than it was at the time of the 2005 work injury.

Ms. Jones reported having episodes of depression prior to the 2005 work injury. They did not affect her at work other than at times shortening her temper with difficult customers.

Ms. Jones sustained the primary work injury while working for Conoco Phillips 66 on July 26, 2005. She stepped onto the cashier podium, and her knee went out, causing her to fall, twisting her left knee. She caught herself on the counter before she hit the floor. She was able to complete her shift. At the time of the injury, she experienced a lot of pain and limited mobility in her knee. She reported the fall to her supervisor that night. Her sleep was immediately disrupted by the pain. She began needing to lie down during the day to manage her knee pain.

Ms. Jones was sent to OHS Comp Care on August 8, 2005 due to ongoing problems in her knee. She aggravated her knee problem on August 11, 2005 when she was at home, walking on her crutches, and her knee went out. She had an MRI on August 26, 2005 revealing an anterior cruciate ligament and medial collateral ligament sprain and evidence of degenerative change with an anterior horn tear of the medial meniscus.

Dr. Frevert recommended an arthroscopy on September 16, 2005. The surgery was delayed due to her diabetes and hypertension. She had the surgery on February 13, 2006. Dr. Frevert performed a tri-compartmental chondroplasty, partial synovectomy, partial medial meniscectomy and partial lateral meniscectomy.

Dr. Pratt also saw Ms. Jones in May 2006. She reported problems with standing and walking and was having low back pain radiating into her left leg.

Dr. Frevert issued a 25% rating for Ms. Jones knee injury on September 20, 2006. An FCE performed September 27, 2006 and shoed significant limitations.

Ms. Jones current complaints in her knee include constant pain in and around her left knee. Standing 3-5 minutes makes the pain worse. Walking makes the pain worse. She is limited to walking 50 feet without her walker and can only walk 100 feet with her walker. Sitting and stair climbing also intensify her left knee pain. She reports her knee is instable and gives out. She cannot squat, kneel or crawl because of her knee pain. She uses a wheelchair at home and a cane or walker all other times. Her knee pain interrupts her sleep and makes her sleepy during the day causing her to need naps. She does not drive her car because the manual transmission would require her to use her left knee. She limits lifting to 7-8 pounds because of her knee pain. She has to take naps in her recliner to help with her knee pain and takes pain medication for her knee pain.

EXPERTS

Dr. Koprivica authored an Independent Medical Evaluation dated August 6, 2008 and an addendum report dated April 16, 2011, both at the request of Ms. Jones. Dr.

Koprivica's deposition was also offered. Dr. Koprivica opined that the fall on July 26, 2005 was the direct, proximate, substantial, as well as prevailing, factor in the development of symptomatic internal derangement of the left knee that necessitated subsequent treatment. Due to the injury on July 26, 2005, Dr. Koprivica opined that Ms. Jones had a 75 percent permanent partial disability of the left lower extremity at the 160 week level. He also felt that she may be a candidate for a total knee arthroplasty or total knee replacement, if her medical condition permitted it. The July 2005 work injury would be a substantial factor in her need for a left knee replacement.

In his original 2008 report, Dr. Koprivica relied on Ms. Jones testimony and determined she was permanently and totally disabled due to the last accident alone and she had no permanent pre-existing disabilities. Dr. Koprivica's addendum changed his opinion. In 2011 he opined that her diabetes was disabling prior to July 26, 2005, and issued a 15 percent permanent partial disability for her pre-existing diabetes. During his deposition, Dr. Koprivica deferred to Mary Titterington as to whether or not the restrictions and limitations he identified for the July 25, 2005 injury were permanently and totally disabling. He opined that Ms. Jones was permanently and totally disabled and that it would be caused by the primary injury alone if a vocational expert determined that the napping and laying down due to pain were considered permanently and totally disabling. Dr. Koprivica opined that Ms. Jones reported napping and lying down as a pain behavior was consistent with the severity of her knee condition (Exhibit A, 22:20). Dr. Koprivica admitted that Ms. Jones knee pain was a major contributor to her sleep interruption. (Exhibit A, 45:9). He also admitted that even before he knew of any limitations Ms. Jones had prior to the last injury, he thought her restrictions on her knee and her limitations due to her knee pain were enough to permanently and totally disable her (Exhibit A, 47:19).

Dr. Koprivica suggested permanent restrictions due to Ms. Jones 2005 knee injury. He restricted her from squatting, crawling, kneeling, and climbing. He also suggested that due to her knee condition she need a cane and cart to get a round. Dr. Koprivica opined that Ms. Jones should limit time on her feet to less than one to two hours in an eight hour period and should be limited to ten minutes of standing in any one interval with flexibility of sitting whenever necessary. He recommended a sedentary physical demand level. He stated that she had issues regarding sleep deprivation and need to recline and doze during the day.

Mary Titterington, a Vocational Expert, offered an opinion at the request of the employee. Ms. Titterington issued a report on January 4, 2010 and testified by deposition on January 11, 2012. Ms. Titterington's opined that Ms. Jones work injury to her knee has removed her from the work force when combined with her low academic skills and very limited mobility. On cross-examination Ms. Titterington admitted that Ms. Jones never reported needing to lie down during the day prior to the July 26, 2005 work injury. She also admitted that Ms. Jones was not having trouble performing her job prior to her work injury, and that she had good attendance. Ms. Titterington further admitted that Ms. Jones pain and standing and walking limitations were the main reasons she was unable to

meet the essential characteristics of work including: ability to report to work consistently, stay on task throughout the work day and meet productions goals for quality or quantity of work (Exhibit C, 29:22). Ms. Titterington also opined that a need to recline during the day would remove her from the work force in isolation (Exhibit C, 31:2).

Allan Schmidt, Ph.D., was retained by the employee to render an opinion on Ms. Jones psychological condition. His reported I dated April 9, 2010 and his deposition was taken January 3, 2012. He opined that Ms. Jones had 10% pre-existing psychological disability and a 15% permanent partial psychological disability due to her last injury. He admitted she never saw a specialist for any psychological problem prior to the primary work injury. She was not taking any medication for any psychological condition at the time of the primary injury, and Dr. Donaldson had been able to wean her off her depression medication because she had been doing better with her depression symptoms. He also admitted that Ms. Jones was not mentally retarded, but her IQ of 73 was borderline intellectual functioning. He did diagnose her as having a reading disorder, though admitted poor sleep could have altered her testing scores.

Dr. Frevert, treating physician, offered a rating report dated September 20, 2006. He also testified by deposition on July 2, 2012. Dr. Frevert opined that Ms. Jones had a 25% permanent partial impairment of the left lower extremity at the level of the knee due to the last injury. He opined that she had a 10% pre-existing impairment at the knee due to arthritis, but that she did not report any limitations due to her knee before the injury and there was no reason to believe it was symptomatic. He restricted claimant from prolonged standing or walking and repetitive stair climbing. He stated she could ambulate as tolerated but should avoid carrying or lifting greater than 5-10 pounds. He admitted that it would be reasonable for Ms. Jones to report sleep interruption from her knee pain.

Dr. Clymer issued an Independent Medical Evaluation on February 20, 2012 at the request of the Employer/Insurer. He testified by deposition on July 9, 2012. He admitted that Ms. Jones was doing well with her knee prior to the July 26, 2005 injury. He opined that Ms. Jones had osteoarthritis, morbid obesity, diabetes, hypertension, depression, hyperlipidemia, and some pervious degenerative arthritis pre-dating her work injury. He determined that her primary problem was obesity and arthritis in the left knee. He assigned a 20% permanent partial disability due to the work injury and a pre-existing 15% to the knee due to arthritis and obesity. He suggested that she cannot manage prolonged standing or walking and could work a sedentary job.

Terry Cordray, Vocational Expert, was retained on behalf of the Employer/Insurer. He issued a report on May 23, 2012 and testified by deposition on July 12, 2012. Mr. Cordray opined that based on her sedentary work restrictions and background she would be able to work as a parking garage cashier, a telemarketer, or a security monitor. He admitted that if she needed to lie down, it would be totally disabling.

Mike Dreiling, Vocational Expert, wrote a report at the request of the Second Injury Fund. His deposition was taken July 9, 2012. Mr. Dreiling testified that the limitations due to the July 26, 2005 injury alone, there is no employment an employer could reasonably be expected to hire Ms. Jones for (Exhibit II, 13:17). He indicated that her need to sit-down for work, and potentially needing to lie down, doze off and use assistive devices in the work setting would preclude her from working.

RULINGS OF LAW

At issue in this case is the nature and extent of disability, including liability of the Second Injury Fund. The Missouri Supreme Court in the case of Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966) explained the procedure, which must be undertaken when there is a dispute as to whether the employer or the Second Injury Fund is liable for permanent total disability benefits. The Court explained that the first consideration is the disability resulting from the last injury alone. Otherwise, the words in §287.220 “considered alone and of itself” were meaningless. Therefore, a claimant’s pre-existing disabilities are irrelevant until employer’s liability for the last injury is determined. And if a Claimant’s last injury in and of itself renders a claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. See Huey v. Chrysler Corporation, 34 S.W.3d 845 (Mo.App. 2000); Keysior v. TransWorld Airlines, 5 S.W.3d 195, 201 (Mo.App. 1999); Maas v. Treasurer of Missouri, 964 S.W.2d 541 (Mo.App. 1998); Roller v. Treasurer of Missouri, 935 S.W.2d 739, 741 (Mo.App. 1996).

The test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the employer in the usual course of business would reasonably be expected to employ the Employee in his present physical condition. Isaac v. Atlas Plastic Corporation, 793 S.W.2d 165 (Mo App. 1990). The critical question is whether Employer could reasonably be expected to hire the Claimant, considering her present physical condition, and reasonably expect her to successfully perform the work. Forshee v. Landmark Excavating and Equipment, et al, No.85582 (Mo app. E.D. 2005); Sutton v. Vee Jay Cement Contracting Company, 37 S.W.3rd 803, 811 (Mo App. 2000). Total disability means the inability to return to any reasonable or normal employment. It does not require that the employee be completely inactive or inert. Isaac, 793 S.W.2d 165 (Mo App. 1990).

One factor in determining whether a person is permanently and totally disabled under the Missouri Workers’ Compensation Law is the Claimant’s physical condition. See generally Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo App. 1990); Isaac, 793 S.W.2d 165 (Mo App. 1990). First the Court must look at the physical effects of the primary work injury in isolation. Ms. Jones reported that as a result of her 2005 knee injury she had problems standing, walking, sitting, sleeping, using stairs, kneeling, squatting, crawling and driving. She indicated she uses pain medication for her knee and that she must take naps in her recliner to help with her knee pain. She uses a wheel chair,

cane and walker to ambulate, never being without one of the three. Dr. Frevert restricted claimant from prolonged standing or walking and repetitive stair climbing and stated she could ambulate as tolerated but should avoid carrying or lifting greater than 5-10 pounds. Dr. Koprivica also limited Ms. Jones work based on her last accident in isolation. He restricted her to sedentary work, with ability to sit whenever necessary and limited any standing to ten minutes at any given time, with a total of one to two hours in any given shift. Dr. Koprivica also added that Ms. Jones was sleepy due to her knee pain keeping her awake and night and that it was reasonable for her to recline and doze during the day.

Mary Titterington and Mike Dreiling, both vocational experts, testified that in their professional opinion, the need to lie down during the day removes an employee from the workforce based on the fact that no employer would be reasonably expect to employ an individual who must lay down during the day for pain. Ms. Jones needs to lay down during the day for her knee pain alone. Dr. Koprivica and Dr. Frevert both opined that it is reasonable for someone with a knee injury such as Ms. Jones, to lie down during the day. Dr. Koprivica opined that if a vocational expert found that lying down during the day was permanently and totally disabling, that Ms. Jones was permanently and totally disabled based on the last injury in isolation.

I find that Ms. Jones is permanently and totally disabled as the result of her July 26, 2005 injury to her left knee in isolation. Therefore I order the Employer/Insurer to pay permanent and total benefits in the amount of \$271.79 weekly from the date of maximum medical improvement, September 6, 2006 for the remainder of Ms. Jones lifetime. I find that no workers' compensation benefits are due from the Second Injury Fund as the cause of the permanent and total disability is the last accident in isolation.

I also find the Employer is liable to the Employee for future medical care of the left knee. Drs. Clymer, Koprivica and Frevert indicate a total knee replacement would be an option as treatment. Therefore, I find Claimant has met her burden of proof that the Employer provide future medical care of the left knee.

This award is subject to an attorney's lien in the amount of 25 percent for services rendered by Mr. David Slocum.

Made by: _____

Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation