

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

Injury No.: 04-078413

Employee: Patricia Matthews
Employer: Hiar Holdings, LLC
Insurer: Zenith Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

Date of Accident: July 13, 2004

Place and County of Accident: St. Louis 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 October 3, 2006. The award and decision of Administrative Law Judge Matthew D. Vacca, issued October 3, 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 3rd day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Patricia Matthews

Injury No.: 04-078413

Dependents: N/A
Employer: Hiar Holdings, LLC
Additional Party: Second Injury Fund (Open)
Insurer: Zenith Insurance Company
Hearing Date: August 29, 2006

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

Checked by: MDV: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: July 13, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
Fell while working as a waitress.
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: Left knee and right shoulder
14. Nature and extent of any permanent disability: 25% of left knee and 35% of right shoulder
15. Compensation paid to-date for temporary disability: \$3,811.81
16. Value necessary medical aid paid to date by employer/insurer? \$36,424.22

Employee: Patricia Matthews Injury No.: 04-078413

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$375.00
19. Weekly compensation rate: \$250.00/\$250.00
20. Method wages computation: Per statute §287.250

COMPENSATION PAYABLE

21. Amount of compensation payable:

20 4/7 weeks of temporary total disability

(already paid)

4 weeks temporary partial disability (already paid)
145.44 weeks of permanent partial disability from Employer \$36,360.00

22. Second Injury Fund liability: Open

TOTAL: \$36,360.00

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

Cynthia Hennessey

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Patricia Matthews	Injury No.: 04-078413
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Hiar Holdings, LLC	Department of Labor and Industrial
Additional Party:	Second Injury Fund (Open)	Relations of Missouri Jefferson City, Missouri
Insurer:	Zenith Insurance Company	Checked by: MDV:tr

ISSUES PRESENTED

The issues presented for resolution by way of this hearing are the nature and extent of disability pertaining to an admitted accident that occurred on July 13, 2004, while Claimant was working as a waitress for Krieger's. The Employer also contests the wage rate.

The Claimant was paid 20 and 4/7ths weeks of temporary benefits at \$170.22 from September 7, 2004 to January 28, 2005. She was also paid 4 weeks of temporary partial disability in the amount of \$28.98, \$75.55, \$84.03 and \$121.59.

FINDINGS OF FACT

1. Claimant is 62 years old, married and works at Krieger's Pub inside the Holiday Inn Hotel as a waitress. Her Employer is the Holiday Inn. She has worked since March 12, 2004.

2. On the date of the accident Claimant was carrying a tray of food during the lunch hour and was ascending a dais to place food on a high table when she fell off the dais onto all fours.
3. Claimant ultimately underwent surgery on her left knee and right shoulder. Dr. Emanuel performed the shoulder surgery. Dr. Johnson performed the knee surgery.
4. The shoulder surgery consisted of repair of a 40% rotator cuff tear, impingement syndrome and a labral tear. She underwent subacromial decompression and distal clavicle excision.
5. Claimant also underwent a torn medial meniscus surgery and chondroplasty of the medial femoral condyle.
6. Dr. Johnson believes that Claimant sustained a 5% permanent partial disability as a result of the knee injury. Dr. Emanuel believes Claimant suffered a 5% permanent partial disability of the right shoulder.
7. Dr. Volarich, testifying on behalf of Claimant, found that Claimant sustained a 35% permanent partial disability of the shoulder and a 35% permanent partial disability of the knee.
8. Dr. Emanuel agrees that Claimant probably cannot perform any pushups or pick up her granddaughter, that she had a 40% partial thickness tear of the rotator cuff, and that she underwent extensive physical therapy for the shoulder. The record reflects she also underwent extensive physical therapy for the knee.
9. Dr. Volarich believes that the disability as a result of the injuries is greater than their simple sum total and believes that a loading factor should be applied. He also finds that Claimant will need ongoing medical care in the form of narcotic pain relievers, non-steroidal anti-inflammatory drugs, muscle relaxants and occasional physical therapy.
10. Claimant returned to work as a hostess for a couple of weeks which is considered light duty and then returned to her full waitress duties on the floor.
11. Claimant has shoulder pain now like it is stuck in one position, she has to rub it and it feels like it locks up. She has sharp pain approximately one time per month. She has poor range of motion and lifts trays with her left upper extremity but has to handle plates with her right which she now finds heavier than before the accident. She can only handle one plate at a time now.
12. Claimant limps and working aggravates her knee problems. Extended walking causes increases in pain. Squatting or bent knees causes pain. She has difficulty getting up and has to grasp something in order to help propel her to a standing position. She doesn't really have problems on stairs or uneven terrain except when she is in pain. She continues to take Tylenol for pain.
13. At the time of the injury Claimant worked as a server 3 to 4 hours a day, part-time, 5 days a week. Her base and tips averaged \$10.00 an hour and she was also allowed to take a full meal and all the beverages and coffee that she would like which she would estimate at \$10.00 per shift. Uniforms were also provided and Claimant testified other employees worked full-time.
14. Claimant now works 15 to 20 hours a week. She makes \$4.30 base plus tips and now averages \$200.00 to \$250.00 a week. She also works at the Embassy Suites three hours an evening.
15. Heather Logan, a food and beverage manager, testified on behalf of Employer. She testified that some employees work more than Claimant.
16. Claimant testified in a direct and forthright manner. She is a happy, cheerful person who was not given to overstating her injuries.

RULINGS OF LAW

Permanent Partial Disability

Claimant has sustained a 35% permanent partial disability measured at the level of the right shoulder and a 25% permanent partial disability measured at the level of the left knee.

I find Dr. Johnson and Emanuel's estimates of permanent disability to be sparse given the extensive procedures they performed and the difficulties that Claimant continues to have, particularly with regard to the shoulder. I note that there was a 40% full thickness tear of the rotator cuff, an impingement syndrome, a labral tear, a subacromial decompression and a distal clavicle bone excision. I don't think that the torn medial meniscus and chondroplasty of the medial femoral condyle were as extensive as the procedure on the shoulder, and that is why I have moderated the finding on that injury.

Furthermore, the two injuries consist of opposing extremities which work in a synergistic fashion to create enhanced disability. Due to the multiplicity of injuries I think it is appropriate to add a 20% loading factor to compensate for the multiple injuries as a result of this accident.

Rate

Claimant testified that Krieger's had other full-time employee waitresses. I apply the 30-hour rule of §287.250.3 to arrive at \$300.00 per week wages. Pursuant to §287.250.2, I add \$50.00 per week for meals and beverages and \$25.00 per week for uniforms. This makes the average weekly wage \$375.00 and the rate \$250.00.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Employee: Patricia Matthews

Injury No.:

04-078413