

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

Injury No.: 07-004900

Employee: Mary K. Meyer
Employer: Delmonico's (Settled)
Insurer: Westport Insurance (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 July 3, 2013. The award and decision of Administrative Law Judge Gary L. Robbins, issued July 3, 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 19th day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Mary K. Meyer Injury No. 07-004900
Dependents: N/A
Employer: Delmonico's
Additional Party: Second Injury Fund
Insurer: Westport Insurance
Appearances: Phillip J. Barkett, attorney for the employee.
Jonathan Lintner, attorney for the Second Injury Fund.
Hearing Date: April 10, 2013 Checked by: GLR/rm

SUMMARY OF FINDINGS

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? January 22, 2007.
5. State location where accident occurred or occupational disease contracted: Cape Girardeau 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 happened or occupational disease contracted: The employee fell injuring her left hip and left knee.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left hip and left knee.
14. Nature and extent of any permanent disability: The employee settled her primary claim with the employer-insurer for 25% permanent partial disability of the left hip and 15% permanent partial disability of the left knee.
15. Compensation paid to date for temporary total disability: \$6,130.99.
16. Value necessary medical aid paid to date by employer-insurer: \$71,791.37.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$213.84.
19. Weekly compensation rate: The employee's compensation rate for all purposes is \$142.56 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: Phillip J. Barkett.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On April 10, 2013, the employee, Mary K. Meyer, appeared in person and with her attorney, Phillip J. Barkett for a hearing for a final award. The employer-insurer was not represented at the hearing as they had already settled their portion of the claim with the employee. Assistant Attorney General, Jonathan Lintner represented the Second Injury Fund. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Delmonico's was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Westport Insurance.
2. On January 22, 2007, Mary K. Meyer was an employee of Delmonico's and was working under the Workers' Compensation Act.
3. On January 22, 2007, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$213.84, resulting in a compensation rate of \$142.56 for all purposes.
7. Employee's injury was medically causally related to the occupational disease.
8. The employer-insurer paid \$71,791.37 in medical aid.
9. The employer-insurer paid \$6,130.99 in temporary disability benefits.
10. The employee had no claim for previously incurred medical bills.
11. The employee had no claim for mileage.
12. The employee had no claim for future medical care.
13. The employee had no claim for any temporary disability benefits.
14. The employee had no claim for permanent partial or permanent total disability as to the employer-insurer.
15. The employee reached maximum medical improvement as of June 26, 2008.

ISSUE:

1. Liability of the Second Injury Fund for either permanent partial or permanent total disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee Exhibits:

- A. Deposition of Juan C Escandon, M.D.

- B. CV of Juan C. Escandon, M.D.
- C. Letter of Juan C. Escandon, M.D.
- D. Deposition of James E. Israel.
- E. CV of James E. Israel.
- F. Vocational Rehabilitation Evaluation of James E. Israel.
- G. Medical Records Summary.
- H. Medical Records Summary.
- I. Medical records from St. Francis Medical Center.
- J. Medical records from Orthopaedic Associates.
- K. Medical records from HealthPoint Rehabilitation/Southeast Hospital Outpatient Rehab.
- L. Medical records from Physicians Alliance Surgery Center.
- M. Medical records from Cape Imaging.
- N. Medical Records Summary.
- O. Medical records from Washington University Medical School.
- P. Medical records from HealthPoint Rehab.
- Q. Medical Records Summary.
- R. Medical records from Southeast Hospital.
- S. Medical Records Summary.
- T. Medical records of Randall L. Stahly, D.O.
- U. Medical records from Orthopaedic Associates.
- V. Medical records from Regional Primary Care.
- W. Social Security Administration Notice of Favorable Decision.
- X. Social Security Administration Award Certificate.

The Second Injury Fund offered no exhibits.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

Mary K. Meyer, the employee, was the only witness to personally testify at trial. All other evidence was presented in the form of written records, medical records or deposition testimony.

Ms. Meyer was 63 years old at the time of her trial. She grew up in Jackson, Missouri. Ms. Meyer graduated from Jackson High School in 1967 and shortly thereafter she completed a nine month program at the Jackson School of Cosmetology. She obtained her license in 1968. Ms. Meyer has not had any other type of vocational training, apprenticeship or formal education since then.

She worked full time as a beautician until she was diagnosed with relapsing remitting multiple sclerosis/MS. She received this diagnosis in 1984. Due to the effects of MS, Ms. Meyer gradually reduced the hours she could work as a beautician and eventually had to quit as she could not perform that job anymore. When she was unable to work as a beautician she tried other work. She quit working as a beautician in about 1984. Other than working for a family restaurant she did not work from 1984 to 1995. She worked part time at Country Mart in the deli

from 1995 to 1998. She had to quit as she could no longer stand on her feet all day and her arms got too tired. Dr. Stahly reduced her work hours and would not allow her to work over 25-30 hours a week as anything more than that was too mentally and physically exhausting. Ms. Meyer testified that with MS you have to avoid stress as stress makes the physical problems worse. She indicated that due to stress problems she had to cut out any stressors in her life.

The employee was awarded social security total disability on June 13, 1988, solely due to her MS. She testified that chronic fatigue has been a major problem for her with this disease. Ms. Meyer testified that social security had a program where she could work part time and she continued to work part time as she was able. Ms. Meyer described MS as a relapsing/remitting kind of disease, it comes and goes. Some days she has good days and some days are bad days. She testified that a major problem with MS is tiredness. She indicated that when she was first diagnosed she was really tired, but also had drop toe which caused her to trip, and tingling. These general problems caused her to change her vocation and reduce the number of hours that she could work.

Dr. Stahly prescribed Betaseron for the employee in 1993. This drug is administered by injection. Ms. Meyer still takes this medication today and injects herself about every other day. Betaseron does not cure MS, it just tries to retard the disease and keep it in check.

Ms. Meyer worked part time at Delmonico's Restaurant from 1998 until she was injured on January 22, 2007. She was employed as a waitress and worked approximately 20 to 30 hours per week. Her duties required her to serve beverages and items from the menu and also take care of a self-service buffet.

On January 22, 2007, she was injured while preparing drinks at the soda fountain. Her foot was stuck to the floor because of a sticky substance. As she tried to walk away her foot would not move and she fell and injured her left hip and left knee.

On January 24, 2007, Dr. Kapp performed a partial left hip replacement. On March 20, 2007, Dr. Kapp performed left knee surgery. Ms. Meyer continued to have treatment for the injury of January 22, 2007, until June 26, 2008, at which time she reached maximum medical improvement. Ms. Meyer settled her primary claim with the employer-insurer for 25% permanent partial disability of the left hip and 15% permanent partial disability of the left knee. Ms. Meyer testified that she was unable to work because of the pre-existing chronic fatigue caused by the MS and the problems due to the injury to her left hip and knee of January 22, 2007.

The employee had another work accident on September 1, 2003, that was settled for 12½% permanent partial disability to the head and body as a whole (Injury Number 03-102426).

Ms. Meyer was evaluated Dr. Escandon, a board certified neurologist who practices in St. Louis. Dr. Escandon provided opinions:

- The employee has a 30% permanent partial disability of the left hip due to her primary injury.

- The employee had a 15% permanent partial disability of the left knee due to her primary injury.
- He confirmed the diagnosis of multiple sclerosis of the relapsing remitting type together with chronic fatigue syndrome secondary to MS.
- The employee has a 30% permanent partial disability to the body as a whole due to the pre-existing MS.
- The multiple sclerosis which pre-existed the accident of January 22, 2007, was and is a hindrance and obstacle to employment and re-employment should she become unemployed.
- The employee is permanently and totally disabled as a result of the combination of the three impairments.

Ms. Meyer was also evaluated by Mr. Israel on April 8, 2009. Mr. Israel is a licensed professional vocational rehabilitation counselor. Mr. Israel opined that:

- The employee's diminished endurance capability makes it quite unlikely that she could sustain any substantial gainful employment.
- The cumulative effects of her physical condition, advanced age, education, work background and the special work site accommodations required of prospective employers have placed her at a very substantial disadvantage.
- The employee would not be able to sustain gainful work.
- The employee has combined circumstances and is unable to compete in the open labor market.

The Second Injury Fund offered no evidence in this case and chose not to file any proposed findings in opposition to the employee's position that she was permanently and totally disabled due to a combination of the disabilities from her January 22, 2007 accident and her pre-existing disabilities due to her MS.

RULINGS OF LAW:

Based on a consideration of all of the evidence in this case, the Court finds that the employee is permanently and totally disabled and unemployable in the open labor market due to a combination of the disabilities that resulted from her January 22, 2007 accident and her pre-existing MS.

The parties agreed that the employee reached maximum medical improvement as of June 26, 2008. The Second Injury Fund is entitled to credit to the extent of the permanent partial disability paid to the employee by the employer-insurer. The employee settled her primary claim with the employer-insurer for 25% permanent partial disability of the left hip and 15% permanent partial disability of the left knee. The Second Injury Fund is entitled to a credit of 76 weeks before their liability begins. The Second Injury Fund shall make a lump sum payment to the employee of \$142.56 per week for the period of December 11, 2009 to June 28, 2013. As of June 28, 2013, the Second Injury Funds shall pay permanent total disability benefits to the employee at a rate of \$142.56 per week.

ATTORNEY'S FEE:

Phillip J. Barkett, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation