

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

Injury No.: 96-442348

Employee: Patricia Key
Employer: Aldi, Inc. (Settled)
Insurer: Self-Insured (Settled)
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 and briefs, heard the parties' oral arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the July 16, 2010, award and decision of the administrative law judge (ALJ). We adopt the findings, conclusions, decision, and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The ALJ found that employee is permanently and totally disabled as a result of her preexisting disabilities combining with her permanent partial disabilities suffered as a result of her February 1996 work-related injury. The ALJ further found that employee attained maximum medical improvement (MMI) on December 14, 1998. We agree with the ALJ's determination that employee is permanently and totally disabled as a result of her preexisting disabilities combining with the last injury; however, we disagree with the ALJ's determination that employee attained MMI on December 14, 1998.

While Dr. Boland initially placed employee at MMI on December 14, 1998, employee continued to receive extensive treatment following this date, including three additional surgeries. Prior to employee's May 2, 2003, surgery, Dr. Boland even opined in a letter that the "surgical intervention to treat employee's structural abnormality is rather extensive, but ... necessary in an effort to fix her structural problem and work toward the goal of alleviating back and lower extremity pain, improving her ability to be upright on her feet for longer periods of time with less symptoms." Further, Dr. Boland opined that the operation would allow for correction of employee's lordosis, improvement in her flat back syndrome, and treat the pseudoarthrosis at the L4-5 level. Dr. Boland's opinions regarding this additional surgical intervention are not something a doctor would recommend for a patient that had attained MMI.

Employee's testimony provides additional support for the Second Injury Fund's assertion that employee had not attained MMI on December 14, 1998. Employee testified that the May 2, 2003, surgery improved her ability to stand up straight, bathe herself, exercise, and walk up and down steps. Employee's testimony is clear evidence that the 2003 surgery improved her functioning. After the 2003 surgery, Dr. Boland placed employee at MMI on January 24, 2005.

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We find that the weight of the evidence shows that employee had not attained MMI on December 14, 1998. Employee received a significant amount of treatment following that date and was even given a subsequent MMI date by the same treating physician that gave her the previous December 14, 1998, MMI date.

For the foregoing reasons, we modify the ALJ's decision and find that employee attained MMI on January 24, 2005. Therefore, going forward from January 25, 2005, the Second Injury Fund is liable for the difference between the permanent total disability benefits and the permanent partial disability benefits, or \$81.91 (= \$339.20 PTD rate - \$257.29 PPD rate) for 400 weeks (100% PPD to the body as a whole due to employee's lower back disabilities and psychological disorder). Thereafter the Second Injury Fund shall be liable for employee's weekly permanent total disability benefit of \$339.20 for the remainder of employee's life, or until modified by law.

The award and decision of Administrative Law Judge Edwin J. Kohner, as modified, is attached and incorporated by 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 10th day of February 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

Employee: Patricia Key

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed without modification. Therefore, I adopt the decision of the administrative law judge, in its entirety, as my decision in this matter.

Because the Commission majority has decided otherwise, I respectfully dissent.

John J. Hickey, Member

NOTE: The Award of the Division's Administrative Law Judge is not posted.