

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

Injury No.: 99-077613

Employee: Marian Knisley
Employer: Charleswood Corporation
Insurer: Fireman's Fund Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: April 6, 1999

Place and County of Accident: Warren County, Missouri

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 May 16, 2005. The award and decision of Administrative Law Judge Hannelore D. Fischer, issued May 16, 2005, 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 24th day of January 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Marian Knisley

Injury No. 99-077613

Dependents:
Employer: Charleswood Corporation
Additional Party: Second Injury Fund
Insurer: Fireman's Fund Insurance Company

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: HDF/cs

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: April 6, 1999.
5. State location where accident occurred or occupational disease was contracted: Warren County, MO.
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:
Injured low back when changing dyes in embosser machines.
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: Back, body as a whole.
14. Nature and extent of any permanent disability: 45% ppd of the body as a whole.
15. Compensation paid to-date for temporary disability: \$20,285.95
16. Value necessary medical aid paid to date by employer/insurer? \$53,741.13.
17. Value necessary medical aid not furnished by employer/insurer?
18. Employee's average weekly wages:
19. Weekly compensation rate: \$269.20 for all benefits.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:
weeks of permanent partial disability from Employer: \$48,456.00

22. Second Injury Fund liability: No.

TOTAL: \$48,456.00

23. Future requirements awarded:

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 all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

J. Patrick Chassaing.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Marian Knisley

Injury No: 99-077613

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents:

Employer: Charleswood Corporation

Additional Party Second Injury Fund

Insurer: Fireman's Fund Insurance Company

Checked by: HDF/cs

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on March 14, 2005. Memoranda were due by May 6, 2005.

The parties stipulated that on or about the 6th day of April, 1999, the claimant was in the employment of Charleswood Corporation; the claimant sustained an injury by accident; the accident arose out of and in the

course of employment; the employer was operating under the provisions of the Missouri workers' compensation law; the employer's liability was insured by Fireman's Fund Insurance Company; the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law; the rate of compensation on the date of accident was \$269.20 per week for all benefits; temporary disability benefits have been paid to the claimant to date in the amount of \$20,285.95, those payments representing benefits paid through January 21, 2003; medical aid has been provided in the amount of \$53,741.13.

The issues to be resolved by hearing include 1) the liability of the employer/insurer for permanent partial or permanent total disability benefits and the liability of the Second Injury Fund. Benefits are claimed as of and including January 22, 2003.

FINDINGS OF FACT

The claimant, Marian Knisley, was 53 at the time of the hearing of this claim. Ms. Knisley initially dropped out of high school, but then graduated from high school in 1988.

Ms. Knisley began working for the Charleswood Corporation (Charleswood) in 1993. Prior to working at Charleswood, Ms. Knisley babysat, helped manage apartments and worked in a bowling alley. Ms. Knisley had a variety of jobs at Charleswood, including that of an embosser, which involved setting 50- to 70-pound brass dyes in machines which were then used to make impressions on wooden furniture pieces. Setting a dye involved two to two and one-half hours of work.

On April 6, 1999, Ms. Knisley had to set up and then replace the dyes just set up on an embossing machine, the equivalent of setting up two embossing machines, one right after the other. After completing the second set-up of the dyes, Ms. Knisley experienced intense back pain. Ms. Knisley received initial treatment for her back pain at Crossroads Regional Hospital and then saw Dr. Doumit, the physician for Charleswood. Ms. Knisley was then referred to Dr. Vellinga, who performed three epidural steroid injections without providing lasting relief to Ms. Knisley. Ms. Knisley was then referred to Dr. Piper who recommended a fusion in Ms. Knisley's back.

Ms. Knisley had to delay her surgery with Dr. Piper due to the recurrence of her breast cancer, located in 2000 in her left breast. In March of 2001, Ms. Knisley was released from her treatment for her cancer.

In November of 2001, Dr. Piper performed a lumbar fusion at the L4-5 level; specifically, Dr. Piper described Ms. Knisley's procedure as follows:

She underwent a decompressive laminectomy with decompression of the L5 nerve roots, as well as an instrumented L4-L5 posterolateral fusion with autogenous local bone. She was covered peri-operatively with antibiotic coverage and deep vein thrombosis prophylaxis. (From November 10, 2001 discharge summary from Barnes-Jewish St. Peters Hospital.)

After her release from treatment with Dr. Piper, Ms. Knisley saw her family physician, Dr. Cuellar, then Dr. Kennedy, a neurologist, Dr. Graham, a pain specialist, and then Ms. Knisley saw Dr. Nasrallah, a chiropractor, on her own. Ms. Knisley got only temporary relief of her symptoms from Dr. Nasrallah and discontinued her treatment with him.

Currently, Ms. Knisley suffers from nervousness, stress and exhaustion. Most recently, Ms. Knisley has been receiving psychiatric treatment from Dr. Riser for the past three months. Ms. Knisley can walk from 15 minutes to a half hour. She can sit, lie down or stand for limited periods of time.

Ms. Knisley's past medical history includes a 1985 right breast lumpectomy as the result of cancer, right hand carpal tunnel surgery in April of 1990, a 1990 left breast lumpectomy as the result of cancer, a 1994 right breast mastectomy as the result of cancer and a 1996 right breast reconstruction. Ms. Knisley was also diagnosed with mitral valve prolapse in 1998.

Ms. Knisley stated that the nervous breakdown in February of 1999 reflected in Dr. Cuellar's records was the result of her divorce.

Subsequent to April 6, 1999, Ms. Knisley had another bout of breast cancer, this time resulting in the removal of the left breast.

Dr. Thomas Musich, M.D., specializing in industrial medicine, evaluated Ms. Knisley on February 27, 2004. Dr. Musich opined to a permanent disability of 65 percent of the body referable to Ms. Knisley's accident while employed by Charleswood on April 6, 1999.

With regard to prior disabilities, Dr. Musich noted Ms. Knisley's history of bilateral breast cancer between 1985 and 2000, along with a right breast reconstruction resulting in "chronic fatigue, chronic intermittent chest

pain secondary to radiation, surgical scarring, and mitral valve prolapse which was diagnosed in 1998.”

Dr. Musich also noted Ms. Knisley’s surgical treatment of right carpal tunnel syndrome and “chronic depression and anxiety as a result of her metastatic breast cancer over the past twenty years,” among Ms. Knisley’s disabilities prior to April 6, 1999. Dr. Musich also noted prior disability due to hypertension. Without including the chronic depression and anxiety, Dr. Musich opined to a 35-percent permanent partial disability attributable to Ms. Knisley’s prior disabilities. Dr. Musich went on to find Ms. Knisley permanently and totally disabled as the result of her 1999 low back injury, combined with her prior disabilities when viewed with her “limited education, lack of transferable skills, and her ongoing medical care and treatment.”

Dr. Musich acknowledged that the restrictions he imposed on Ms. Knisley as the result of her April 1999 back injury alone would make it difficult to perform light, sedentary work.

With regard to Ms. Knisley’s high blood pressure, Dr. Musich described it as “still mildly elevated despite the medication of Hyzaar.” The mitral valve prolapse suffered by Ms. Knisley was described by Dr. Musich as not symptomatic enough that she was being treated with a beta blocker at the time that Dr. Musich evaluated her.

Mr. James M. England, a rehabilitation counselor who also does vocational evaluations, testified by deposition that Ms. Knisley’s cancer, which has taken an emotional toll on her, her hands for “which she had had carpal tunnel treatment in the past” and which cramp after repetitive use and have negatively affected Ms. Knisley’s handwriting and Ms. Knisley’s back are the significant factors in causing Ms. Knisley to be unable to sustain employment on a consistent basis. However, Mr. England was unaware of any permanent restrictions on the use of her hands which Ms. Knisley had as the result of her carpal tunnel surgery. Likewise, Mr. England was aware of no permanent restrictions sustained by Ms. Knisley as the result of her cancer, citing only the worry of a recurrence of the cancer as a concern.

Mr. England’s description of Ms. Knisley’s restrictions or limitations in his report refers only to restrictions and limitations imposed by her back injury. Although Mr. England testified to Ms. Knisley’s cancer as affecting her ability to complete for as well as to sustain work, he failed to both distinguish between the cancer pre-dating the April 6, 1999 injury and the bout of cancer after April 6, 1999, and to elaborate on how the cancer affects Ms. Knisley’s ability to work.

During her deposition testimony, Ms. Knisley testified with regard to the effect of her carpal tunnel syndrome affected on hands and Ms. Knisley noted that she believed her handwriting had deteriorated and her left hand “goes dead all the time,” but stated that she did not believe her ability to work was affected by her hands. With regard to her breast cancer and its effect on her ability to work, Ms. Knisley stated that she was careful with her arms because she did not want to pull the scar tissue and mentioned swelling in the arms as the result of the removal of lymph nodes. Ms. Knisley stated that as the result of the mitral valve prolapsed she would “on occasion” go to the nurse’s office to “calm down”; this happened two or three times. The depression came on slowly according to Ms. Knisley, but did not cause her to miss work or be hospitalized.

Ms. Knisley elaborated on things she is not able to do since her back injury; they include lifting, stooping, walking any distance, horseback riding, sitting on a hard bench and standing more than 10 to 15 minutes.

Dr. David Kennedy, neurological surgeon, evaluated Ms. Knisley after her November 2001 laminectomy. Dr. Kennedy found Ms. Knisley to be at maximum medical improvement on January 22, 2003, stating that Ms. Knisley “should be in a job capacity wherein she is not lifting more than 10 pounds, nor doing more than occasional bending, twisting or stooping on a permanent basis.”

A 1998 medical record entry from Dr. Cuellar’s office reflects that Ms. Knisley complained of increased stress, an inability to sleep and thoughts of suicide.

Ms. Knisley’s medical records from Dr. Cuellar include a 1999 reference to “Having a nervous breakdown. Called GHP and they referred to Dr. Scripman and St. J. Health Ctr.” The exact date of the 1999 entry is obscured; however, it appears from a general look at the entries around this entry that it pre-dates April of 1999.

An August 1999 “admission database” in the DePaul Health Center records refers to Ms. Knisley’s “nerves from a divorce.”

A 2003 entry in Dr. Cuellar’s notes, while difficult to read, includes a reference to “may need nerve pills for summer months, anxiety under better control, calmer while asleep although (?) ex-boyfriend’s living here (?). The word “although” is very difficult to read and could also be interpreted as “daughter.”

While there are other references to medication for mental conditions or to Ms. Knisley’s mental state, none are easy to read or state the cause or duration of any mental state.

With regard to Ms. Knisley's cardiac health, a March 7, 1998 entry in Dr. Cuellar's records reflects "heart palpitations (sic) and chest pains." On July 16, 1998, Dr. Cuellar's record for Ms. Knisley includes a "complaint of another episode of heart palpitations (sic)."

Boonslick Medical Group records reflect Ms. Knisley's treatment with Dr. Ranjit Bagwe and conclude with an August 3, 1998 entry stating "patient called - echo shows slight leak in valve - no treatment at this time - if something shows up on monitor, then treatment will be started."

APPLICABLE LAW

Ms. Knisley asserts she is permanently totally disabled as a combination of her disabilities. The Second Injury Fund is a creature of statute, and benefits from the Second Injury Fund are awarded only if Employee proves that under Section 287.220.1 RSMo., she is entitled to such benefits. Employee has the burden of proving all essential elements of his workers' compensation claim. Lawrence v. Joplin R-VIII School Dist., 834 S.W. 2d 789, 793 (Mo. App. S.D. 1992). Second Injury Fund liability exists only if Employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sum of disabilities. Section 287.220.1 RSMo. 2000; Anderson v. Emerson Elec. Co., 698 S.W. 2d 574, 576 (Mo. App. 1985). When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. Brown v. Treasurer of Missouri, 795 S.W. 2d 479, 482 (Mo. App. 1990).

In order to find permanent total disability against the Second Injury Fund, it is necessary that Employee suffer from a permanent partial disability to result in total disability. Section 287.220.1 RSMo. 1994, Brown v. Treasurer of Missouri, 795 S.W. 2d 479, 482 (Mo. App. 1990), Anderson v. Emerson Elec. Co., 698 S.W. 2d 574, 576 (Mo. App. 1985).

AWARD

The claimant, Marian Knisley, has sustained her burden of proof that she has sustained permanent disability as the result of her accident and injury on April 6, 1999. Ms. Knisley has sustained a permanent disability of 45-percent of the body referable to the accident and injury of April 6, 1999. This award is based on Ms. Knisley's own testimony regarding her limitations as the result of her back injury, as well as the opinions of Dr. Kennedy and Dr. Musich. The restrictions imposed by each physician as the result of the back injury were most important.

The claimant, Marian Knisley, has failed to sustain her burden of proving Second Injury Fund liability. Dr. Musich's testimony regarding Ms. Knisley's pre-existing disabilities failed to distinguish the disabilities, grouping sequelae of metastatic breast cancer, carpal tunnel syndrome, cardiac mitral valve prolapse and hypertension together. With regard to the cancer, Dr. Musich failed to distinguish between the cancer pre-existing 1999 and the bout of cancer in 2000. Although Dr. Musich ascribed a disability of 35 percent of the body to all of the "pre-existing disabilities" and concluded that Ms. Knisley was permanently and totally disabled as the combination of these pre-existing disabilities and her low back injury, where the "pre-existing disabilities" fail to distinguish between pre- and post- April 6, 1999 cancer and its sequelae and where the pre-existing injuries include hypertension controlled by medication and mitral valve prolapse for which no treatment is needed, Dr. Musich has failed to establish that Ms. Knisley has pre-existing disability significant enough to combine with the low back injury and to, thus, implicate the Second Injury Fund for permanent partial or permanent total disability.

Likewise, although Mr. England found Ms. Knisley to be unable to be employed, Mr. England failed to distinguish between Ms. Knisley's pre- and post- April 6, 1999 status regarding her cancer and failed to elaborate on the disability caused by the cancer and its effect on Ms. Knisley's employability.

Date: May 16, 2005

Made by: /s/Hannelore D. Fischer
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/Patricia "Pat" Secret
Patricia "Pat" Secret, Director
Division of Workers' Compensation