

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

Injury No.: 02-009603

Employee: Janet Kersting  
Employer: Missouri Goodwill Industries (Settled)  
Insurer: Self-Insured/SWIM  
c/o Gallagher Bassett (Settled)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: February 12, 2002  
Place and County of Accident: St. Louis

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 5, 2006. The award and decision of Administrative Law Judge Kathleen M. Hart, issued July 5, 2006, 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 20<sup>th</sup> day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Dependents: n/a

Employer: Missouri Goodwill Industries (settled)

Additional Party: Second Injury Fund (only)

Insurer: Settled

Hearing Date: April 11, 2006

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: KMH/tr

### **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: February 12, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 tripped and fell at work injuring her left shoulder.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left Upper Extremity
14. Nature and extent of any permanent disability: 74% permanent partial disability of the left upper extremity against Employer, Permanent total disability beginning on September 5, 2005.
15. Compensation paid to-date for temporary disability: \$1,857.12
16. Value necessary medical aid paid to date by employer/insurer? \$24,828.05

Employee: Janet Kersting

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17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$152.62
19. Weekly compensation rate: \$101.75/\$101.75
20. Method wages computation: Stipulation

### **COMPENSATION PAYABLE**

21. Amount of compensation payable:

171.68 weeks of permanent partial disability from Employer

(previously paid)

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund at \$101.75 per week beginning September 5, 2005 and continuing for Claimant's lifetime

TOTAL:

UNKNOWN

23. Future requirements awarded: None

Said payments to begin immediately 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 the first 300 weeks of compensation only in favor of the following attorney for necessary legal services rendered to the claimant:

Raymond J. Flunker

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Janet Kersting

Injury No.: 02-009603

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Missouri Goodwill Industries

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

Additional Party: Second Injury Fund

Insurer: n/a

Checked by: KMH/tr

A hearing was held in the above captioned matter April 11, 2006. Attorney Ray Flunker represented Janet Kersting (Claimant). Assistant Attorney General Levander Smith represented the Second Injury Fund. Claimant's case against the employer was settled before this hearing.

## **STIPULATIONS**

The parties stipulated to the following:

1. On February 12, 2002, Claimant sustained a left shoulder injury while in the course and scope of her employment with MERS/Missouri Goodwill (Employer).
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Venue is proper in St. Louis.
4. Claimant's TTD and PPD rates are \$101.75.
5. Claimant settled her primary injury for 74% of her left shoulder.

## **ISSUES**

The sole issue to be determined is the nature and extent of the Second Injury Fund's liability.

## **FINDINGS OF FACT**

1. Claimant is a 64 year-old female who sustained a compensable left upper extremity injury in February 2002.
2. Claimant has a long history of psychiatric problems. Before her 2002 work injury, Claimant had been diagnosed with Obsessive-Compulsive Disorder, Depressive Disorder, Developmental Disorder and Schizophrenia. Due to her psychiatric difficulties, Claimant has spent her entire life in a protective home environment. Upon her parents' death, she moved into Laclede Groves, an assisted living facility.
3. Claimant characterizes her psychiatric problems as her "nervous disorder" that she has had since birth. The evidence indicates Claimant has seen and continues to see a psychologist on a regular basis and has been on the same medications for several years.
4. Claimant graduated from high school, and shortly thereafter she began working for Employer in May 1961 as a typist. When Employer began using automatic typewriters, Claimant changed jobs because the noise of the automatic typewriters upset her nervous disorder. Claimant began working three days a week as a clothes hanger, and also packed clothes and worked on hangers. Claimant worked for Employer 43 years until her retirement in March 2005.
5. In February 2002, Claimant fell at work fracturing her left shoulder. Dr. Hertel performed an open reduction and internal fixation of her left humeral fracture. Due to Claimant's psychiatric problems and social situation, she had an extended stay in the hospital and was later transferred to a nursing facility. She eventually was able to return to her apartment at Laclede Groves.
6. Claimant returned to work May 23, 2002. Dr. Hertel recommended Claimant work only 4 hours a day instead of her typical 6 hours a day.
7. Dr. Hertel released Claimant from care on September 18, 2002. He rated her disability at 50% of the left shoulder and gave her permanent restrictions of no repetitive use, no overhead work, a 5-pound lifting restriction, and he restricted her to a 4-hour workday.
8. Dr. Hertel saw Claimant again in May 2003. He allowed Claimant to return to working 6 hours per day and continued her restrictions of no repetitive use of her arm and no overhead work. Claimant testified she continued to work 4 hours per day until her retirement because Dr. Hertel told her to work just 4 hours, because she continued to have pain in her shoulder, and partly by choice so she could participate in activities at Laclede Groves.
9. In June 2004, Claimant settled her case against Employer for 74% of her left shoulder.
10. Claimant continued to work 3 days a week, 4 hours a day until her retirement in May 2005 after she fractured her left elbow in a non-work related injury. Those medical records are not in evidence.
11. Claimant never worked any other job, and she never tried to work any other job due to her nervous disorder. Claimant's and the Second Injury Fund's vocational experts agree that as a result of Claimant's continuous employment in an unskilled capacity, she has acquired no knowledge or skills transferable to other types of work in the local or national economy.

12. Claimant has never driven a car due to her nervous disorder. Claimant has someone at Laclede Groves take care of her finances, pay her bills, do her income taxes and take her to the doctor. She is able to bathe and dress herself, do her own laundry and make her bed. She is not able to cook her own food.
13. Claimant continues to have significant pain and restricted motion in her shoulder, and pain and restrictions when raising her arm.

## RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

Claimant is permanently and totally disabled as a result of the combination of her prior disabilities and her February 2002 work injury.

Section 287.220 RSMO provides that in cases of permanent total disability, there must be a determination of the following:

1. the percentage of disability resulting from the last injury alone;
2. that there was a pre-existing permanent disability that was a hindrance or obstacle to employment or to obtaining re-employment;
3. that all of the injuries and conditions combined, including the last injury, have resulted in the employee being permanently and totally disabled.

Claimant settled her case with Employer prior to this hearing. The parties stipulated to Claimant's primary PPD. Based on my review of the treating records, the medical opinions and the Claimant's complaints, I find Claimant sustained a 74% permanent partial disability to her left shoulder as a result of her February 2002 work injury.

Regarding her prior disability, there is no dispute in the evidence that Claimant was unable to compete in the open labor market prior to this accident as a result of the psychiatric conditions described above. She has always worked in an unskilled, light work capacity in a sheltered work environment. She has no transferable, competitive skills.

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I find this case analogous to *Laturno v. Carnahan*, 640 SW2d 470 (Mo.App.1982) which was recently reaffirmed by the Court of Appeals on a separate issue in the case of *Harris v. Treasurer of the State of Missouri as Custodian of the Second Injury Fund*, (only the Westlaw citation is available, --- S.W.3d ---, 2006 WL 1390139, Mo.App. ED, 2006). In *Laturno*, the claimant suffered from life-long mental disability and had spent his entire career with the same employer. He was only able to do simple, manual tasks in an unskilled, closely supervised position. His employment options were clearly limited before his work injury. He was found permanently and totally disabled before his work accident, in terms of competition in the open labor market. However, given the fact that Mr. Laturno had maintained steady employment for over 30 years before his work injury, the court affirmed a finding that the Claimant was permanently and totally disabled as a result of the combination of his pre-existing disabilities and his work injury.

While the case at hand may be distinguishable by the fact Claimant did return to work after her February 2002 injury, Dr. Hertel had placed significant physical restrictions on her work and had restricted her hours of work at least through May 1, 2003. Even when Dr. Hertel allowed Claimant to work without restricted hours, her physical restrictions continued, and she continued to work a reduced hour schedule due pain in her shoulder. Claimant should be commended, not penalized, for her attempt to return to work.

In considering whether an individual is permanently and totally disabled, the courts have found "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." *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo.App. E.D. 1990). The question is whether an employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition. I find no employer on the open labor market would employ an individual of Claimant's age with her physical restrictions, her prior condition, and her lack of transferable skills.

The Second Injury Fund is hereby ordered to pay permanent total disability benefits at the rate of \$101.75 per week beginning on September 5, 2005, (171 5/7 weeks after May 23, 2002) for Claimant's lifetime. The amount accrued to date shall be paid forthwith with interest as provided by law. Claimant's attorney shall be entitled to a fee of 25% on the first 300 weeks of compensation.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

KATHLEEN M. HART  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*