

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

Injury No.: 06-100104

Employee: Mary E. Miller  
Employer: Argosy Casino Riverside  
Insurer: Zurich American Insurance Co.

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 October 8, 2009. The award and decision of Administrative Law Judge Robert B. Miner, issued October 8, 2009, 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 2<sup>nd</sup> day of April 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: Mary E. Miller

Injury No.: 06-100104

Employer: Argosy Casino Riverside

Insurer: Zurich American Insurance Co.

Hearing Date: August 28, 2009

Checked by: RBM

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: October 17, 2006.
5. State location where accident occurred or occupational disease was contracted: Riverside, Platte 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 walking down a hall when she tripped and fell, causing injury to her right shoulder.
12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Right shoulder.
14. Nature and extent of any permanent disability: 19.5% of the right upper extremity at the level of the shoulder (232 week level).
15. Compensation paid to-date for temporary disability: \$3,683.21.
16. Value necessary medical aid paid to date by employer/insurer? \$23,492.38.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$690.57.
19. Weekly compensation rate: \$460.38 for temporary total disability and \$376.55 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

23 5/7 weeks of temporary total disability at the rate of \$460.38 per week from Employer: \$10,917.58.

45.24 weeks of permanent partial disability (.195 times 232) at the rate of \$376.55 per week from Employer: \$17,035.12.

No weeks of disfigurement from Employer.

TOTAL FROM EMPLOYER: \$27,952.70.

22. Second Injury Fund liability: Not applicable. The Second Injury Fund is not a party to this case.
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: Mark E. Kolich.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mary E. Miller

Injury No.: 06-100104

Employer: Argosy Casino Riverside

Insurer: Zurich American Insurance Co.

Hearing Date: August 28, 2009

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PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer on August 28, 2009 in Gladstone, Missouri. Employee, Mary E. Miller appeared in person and by her attorney, Mark E. Kolich. Employer, Argosy Casino Riverside and Insurer, Zurich American Insurance Co. appeared by their attorney, Thomas J. Walsh. Kim Linneen was also present at the hearing as a representative of Employer. The Second Injury Fund is not a party to this case. Mark E. Kolich requested an attorney's fee of 25% from all amounts awarded.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about October 17, 2006, Mary E. Miller ("Claimant") was an employee of Argosy Casino Riverside ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about October 17, 2006, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was insured by Zurich American Insurance Co. ("Insurer").
3. Employer had notice of Claimant's alleged injury.
4. Claimant's Claim for Compensation was filed within the time allowed by law.
5. The average weekly wage was \$690.57 and the rate of compensation for temporary total disability is \$460.38 per week and the rate of compensation for permanent partial disability is \$376.55 per week.

6. Employer/Insurer has paid \$3,683.21 in temporary total disability after May 15, 2007 at the rate of \$460.38 per week.

7. Employer/Insurer has paid \$23,492.38 in medical aid.

8. In the event it is determined that Claimant sustained a compensable accident arising out of her employment for Employer, Claimant shall be entitled to an award of permanent partial disability benefits from Employer of 19.5% of the right shoulder at the 232 week level at the permanent partial disability rate of \$376.55 per week.

9. In the event it is determined that Claimant sustained a compensable accident arising out of her employment for Employer, Claimant shall be entitled to an award of temporary total disability benefits from Employer for the period from and including October 18, 2006 through and including April 1, 2007, at the temporary total disability rate of \$460.38 per week.

10. Claimant requested no award for disfigurement, past medical expenses, or future medical aid.

## ISSUES

The parties agreed that there were disputes on the following issues:

1. Whether on or about October 17, 2006, Claimant sustained an injury by accident arising out of and in the course of her employment for Employer.

2. Employer's liability for permanent partial disability benefits.

3. Employer's liability for past temporary total disability benefits for the period from and including October 18, 2006 through and including April 1, 2007.

Claimant testified in person. In addition, Claimant offered the following exhibits that were admitted in evidence without objection: Exhibit A—Medical report of Dr. John Pazell dated June 25, 2008, and Exhibit B—Medical report of Dr. Craig Satterlee dated December 4, 2007.

Employer offered the following exhibits that were admitted in evidence without objection: Exhibit 1—copy of video in VHS format, and Exhibit 2—copy of video in DVD format.

## Findings of Fact

Mary Miller testified that she is 74 years old and has worked for Employer for more than ten years. She is a dealer at the casino. She was injured on October 17, 2006 while working for Employer when she fell forward and landed on a concrete floor. Her face hit the floor and she hurt her right shoulder.

Claimant testified that she fell in a hall leading from the casino floor to the break room at Employer. The surface of the floor where she fell is concrete. All employees use that hallway. People eat and drink in the break room. Employees take food and drink outside the break room and down the hallway where she was walking when she fell.

Claimant testified that on October 17, 2006, her left foot stuck on something on the concrete floor at Employer's workplace, and she pitched forward and fell. She testified she did not trip on her own feet and did not clip one toe behind the other. She was positive her foot stuck to the floor before she fell.

A co-worker came to her after she fell, and she was then taken to a room. Her lip was bleeding and her right arm was hurting. She did not want to go to the hospital at that time. She testified that she told the EMTs that her foot stuck on the floor.

After she was treated in a room at Employer, she went to her car and left Employer's premises. Claimant went home after the accident and did not go back to work that day after she fell. She could not drive with her right arm. She did not go back to look at the floor after the accident.

Claimant saw Dr. Romito two days after she fell. Dr. Satterlee surgically repaired her right shoulder on May 15, 2007. She has been fully released from treatment. She was off work after her surgery and was paid temporary total disability benefits after her surgery. All of her medical bills have been paid.

Claimant testified on cross-examination that she did not see any spills on the floor before she fell. She saw no placards in the area and saw no debris on the floor.

Claimant viewed Exhibit 1, a video of her at the time of the fall, during the hearing. She identified herself on the video. She testified that the video showed other employees walking through the area where she fell. She said she did not look down to see what had caused her to fall, nor did the two persons who assisted her.

Claimant said that she was wearing oxford-type shoes with rubber soles when she fell. She said she had walked up and down that hall many times. The floor is concrete

and is smooth like vinyl. She said she had never fallen in that area before. She was not watching where she walked at the time she fell.

I find that Claimant was a credible witness.

Exhibit A, the independent medical evaluation report of Dr. John Pazell dated June 25, 2008, recites the following history of present illness: "On October 17, 2006, Ms. Miller was injured while at work. She was walking in a hallway going to the break room when her left shoe stuck to something on the floor and caused her to fall. She injured her face and right shoulder. She states she was taken to the emergency medical personnel office and they were more concerned with her bloody lip than her shoulder. They treated her with first aid." The report further notes that Claimant sought medical attention with John Romito, M.D. on October 20, 2006, "And the history was reiterated which is identical to the history that she related to me."

Dr. Pazell's report also contains a "review of records". Page 7 of his report contains an entry dated October 20, 2006 regarding examination by Joanne Turano, Ph-X. Dr. Pazell's report states the following regarding the October 20, 2006 entry: "On 10/17/06 she was walking when she caught her foot in the carpet. Fell landing onto an outstretched right upper extremity. Struck her face and had swelling lip. Seen by medic people at the casino. Did not evaluate her shoulder but she was unable to lift her right at all. Recommend MRI."

Dr. Pazell rated Claimant's permanent partial disability at 30% at the level of the shoulder at the 232 week level. He apportioned 90% of her disability to the injury of October 17, 2006.

Dr. C. Craig Satterlee's December 4, 2007 rating report, Exhibit B, notes that Claimant had reached maximum medical improvement. The report states that Claimant's permanent partial disability was 16% of the right shoulder, and that 4% was pre-existing her injury.

The parties stipulated that in the event this claim is found to be compensable, Claimant shall be entitled to an award of permanent partial disability benefits from Employer of 19.5% of the right shoulder at the 232 week level.

The surveillance video, Exhibit 2, depicts Claimant walking down a hallway on October 17, 2006. It shows Claimant trip and fall. The video does not show Claimant tripping over her own feet. It does not show one foot coming into contact with the other foot immediately before Claimant fell. The video does not clearly show the condition of the surface of the floor where Claimant tripped at the time that she tripped and fell. The video does not appear to show anything wet on the floor in the general area where

Claimant fell. The video shows other persons walking in the hallway after Claimant fell in the general area where Claimant fell. Although the video shows other persons walking in the hall after Claimant fell, it does not clearly show others stepping in the exact location where Claimant stepped immediately before she fell.

The video later shows Claimant sitting in a room being treated for facial bleeding by a uniformed person. Later in the video, a second uniformed person entered the room and sat at a desk. Claimant appeared to speak to those persons. The second person is shown to be writing on a piece of paper while he talked to Claimant. Later, a third person also entered the room while Claimant was present.

The video is approximately nine minutes long. The camera in the hallway where Claimant fell appears to be located near the ceiling several feet above the surface of the floor where Claimant fell. There is no audio on the video.

### **Rulings of Law**

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the medical reports, the video, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following Rulings of Law:

1. Did Claimant sustain an injury by accident arising out of and in the course of her employment for Employer on or about October 17, 2006?

Section 287.800, RSMo<sup>1</sup> provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting

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<sup>1</sup> All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.020.2, RSMo provides:

The word 'accident' as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.020.3, RSMo provides in part:

3. (1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(5) The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body. . . .

Section 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care* and

Rehabilitation, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Section 287.030.2, RSMo provides: “2. Any reference to the employer shall also include his or her insurer or group self-insurer.”

A claimant has the burden to prove all the essential elements of his or her case, and a claim will not be validated where some essential element is lacking. *Thorsen*, 52 S.W.3d 611, 618 (Mo.App. 2001), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. banc 2003)<sup>2</sup>; *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo. App. 1996).

The trier of facts may disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

Based on the substantial and competent evidence and the application of the Missouri Workers' Compensation Law, I find that the credible evidence has established that Claimant sustained an injury to her lip and right shoulder arising out of and in the course of her employment for Employer which resulted from an accident on October 17, 2006 in Employer's workplace. I find that Claimant's accident while working for Employer was the prevailing factor in causing her injury, her resulting disability, and the need for the medical treatment she received.

I find that this occurrence qualifies as an “accident” as defined by Section 287.020.2, RSMo. I find that Claimant had an unexpected traumatic event when she tripped and fell on October 17, 2006, and her fall produced an objective symptom of an injury, a bloody lip and pain in her right shoulder, which was caused by a specific event during a single work shift.

Claimant testified that her left foot stuck on something on the concrete floor at Employer's workplace, and she pitched forward and fell. She said she did not trip on her own feet. I believe Claimant's testimony.

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<sup>2</sup> Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

Claimant testified that she reported to the EMTs that her foot stuck on the floor. Employer offered no witnesses at the hearing. No EMTs testified at the hearing or by deposition to refute or contradict this testimony of Claimant. Employer offered no photographs of the floor where Claimant fell. Employer offered no investigative reports or other documentation regarding the incident. Employer offered no witnesses to testify that they had examined the floor where Claimant fell immediately after she fell, and found the floor to be dry, clean, and non-sticky.

Employer cites *Bivins v. St. John's Regional Health Center*, 272 SW3d 446 (Mo.App. 2009) in support of its position that Claimant's injury was not due to an accident arising out of in the course of her employment. The Southern District Court of Appeals affirmed the Commission's denial of benefits to claimant in *Bivins*. The court noted that the Commission found that there was no rational connection between claimant's work and injury that was sustained.

*Bivins* is distinguishable from the case at hand. In *Bivins*, Employer presented evidence that there was nothing on the floor that would have caused Claimant's foot to stick or would have caused her to slip or trip. The Court noted that photographs taken immediately after the incident provided no evidence of anything on the floor. In the case at hand, Employer offered no still photographs of the floor taken immediately after the incident and documented no evidence of anything on the floor. The surveillance video does not clearly show the condition of the floor where Claimant stepped at the time of the accident.

In *Bivins*, employer offered a dispatch report and emergency nursing record stating that claimant tripped, and neither indicated that claimant's foot stuck to the floor. In the case at hand, no such records were offered into evidence.

In *Bivins*, an officer who responded to the incident involving claimant asked claimant if she had tripped. Claimant responded that she "just fell", and did not advise the officer that she had fallen because her right foot stuck to the floor. In the case at hand, Employer did not offer the EMTs or anyone else investigating the accident to testify. They did not refute Claimant's statements that she told the EMTs that her foot had stuck to the floor.

In *Bivins*, a nurse, claimant's supervisor, testified that he discussed claimant's general condition with her. In *Bivins*, the supervisor denied that claimant told him she had fallen because her foot had stuck to the floor. Further, in *Bivins*, employer's health manager testified she spoke with claimant the day after the accident. She said the claimant told her that she "just fell". She also testified that claimant did not advise her that her foot did stick to the floor. The testimony of the officers, nurse and employee

health manager were all found to be credible. The *Bivens* court also noted that written documentation would not substantiate claimant's contention that she advised hospital personnel that her foot had stuck to the floor.

In the case at hand, Dr. Pazell's report documents Claimant's report to personnel in Dr. Romito's office three days after the fall that "she was walking when she caught her foot in the carpet." Dr. Romito's records were not offered into evidence. Dr. Pazell's summary of Dr. Romito's record refers to Claimant having "caught her foot in the carpet" rather than her left foot having stuck on a concrete floor. I do not find the difference of the surface of the floor to be material. The important fact is that the record documents that Claimant did state just three days after the fall that she had caught her foot while walking and that she then fell. The doctor's record indicates there was something on the surface of the floor that caused Claimant to fall, and that Claimant's fall was not an unexplained fall, as was found to be the case in *Bivins*.

The court notes in *Bivins* at 449 that the Commission had found and concluded "that the employee was walking in a hallway on the premises of employer when the employee 'just fell', meaning that she simply or merely fell, without explanation." The court notes that the Commission did not find credible "employee's trial testimony that her foot stuck to the floor immediately prior to falling." The Commission specifically found that the most credible version of what transpired was that employee "just fell", i.e., the injury simply was the result of an unexplained fall.

The court in *Bivens* states at 449:

Due to the fact that the injury was the result of an unexplained fall, the commission is unable to determine clearly if there was any condition of employment that contributed to the result of injury.

The burden rests upon the employee to show some direct causal connection between the injury and the employment. An award of compensation may be at issue if the injury were a rational consequence of some hazard connected with the employment. However, the employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The injury must have been a rational consequence of that hazard to which the employee has been exposed and which exists because of and is part of the employment. It is not sufficient that the employment may simply furnish an indication for an injury for some unconnected source.

In *Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671 (Mo. 2009), claimant was walking briskly toward a truck when he felt a pop and his knee began to hurt. The Court noted there was “nothing about the road surface, his work clothes or the job that caused any slip, strain or unusual movement, and he did not fall or otherwise sustain any additional injuries due to the popping. He just felt a pop.” *Id.* at 672. The Missouri Supreme Court stated in *Miller* at 674:

An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved—here, walking—is one to which the worker would have been exposed equally in normal non-employment life. The injury here did not occur because Mr. Miller fell due to some condition of his employment. He does not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment. He was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The injury arose during the course of employment, but did not arise out of employment.

The *Miller* court noted that claimant did not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment. The court noted that claimant was walking on even road surface when his knee happened to pop and that nothing about work caused it to do so.

*Miller* is also distinguishable from the case at hand. Claimant’s injury did not occur merely because she was walking and she suffered a pop in her knee. Here, she asserts, and I believe, that she tripped because of a sticky surface on the floor, and the trip caused her to fall. I find that her injury arose during the course of employment and also arose out of her employment.

I find that that Claimant’s accident is the prevailing factor in causing her injury. I also find that her accident does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. I find that there was a rational connection between Claimant’s work and the injury sustained. I find that Claimant’s injury was a rational consequence of some hazard connected with the employment, the hazard being a substance on the floor that caused her foot to stick to the floor and caused her to then fall to the floor. In believing the Claimant’s testimony, I find that the condition of the floor exposed Claimant to an unusual risk or injury from such hazard which was not shared by the general public, and that the injury was a rational consequence of that hazard to which the Claimant had been exposed and which existed because of and as part of the employment. I find that Claimant’s injury was not sustained

due to an unexplained fall. I find that Claimant's work was not a triggering or precipitating factor.

In the case at hand, Employer's attorney acknowledged at the beginning of trial that medical aid has previously been furnished in this case in the amount of \$23,492.38. Claimant specified that all medical bills have been paid. Employer's attorney also acknowledged that temporary total disability benefits had been paid in the amount of \$3,683.21 for time Claimant was off work after her May 15, 2007 surgery.

The parties stipulated at the hearing that in the event it is determined that Claimant sustained a compensable accident arising out of her employment for Employer, Claimant shall be entitled to an award of permanent partial disability benefits from Employer of 19.5% of the right shoulder at the 232 week level at the permanent partial disability rate of \$376.55 per week. I have determined that Claimant sustained a compensable accident on October 17, 2006 arising out of her employment for Employer. I therefore award permanent partial disability benefits to Claimant in the amount of \$17,035.12 from Employer/Insurer.

The parties stipulated at the hearing that in the event it is determined that Claimant sustained a compensable accident arising out of her employment for Employer, Claimant shall be entitled to an award of temporary total disability benefits from Employer for the period from and including October 18, 2006 through and including April 1, 2007 at the temporary total disability rate of \$460.38 per week. That period amounts to 23 5/7 weeks. I have determined that Claimant sustained a compensable accident on October 17, 2006 arising out of her employment for Employer. I therefore award temporary total disability benefits to Claimant in the amount of \$10,917.58 from Employer/Insurer.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the claimant: Mark E. Kolich.

Made by: /s/ Robert B. Miner  
Robert B. Miner  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated and attested to this 8th day of October, 2009.

Issued by DIVISION OF WORKERS' COMPENSATION

Re: Injury No.: 06-100104  
Employee: Mary E. Miller

/s/ Naomi Pearson

Naomi Pearson  
*Division of Workers' Compensation*