

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

Injury No.: 09-077826

Employee: Lori Lawson
Employer: Boone Hospital Center (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. 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 May 29, 2013. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued May 29, 2013, 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 22nd day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Lori Lawson

Injury No. 09-077826

Dependents:

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

Employer: Boone Hospital Center (settled)

Additional Party: Second Injury Fund

Insurer: Self-insured (settled)

Hearing Date: April 9, 2013

Checked by: RJD/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: September 30, 2009.
5. State location where accident occurred or occupational disease was contracted: Boone 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 was performing her job duties as a nurse when a patient kicked Employee in the abdomen and punched Employee in the face.
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: Nose, head, sinuses, psyche.
14. Nature and extent of any permanent disability: 35% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: Unknown.
16. Value necessary medical aid paid to date by employer/insurer? Unknown.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.

Employee: Lori Lawson

Injury No. 09-077826

18. Employee's average weekly wages: \$1,211.22.
19. Weekly compensation rate: \$807.48 for permanent total disability benefits; \$422.97 (for permanent partial disability benefits).
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

20. Second Injury Fund liability:

Permanent total disability differential benefits of \$384.51 per week for 140 weeks beginning February 3, 2010 and, thereafter, permanent total disability benefits of \$807.48 per week, for Claimant's lifetime.

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:

James J. Sievers

Employee: Lori Lawson

Injury No. 09-077826

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Lori Lawson

Injury No. 09-077826

Dependents:

Employer: Boone Hospital Center (settled)

Additional Party: Second Injury Fund

Insurer: Self-insured (settled)

Hearing Date: April 9, 2013

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

ISSUES DECIDED

An evidentiary hearing was held in this case on April 9, 2013 in Columbia. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on May 2, 2013. The hearing was held to determine the liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant sustained an accident arising out of and in the course of her employment with Boone Hospital Center on September 30, 2009;
6. That Claimant's average weekly wage is \$1,211.22, resulting in compensation rate for temporary total disability and permanent total disability of \$807.48 and a compensation rate for permanent partial disability of \$422.97;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation herein; and

Employee: Lori Lawson

Injury No. 09-077826

8. That Boone Hospital Center was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Claimant, Lori Lawson; the deposition testimony of Claimant; the deposition testimony and narrative report of Dr. David Volarich; the deposition testimony and narrative report of Mr. James England, a vocational rehabilitation counselor; the deposition testimony and narrative report of Mr. Gary Weimholt, a vocational rehabilitation consultant; the deposition testimony and narrative report of Dr. Wayne Stillings; the deposition testimony and narrative report of Mr. Terry Cordray, a vocational rehabilitation counselor; medical records; and stipulations for compromise settlement.

DISCUSSION

Claimant, Lori Lawson, was born November 22, 1962. She graduated from Blair Oaks High School in 1981 and earned her associates degree in nursing from Lincoln University in 1984. She has worked as a certified nursing assistant, a staff nurse, and as a charge nurse. Claimant is 5'8" tall and currently weighs 320 pounds. Claimant testified she had a 40 pound weight gain since the accident of September 30, 2009.

Claimant began working for Employer (Boone Hospital Center) in 2008 as a nurse. She worked as a staff nurse at times and as a charge nurse at other times. As stipulated, Claimant sustained a work-related accident on September 30, 2009. Claimant was performing her job duties as a nurse when a patient kicked her in the abdomen and punched her in the face. Claimant had a nosebleed and complained of a headache in the frontal region behind the eye. Claimant was seen in the emergency department on September 30, 2009 and a CT scan showed a very minimally displaced right nasal bone fracture. Claimant was diagnosed with a right slightly displaced nasal fracture and post concussive syndrome.

Claimant followed up with the employee assistance program on October 2, 2009. She complained of a headache since the injury. Dr. Robert Herting diagnosed a nasal fracture and closed head injury. Claimant saw Dr. Gregory Croll in consultation on October 6, 2009 and he noted very subtle nasal trauma and facial trauma with nasal fracture per CT scan. Claimant returned to Dr. Herting on October 12, 2009 and reported she could not breathe through her right nostril and that she was starting to snore. Dr. Herting diagnosed post concussive syndrome and indicated that Dr. Croll had said there was nothing to be done surgically and the congestion would resolve. Claimant continued to follow up with employee assistance program and returned to Dr. Herting on October 30, 2009 and complained of headache in the temporal area and frontal area since the injury. She also complained of persistent nasal congestion and stated she was breathing through her mouth. On November 24, 2009, Dr. Croll recommended Claimant see a neurosurgeon or ENT. Claimant returned to Dr. Herting on December 1, 2009 with complaints of ongoing headache. He advised her to try a Breathe Right strip across her nose.

Employee: Lori Lawson

Injury No. 09-077826

Claimant began treatment with Dr. Sean Bailey on December 22, 2009 with complaints of persistent sinus congestion, headache, and nasal airway obstruction after an assault. He recommended medications and a possible sleep study. In a letter dated February 2, 2010, Dr. Bailey diagnosed nasal airway obstruction that could be due to nasal fracture with concomitant septal fracture and a deviated septum, and nasal airway obstruction secondary to septal deviation and turbinate hypertrophy. Claimant was provided a nasal spray, placed at maximum medical improvement and advised to work full duty.

In August 2005, Claimant was taken to surgery for her back. The following operations were performed: decompressive laminotomy, L4-5 and L5-S1 on the left; facetectomy at L4-5 and L5-S1 on the left; discectomy with interbody fusion using autograft and bone implants at L4-5 and L5-S1; and internal stabilization with pedicle screws and rods, L4, L5, and S1 bilaterally using the Click'X system. Claimant returned to work full duty following this surgery.

In January 3, 2006, Claimant suffered a work-related accident when she bent over and leaned to plug in an IV pump while she held onto the bed rail when the rail gave way. Claimant was eventually diagnosed with pseudoarthrosis L4-5 and L5-S1 aggravated by the January 3, 2006 fall as well as right leg pain. Claimant was taken to surgery on April 4, 2006 for the following procedures: anterior retroperitoneal approach to L4-5 and L5-S1; anterior complete discectomy and cage removal, L4-5, L5-S1; anterior interbody fusion with Cougar cages, bone morphogenic protein, L5-S1; anterior interbody fusion with Cougar cages, bone morphogenic protein, and Synthes plate, L4-5; stage II posterior lumbar laminectomy and foraminotomy, L4-5 and L5-S1, and exploration of L5-S1 disk, right. Following this surgery, Claimant developed a Staph infection and was taken to surgery on May 1, 2006, for incision and drainage of the infected spinal wound. On October 6, 2006, Dr. Robson released Claimant with a permanent 20 pound lifting restriction as well as no repetitive bending, stooping, twisting or awkward positions.

On August 21, 2006, Claimant sought treatment with the employee assistance program at St. Mary's Health Services. She sought treatment for depression and anxiety, with symptoms originating from a history of the death of a child, marital problems, financial problems and grief when Claimant was told she would be unable to function as a charge nurse again. Claimant continued to seek treatment with the Employee Assistance Program until her position was eliminated.

Claimant testified she experienced continued low back pain and numbness down her entire right leg to the foot, following her back surgeries. She testified she had to be careful with bending and twisting. Claimant testified she could comfortably lift 10-15 pounds but admitted she had to lift more at work. She testified maintaining a fixed position usually caused stiffness and she had difficulty moving. Claimant testified she experienced more difficulty at work because she had to ask for help for things she should be able to do alone, such as moving a patient. Claimant testified she often had to lie down at work and was sometimes reprimanded. She testified that she has been unable to take pain medication since her last surgery of 2006.

On April 27, 2009, Claimant slipped on wet pavement and twisted her left knee. Dr. Matthew Thornburg diagnosed Claimant with left knee degenerative joint disease and administered injections on April 28, May 28, June 6, and June 11. Claimant returned to Dr. Thornburg on January 12, 2011,

Employee: Lori Lawson

Injury No. 09-077826

to seek additional treatment after experiencing a pop and swelling in her left knee. She was diagnosed with a sprain and the left knee was injected.

Claimant testified leading up to the injury of September 30, 2009, her left knee swelled and locked. She testified that she would use heat wraps, ice or an Ace wrap. Claimant testified she has a brace that she would use at times. Claimant testified her knee hurts most the time and her balance is poor.

Dr. David Volarich evaluated Claimant for an Independent Medical Evaluation on August 19, 2011. Dr. Volarich found a 15% permanent partial disability of the body as a whole rated at the face and a 5% permanent partial disability of the body as a whole rated at the central nervous system as a direct result of injuries sustained on September 30, 2009. This rating accounted for the blunt trauma to the nose causing septal deviation, narrowing and partially occluding the right nares, and for the postconcussion syndrome with posttraumatic headaches. Dr. Volarich determined that Claimant had a pre-existing 50% permanent partial disability of the body as a whole rated at the lumbosacral spine due to disc herniations at L4-5 and L5-S1 that required posterior laminectomy, facetectomy and discectomy with instrumentation. The rating also accounted for the development and pseudoarthrosis at both levels that required revision anterior and posterior lumbar fusions. Dr. Volarich determined Claimant had a pre-existing 20% permanent partial disability to the left knee based on the arthritis that required conservative care including Synvisc injections. Dr. Volarich determined disability existed as a result of Claimant's psychiatric disorders. He testified that he deferred to psychiatric evaluation for that assessment. Following his receipt and review of two separate vocational assessments, Dr. Volarich issued an addendum to his Independent Medical Exam, dated September 7, 2012. Dr. Volarich testified Claimant is permanently and totally disabled as a direct result of the work related injuries of September 30, 2009, in combination with pre-existing medical conditions and psychiatric disorders.

Dr. Wayne Stillings evaluated Claimant for a psychiatric Independent Medical Exam on March 29, 2011. Dr. Stillings provided the following psychiatric diagnoses: Axis I: 1) Pathological Grief Reaction (regarding death of 18-day-old daughter), mostly resolved, pre-existing; 2) Depressive Disorder, NOS, mostly resolved (due to a combination of factors surrounding her 2006 surgery/infection for her low back injury), pre-existing; 3) Post-Concussion Syndrome with significant post-traumatic headaches; 4) Mood Disorder with a Major Depressive-Like Episode due to a General Medical Condition (9/30/2009 work injury) with post-traumatic features; 5) Specific Phobia (of returning to work as an RN fearing assault and significant re-injury). Dr. Stillings noted a GAF of 47 (serious impairment).

Dr. Stillings found as a result of the September 30, 2009 injury, a 15% psychiatric permanent partial disability of the body as a whole due to the post-concussion syndrome with significant post-traumatic headaches, 15% psychiatric permanent partial disability of the body as a whole due to a mood disorder, and a 10% psychiatric permanent partial disability of the body as a whole due to a specific phobia. Dr. Stillings determined Claimant had a pre-existing 5% psychiatric permanent partial disability of the body as a whole due to a pathological grief reaction, a 5% psychiatric permanent partial disability of the body as a whole due to depressive disorder, and a 5% psychiatric permanent partial disability of the body as a whole due to personality disorder. Dr. Stillings testified Claimant's psychiatric disability combines synergistically with her pre-existing disability to create a

Employee: Lori Lawson

Injury No. 09-077826

total disability greater than the arithmetic sum rendering her permanently and totally disabled from employment.

Mr. James England, a vocational rehabilitation counselor, evaluated Claimant on June 5, 2012. Mr. England concluded considering the combination of Claimant's problems and the opinions noted by Drs. Stillings and Volarich along with Claimant's presentation and description of her day-to-day functioning he does not believe Claimant would be able to successfully compete for or sustain employment in the long run. Mr. England noted that considering the combination of Claimant's physical and psychological problems she is likely to remain totally disabled from a vocational standpoint and would not really benefit from vocational rehabilitation services. Mr. England testified Claimant's appearance alone would make it very difficult for her to be picked over alternative candidates.

Mr. Gary Weimholt, a vocational rehabilitation consultant, evaluated Claimant on May 22, 2012. Mr. Weimholt concluded Claimant has a total loss of access to the open competitive labor market and is totally vocationally disabled from employment. He opined that there is no reasonable expectation that an employer, in the normal course of business, would hire her for any position, or that she would be able to perform the usual duties of any job that she is qualified to perform. Mr. Weimholt testified the injury of September 30, 2009, Claimant's depression and pre-existing depression, also in combination with her pre-existing physical disability resulted in her total loss of labor market access and vocational disability.

Mr. Terry Cordray, a vocational rehabilitation counselor, conducted a medical record review on February 25, 2013, on behalf of the Second Injury Fund. Mr. Cordray concluded Claimant is not disabled and there is no reason to believe that an employer in the normal course of business would be precluded from hiring her. He testified there is no reason to believe Claimant's injury of September 30, 2009 has ever prevented her from working, and there is no reason to believe that any pre-existing conditions have ever prevented her from working. Mr. Cordray testified a review of the medical records indicated that there were no permanent restrictions provided by any treating physician. He testified that Claimant was released to return to work by all of her treating providers and did in fact return to work on a full duty basis. However; on cross-examination, Mr. Cordray testified that he was not aware that Claimant was given accommodations as far as being able to lay down once or twice a day, following her back surgery. He was unaware of her appearance, as well as her use of a walker and TENS unit. During cross-examination, Mr. Cordray retracted his statement regarding no permanent work restrictions, as it was noted that medical records from Dr. Robson, a treating physician, did in fact contain a 20 pound permanent lifting restriction, as well as restrictions on bending and twisting, given on October 5, 2006.

Claimant settled this case against Employer, Boone Hospital Center, for 10% permanent partial disability of the body as a whole in reference to the nasal fracture and 20% permanent partial disability of the body as a whole in reference to the psychiatric issues, for a total settlement of 30% permanent partial disability of the body as a whole. (It is noted here that the Stipulation For Compromise Settlement, Exhibit F, refers to a settlement of 52% of the body as a whole in reference to the nasal fracture; this was an obvious typographical error, and Exhibit K, a letter from Employer's counsel, clarifies this issue.)

Employee: Lori Lawson

Injury No. 09-077826

Under Missouri Workers' Compensation Law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim, including establishing that he is an "employee" as that term is defined in Section 287.020.1 RSMo. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo.App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). Proof is made only by competent and substantial evidence, and may not rest on speculation. Medical causation not within lay understanding or experience requires expert medical evidence.

Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. S.D. 1984). Where the medical opinions are conflicting, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods*, 855 S.W.2d 460, 462 (Mo. App. E.D. 1993).

The determination of the specific amount of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ or Commission. The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo. App. 2003).

Claimant alleges that she is permanently and totally disabled, and is seeking permanent total disability benefits from the Second Injury Fund. The Second Injury Fund is a creature of statute, and benefits from the Second Injury Fund are awarded only if the claimant proves that under Section 287.220.1 RSMo, he or she is entitled to such benefits. The claimant has the burden of proving all essential elements of his or her workers' compensation claim.

Under section 287.020.7, "total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether a claimant is able to competently compete in the open labor market given his or her condition and situation. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo.App. E.D.1999). When the claimant is disabled by a combination of the work-related event and pre-existing disabilities the responsibility for benefits lies with the Second Injury Fund. Section 287.220.1 RSMo. If the last injury in and of itself renders a claimant permanently and totally disabled the Second Injury Fund has no liability and the employer is responsible for the entire compensation. *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

Based on the testimony of Claimant, Dr. Volarich, Dr. Stillings, Mr. England and Mr. Weimholt, and the evidence as a whole, there is no question that Claimant is permanently and totally disabled.

I do not believe that the last injury in and of itself rendered Claimant permanently and totally disabled. I find that the last injury in and of itself resulted in a permanent *partial* disability equal to 35% of the body as a whole. Claimant is clearly permanently and totally disabled due to the

Employee: Lori Lawson

Injury No. 09-077826

combination of the last injury and her significant pre-existing disabilities, including significant disabilities of the lumbar spine requiring two surgeries with instrumentation, left knee arthritis requiring synvisc injections, and psychiatric disorders. The Second Injury Fund is responsible for payment of permanent total disability benefits.

Claimant's condition reached maximum medical improvement on February 2, 2010, per Dr. Sean Bailey's report. Therefore, the liability of the Second Injury Fund for permanent total disability benefits of \$807.48 per week began on February 3, 2010, subject to a credit for the permanent partial disability benefits attributable to Employer. The credit is for 140 weeks of permanent partial disability benefits at the rate of \$422.97 per week. The weekly differential for the first 140 weeks of benefits is \$384.51.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. Claimant cannot compete in the open labor market for employment;
2. Claimant is permanently and totally disabled;
3. Claimant's condition of permanent total disability is as a result of the combination of the permanent partial disability from the September 30, 2009 work injury and prior permanent partial disabilities;
4. And The Second Injury Fund is liable for permanent total disability benefits with the weekly differential (\$384.51) payable by SIF for 140 weeks beginning February 3, 2010 and, thereafter \$807.48 per week for Claimant's lifetime.

ORDER

The Second Injury Fund is ordered to pay permanent total disability benefits at the weekly differential rate (\$384.51) for 140 weeks beginning February 2, 2010 and, thereafter to pay permanent total disability benefits of \$807.48 per week for Claimant's lifetime.

Claimant's attorney, James J. Sievers, is allowed 25% of all weekly benefits awarded as and for necessary attorney's fees, including future weekly benefits, and the amount of such fees shall constitute a lien thereon.

Employee: Lori Lawson

Injury No. 09-077826

Made by /s/Robert J. Dierkes – 5-29-13

Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation