

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

Injury No.: 06-084921

Employee: Constance Lunn  
Employer: Montgomery County R-II School District  
Insurer: Self-Insured c/o Missouri United School Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 19, 2010. The award and decision of Administrative Law Judge Robert J. Dierkes, issued February 19, 2010, 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 1<sup>st</sup> day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Constance Lunn

Injury No. 06-084921

Dependents:

Employer: Montgomery County R-II School District

Additional Party: Second Injury Fund (Deferred)

Insurer: Self-insured through Missouri United School Insurance

Hearing Date: December 16, 2009

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

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 8, 2006.
5. State location where accident occurred or occupational disease was contracted: Montgomery City, Montgomery 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 working the ticket booth at a home football game. As she was exiting the ticket booth, she fell, fracturing her right proximal humerus.
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: Right shoulder.
14. Nature and extent of any permanent disability: 17.5% permanent partial disability of the right shoulder.
15. Compensation paid to-date for temporary disability: \$326.95.
16. Value necessary medical aid paid to date by employer/insurer? \$17,476.29.

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- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$931.33.
- 19. Weekly compensation rate: \$620.89/\$376.55.
- 20. Method wages computation: Section 287.250.4.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:
  - Additional temporary total disability benefits \$ 116.54
  - 40.6 weeks of permanent partial disability benefits - \$15,287.93
  - TOTAL: \$15,404.47
- 22. Second Injury Fund liability: (Deferred)
- 23. Future requirements awarded: None.

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:

Ronald D. Edelman

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

Employee: Constance Lunn

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Employee: Constance Lunn

Injury No: 06-084921

Dependents:

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Montgomery County R-II School District

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

Additional Party: Second Injury Fund (Deferred)

Insurer: Missouri United School Insurance

Checked by: RJD/cs

### **ISSUES DECIDED**

An evidentiary hearing was held in this case on December 16, 2009 in Warrenton. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on January 29, 2010. The hearing was held to determine the following issues:

1. Claimant's average weekly wage and resultant compensation rates;
2. The nature and extent of Claimant's permanent partial disability, if any;
3. Whether there has been an underpayment or an overpayment of Temporary total disability benefits;
4. Whether additional sums shall be awarded for disfigurement; and
5. Whether Claimant's employment was excluded from the provisions of Chapter 287, RSMo, pursuant to §287.090.1 (5).

### **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 Montgomery County and adjoining counties; Warren County is an adjoining county to Montgomery County, and is, therefore, a proper venue for the hearing;

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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 Montgomery County R-II School District on September 8, 2006;
6. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation herein;
7. That Employer paid medical benefits of \$17,476.29;
8. That Employer paid TTD benefits totaling \$326.95; and
9. That Montgomery County R-II School District was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times, through MUSIC, a self-insurance trust.

### **EVIDENCE**

The evidence consisted of the testimony of Claimant, Constance Lunn; the testimony of Corey Felton; medical records; the narrative medical report of Dr. Robert Poetz; employment contract between Claimant and Employer; Employer's "money box worksheet" for 9/8/06 football game; and copies of the Division of Workers' Compensation's file in this case.

### **DISCUSSION**

The facts of this case are not in dispute. Claimant, Constance Lunn, was born on September 2, 1944, and was 62 years old at the time of the accident in question. Claimant was employed by Employer as a high school Language Arts teacher for the 2006-2007 academic year. Exhibit C was a four-page document identified as Claimant's teaching contract. The first page of Exhibit C is entitled "TEACHER'S EMPLOYMENT CONTRACT (Probationary Teachers)", the second page is entitled "CERTIFIED EMPLOYEE'S EMPLOYMENT CONTRACT EXTENDED DUTIES", the third page is a salary schedule, and the fourth page is a cover letter.

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Prior to the date of injury, Corey Felton, Vice-Principal and Athletic Director at the high school, sent an e-mail to the teachers stating that he was looking for people to work the ticket gate and scoreboard for the high school's home football games. The e-mail stated that there would be some monetary compensation paid for this work. Claimant notified Felton that she would be available to work the ticket gate for multiple games, including the September 8, 2006 game. Felton scheduled Claimant to work the ticket gate for September 8, 2006.

On September 8, 2006, Claimant worked the school day teaching three freshman Language Arts classes and three sophomore Language Arts classes and related duties. She left the school premises for a time to go out to dinner with some other teachers. She returned to the high school, where she and another teacher, Kim Albers, met with Felton and were instructed as to their duties and responsibilities for the evening. Claimant and Albers worked the ticket booth prior to the football game and during the first half of the game, as instructed by Felton. At halftime, Claimant was leaving the "ticket booth" as she wanted to watch the marching band perform. The booth was small and cramped, and the doorway was very narrow. As Claimant was walking out of the doorway in a sideways fashion, her foot caught on the lip of the doorway. Claimant fell and it was immediately obvious that she had seriously injured her right upper extremity.

Claimant was taken by ambulance to Hermann Area Hospital, then transported to Boone Hospital Center in Columbia. Claimant was diagnosed with a right proximal humerus fracture. On September 15, 2006, Dr. Todd Oliver of Columbia Orthopaedic Group performed an open reduction and internal fixation procedure. Dr. Oliver placed Claimant at maximum medical improvement on February 12, 2007. On June 15, 2007, Dr. Oliver opined that she had sustained a 5% permanent partial impairment of the right upper extremity. Claimant was seen by Dr. Robert Poetz for an independent medical examination on November 19, 2007. Dr. Poetz opined that Claimant sustained a permanent partial disability of 35% of the right shoulder.

At some time after Claimant returned to work after her injury, Corey Felton went to Claimant and handed her a twenty-dollar bill, telling Claimant that it was for "working the ticket booth." Felton testified that there had been "no prior discussion" with Claimant as to how much she would be compensated for working the ticket booth.

**Average weekly wage and compensation rates.** The first major issue in this case is the calculation of Claimant's average weekly wage and resultant compensation rates. Employer paid Claimant 5/7 weeks of temporary total disability benefits at the weekly rate of approximately \$457.69. This rate appears to have been calculated by taking Claimant's annual salary per page one of Exhibit C (\$35,700.00), and dividing it by 52 weeks (yielding an average weekly wage of \$686.54 and a compensation rate of \$457.69). Employer now takes the position, however, that Claimant's compensation rate should be the \$40.00 minimum weekly rate. Employer argues that

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Claimant had (at least)<sup>1</sup> two separate and distinct “employments” with Employer, and that Claimant’s 9/8/06 accident and injury fell under the “ticket gate worker” employment, for which she was paid \$20.00. Employer argues that Claimant clearly sustained a compensable accident under the Missouri Workers’ Compensation Law, but that the disability benefits should be based solely upon her \$20.00 “salary” as a one-time “ticket gate worker”.

The evidence was that most, but not all, of the people who performed duties at the football games were otherwise employed by the school district. Felton testified that there was a retired school superintendent who worked football games and that there was at least one “school parent” who worked football games, and that each of these individuals received \$20.00 as compensation for their services during football games.

Employer argues that the language of Section 287.800.1 (“Administrative law judges ... shall construe the provisions of this chapter strictly”) compels a finding that Claimant’s compensation rate should be the forty-dollar minimum. However, I find nothing in Section 287.020 (“definitions”), Section 287.030 (“Employer defined”) or Section 287.250 (computation of average weekly wage) that states, or even suggests, that, for purposes of computing an average weekly wage, various aspects of an employee’s employment with an employer be segregated (as Employer suggests). Employer does not cite any such statutory authority in its brief.

While not necessarily dispositive of this issue, Claimant makes an interesting point in her brief regarding Section 287.090 (“Exempt employers and occupations”), and particularly 287.090.1 (5), which states: “This chapter shall not apply to: (p)ersons providing services as adjudicators, sports officials, or contest workers for interscholastic activities programs or similar amateur youth programs who are not otherwise employed by the sponsoring school, association of schools or nonprofit tax-exempt organization sponsoring the amateur youth programs”, and 287.090.2 which states: “Any employer exempted from this chapter ... as to any class of employees of the employer ... pursuant to subsection 1 of this section may elect coverage as ... to the class of employees of that employer pursuant to this chapter by purchasing and accepting a valid workers' compensation insurance policy or endorsement, or by written notice to the group self-insurer of which the employer is a member.” The work that Claimant was doing for Employer on September 8, 2006 was that of a “contest worker for (an) interscholastic activities program”. If Claimant had not been “otherwise employed by the sponsoring school”<sup>2</sup>, this employment would have been “exempt” from Chapter 287, RSMo (the Workers’ Compensation

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<sup>1</sup> Why I say “at least” two separate employments: while Employer does not address this issue in its brief, page 2 of Exhibit C refers to an additional payment to Claimant of \$601.69 for “Three Professional Development Days during the 2006-07 School Year”. One would assume that, to be consistent, as there was a separate payment for the three professional development days, Employer would also argue that this was a “third employment”.

<sup>2</sup> The evidence was clear that Montgomery County High School – one of Employer’s schools, and the school where Claimant was teaching – was the “sponsoring school” for the 9/8/06 football game.

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Law), unless Employer made an election.<sup>3</sup> However, since Claimant WAS “otherwise employed by the sponsoring school”, the employment DOES come under Chapter 287 (to which Employer stipulated). As 287.090.1 (5) ties the *compensability* of an accident sustained while a “contest worker” to employment “by the sponsoring school”, logic would suggest that the total compensation paid for such employment be used for computing the average weekly wage.

I find Employer’s argument regarding the minimum compensation rate to have no merit.

Regarding the appropriate compensation rate for a teacher (who is paid in 12 monthly installments each year, but is required to work considerably less than 12 months), this issue has been recently visited by the Labor and Industrial Relations Commission in *Nancy Brunner v. Columbia Public School District*, Injury No. 07-006357. In the award dated May 20, 2009, the Commission looked to Section 287.250.4, which states:

If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

The Commission found that the average weekly wage of Ms. Brunner, a schoolteacher who was required to work only 187 days to fulfill her contract, could not be fairly and justly determined by the formulas provided in subsections 1 to 3. The Commission held that as Ms. Brunner worked “approximately 37 weeks for the employer”, her annual salary of \$39,861.00 should be divided by 37 to arrive at the average weekly wage.

In the instant case, Claimant’s contract required her to work for a term “of nine months” for the sum of \$35,700.00. (There was no evidence of the actual number of *days* Claimant was required to work.) Besides the \$35,700.00, Claimant was also paid \$601.69 for the “Professional Development Days”, and was paid \$20.00 for the evening of 9/8/06. Claimant was thus paid a total of \$36,321.69 for nine months (39 weeks) of work. Claimant’s average weekly wage should be \$931.33 (i.e., \$36,321.69 ÷ 39), yielding compensation rates of \$620.89 for temporary total disability benefits, and the maximum permanent partial disability rate of \$376.55.

**Temporary total disability benefits.** Claimant was required to miss work while recovering from her injury, and was paid the sum of \$326.95 for 5/7 weeks of temporary total disability benefits, using a weekly compensation rate of \$457.69. The actual rate should have

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<sup>3</sup> There was no evidence adduced as to whether Employer made an election “by written notice to (Employer’s) group self-insurer” to include contest workers not otherwise employed by Employer (e.g., the retired school superintendent, the “parent”) under the provisions of Chapter 287.

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been \$620.89, and Claimant should have been paid \$443.89 for the 5/7 weeks of benefits. There was an underpayment of temporary total disability benefits in the amount of \$116.54.

**Permanent partial disability benefits.** Claimant sustained a right proximal humerus fracture. She was treated surgically with an open reduction and internal fixation. The hardware is in place. Dr. Oliver, Claimant's surgeon, opined that Claimant lost 20 degrees of total forward flexion, 20 degrees of abduction, 10 degrees of external rotation and four or five levels of internal rotation compared to the left side. Dr. Poetz noted that Claimant continued to have pain in her shoulder in November 2007. Claimant impressed me as being a very credible witness. Claimant testified that her pain was "not bad", but "steady". She testified that her pain will increase if she tries to sleep on her right side, and that her pain will also increase with weather changes. She also testified that her range of motion is "not 100%". It did not appear to me that Claimant was trying to exaggerate her symptoms.

**Disfigurement.** Claimant has a scar in her right armpit from the surgery. Section 287.190.4 provides (in part): "(i)f an employee is seriously and permanently disfigured about the head, neck, hands or arms, the division or commission may allow such additional sum for the compensation an account thereof ... ". I do not believe that the armpit area is part of the arm, and thus should not qualify for disfigurement benefits. Further, the scar is not visible unless Claimant is wearing a sleeveless garment *and* she has her arm raised. As 287.190.4 clearly states that disfigurement benefits are permissive, but not mandatory ("the division or commission *may* allow such additional sum"), even assuming that the armpit area is part of the arm, I do not find any basis for the awarding of disfigurement benefits.

**Excluded employment.** Claimant's employment clearly is NOT excluded from the provisions of the Missouri Workers' Compensation Law under Section 287.090.1 (5), as Claimant was "otherwise employed by the sponsoring school".

### **FINDINGS OF FACT**

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

1. On September 8, 2006, Claimant was employed by Employer as a high school teacher;
2. In June 2006, Claimant and Employer entered into a written employment agreement for the 2006-2007 school year; that written agreement was entered into evidence as Exhibit C;

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3. Page one of Exhibit C called for a payment of \$35,700.00 for nine months of work as a school teacher, payable in equal installments over twelve months;
4. Page two of Exhibit C called for a payment of \$601.69 for three “professional development days”;
5. Prior to September 8, 2006, Corey Felton, Vice-Principal and Athletic Director at the high school, sent an e-mail to the teachers, including Claimant, stating that he was looking for people to work the ticket gate and scoreboard for the high school’s home football games; the e-mail stated that there would be some monetary compensation paid for this work;
6. Claimant notified Felton that she would be available to work the ticket gate for multiple games, including the September 8, 2006 game, and Felton scheduled Claimant to work the ticket gate for September 8, 2006;
7. On September 8, 2006, Claimant worked the school day teaching her classes and performing related duties. Claimant then left the school premises for a time to go out to dinner with some other teachers. Claimant returned to the high school, where she and another teacher, Kim Albers, met with Felton and were instructed as to their duties and responsibilities for the evening;
8. Claimant and Albers worked the ticket booth prior to the football game and during the first half of the game, as instructed by Felton;
9. As Claimant was exiting the ticket booth she fell and suffered a right proximal humerus fracture, which required an open reduction and internal fixation procedure;
10. At some time after Claimant returned to work after her injury, Corey Felton went to Claimant and handed her a twenty-dollar bill, telling Claimant that it was for “working the ticket booth”;
11. Claimant was required to miss work while recovering from her injury, and was paid the sum of \$326.95 for 5/7 weeks of temporary total disability benefits, using a weekly compensation rate of \$457.69;
12. The September 8, 2006 football game at which Claimant was working when she was injured was held at Montgomery County High School and the football game was sponsored by Montgomery County High School;
13. Claimant continues to experience a loss of range of motion in her right shoulder as a result of the right proximal humerus fracture;
14. Claimant continues to experience pain in her right shoulder as a result of the right proximal humerus fracture;
15. Claimant’s right shoulder condition, as a result of the right proximal humerus fracture, is a disabling condition; and
16. Claimant has a scar in her right armpit as a result of the surgery to address the right proximal humerus fracture.

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### **RULINGS OF LAW**

In addition to those legal conclusions to which the parties stipulated, I make the following rulings of law:

1. Section 287.800.1, RSMo, requires administrative law judges to construe the provisions of the Workers' Compensation Law strictly;
2. There is no provision in the Workers' Compensation Law that requires or allows various aspects of an employee's employment with an employer to be segregated for purposes of computing an average weekly wage;
3. Section 287.250.4, RSMo, states: If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage;
4. Claimant's average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of Section 287.250, RSMo;
5. Fairness and justness requires that Claimant's average weekly wage be determined by aggregating all of Claimant's pay for the 2006-2007 school year and dividing it by 39 weeks (nine months);
6. Claimant's average weekly wage is \$931.33, yielding compensation rates of \$620.89 for temporary total disability benefits, and the maximum permanent partial disability rate of \$376.55;
7. Claimant's temporary total disability benefits were underpaid by \$116.54;
8. Claimant's employment is not excluded from the provisions of the Missouri Workers' Compensation Law under Section 287.090.1 (5);
9. Claimant sustained a permanent partial disability of 17.5% of the right shoulder as a result of her work-related right proximal humerus fracture, resulting in 40.6 weeks of benefits, totaling \$15,287.93; and
10. No additional sums should be awarded for disfigurement, pursuant to Section 287.190.4.

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**ORDER**

Employer, Montgomery County R-II School District, is ordered to pay Claimant the sum of \$116.54 for temporary total disability benefits and \$15,287.93 for permanent partial disability benefits.

Claimant's attorney, Ronald D. Edelman, is allowed 25% of all benefits awarded as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

Date: February 19, 2010

Made by: /s/Robert J. Dierkes\_  
ROBERT J. DIERKES  
*Chief Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

/s/Naomi Pearson  
Naomi Pearson  
*Division of Workers' Compensation*