

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

Injury No.: 02-103900

Employee: Stancie Molder  
Employer: Bank of America (Settled)  
Insurer: American Home Assurance c/o AIG Domestic Claims (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. We have reviewed the evidence and considered the whole record. We find that the award of the administrative law judge should be modified. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the December 22, 2009, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

The issue we must decide is whether employee is permanently and totally disabled due to a combination of her preexisting disabilities and her primary injuries. The administrative law judge concluded that employee is not permanently and totally disabled. We disagree.

## **Findings**

### Primary Injury

In the instant matter, employee sustained work-related bi-lateral cumulative trauma to her upper extremities (wrist and elbows). Employee underwent a carpal tunnel release for each wrist. Employee settled her claim against employer/insurer for the primary injuries for 12.5% permanent partial disability of the body as a whole. Based upon the opinion of Dr. Koprivica, we believe 12.5% of the body as a whole fairly represents employee's permanent disability from the primary injuries. Based upon the April 9, 2008, medical record of Dr. Toby, we conclude employee reached maximum medical improvement from the primary injury on April 9, 2008.

### Preexisting injuries

Employee had several preexisting conditions of such severity that they constituted hindrances or obstacles to employee's employment or reemployment including: a 1987 low back injury for which she underwent a discectomy and for which she has a lifting restriction; a 2004 foot injury for which she underwent surgery and following which she worked with an accommodation that she could periodically elevate the foot; and, a 2000 shoulder injury for which she underwent surgery and following which she has had ongoing significant pain complaints.

Expert Testimony

Two physicians and one vocational expert are of the opinion that employee cannot work in the open labor market. All three experts believe employee is unemployable due to a combination of her preexisting disabilities with her primary injuries. The Second Injury Fund offered no expert evidence to rebut employee's experts.

Dr. Koprivica testified that he believes employee cannot access the open labor market and that it is unrealistic to believe that any ordinary employer could accommodate the restrictions that are necessary from employee's numerous disabilities. Dr. Koprivica attributed employee's permanent total disability to a combination of her preexisting disabilities and her primary injuries. Dr. Koprivica was of the opinion that employee's primary injuries combined with her preexisting disabilities to result in a greater disability than their simple sum. Due to the primary injuries, Dr. Koprivica would restrict employee from repetitive hand use activities, including extensive typing, repetitive pinching, and repetitive grasping. He advised that employee should avoid repetitive wrist flexion/extension or ulnar deviation of the wrist, as well as exposure of her upper extremities to vibration. Dr. Koprivica specifically opined that he does not believe employee is permanently and totally disabled if he considers only the disability resultant from the primary injury.

Dr. Koprivica explained that at the time employee experienced the cumulative trauma to her wrists, she was operating under multiple physical restrictions due to her preexisting injuries. In particular, Dr. Koprivica would restrict employee from: constant bending at the waist, pushing, pulling, twisting, squatting, crawling, kneeling, climbing, sustained awkward postures of the lumbar spine, activities above the shoulder girdle, and repetitive pushing or pulling activities using her right shoulder. Further, Dr. Koprivica would limit employee to one hour or less of captive standing or walking with the option to sit. Those preexisting restrictions had already limited employee to performing seated work. After the primary injury limited employee's ability to use her hands, she could no longer perform even seated work.

Dr. Stuckmeyer examined employee. Based upon her global orthopedic problem, with cervical, right shoulder, lumbar, and bilateral wrists and elbows, Dr. Stuckmeyer recommended that employee observe the following limitations: no repetitive pushing, pulling, lifting or reaching with the upper extremities, no lifting greater than 5 to 10 pounds overhead on an occasional basis, no lifting greater than 5 to 10 pounds from waist to shoulder, no prolonged standing, no prolonged walking, no repetitive traversing of steps, no ladder climbing, no repetitive bending, and no repetitive torsional stresses. Dr. Stuckmeyer believed employee's primary injuries combined with her preexisting disabilities to result in a greater disability than the simple sum. Dr. Stuckmeyer testified he would defer to a vocational expert's opinion regarding whether there are employment opportunities for employee. If the vocational expert believes there are none, Dr. Stuckmeyer believes employee is permanently and totally disabled.

Mr. Bud Langston testified as a vocational expert for employee. Mr. Langston testified that employee is unemployable in the open labor market. In reaching his conclusion, Mr. Langston considered the physical restrictions imposed by Dr. Koprivica and Dr. Stuckmeyer, as well as, employee's age, education, training, and her capacity for rehabilitation and re-education. Based upon these considerations, Mr. Langston does

not believe that any reasonable employer in the usual course of business would hire employee in an open labor market position.

### **Discussion**

The administrative law judge misapplied the law to reach her conclusion that employee is not permanently and totally disabled.

The test for permanent total disability is whether, given the employee's situation and condition, he or she is qualified to compete in the open job market. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001). "The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired." *Id.* at 884.

*Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo. App. 2004)

The administrative law judge addressed the issue of permanent total disability in the following manner: Is employee able to work? The administrative law judge found:

Ms. Molder is, in fact, working in the open labor market on a part-time basis and has been doing so since shortly after retiring from Bank of America. In *Jason Rector v. Gary's Heating and Cooling and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund*, 293 S.W. 3d 143 (Mo. Ct. App. S.D. 2009), the employee injured himself in 2004, went back to his place of employment and performed work on a part-time basis, was accommodated by the employer and was taking high doses of narcotic pain medication during the day. The employee then injured himself again on the job in 2005. The administrative law judge found that the employee was "able to work" following the 2004 injury and the combination of the 2004 and 2005 injuries rendered the employee permanently and totally disabled. The Court of Appeals affirmed the findings of the administrative law judge.

Given the part-time accommodated work that the employee was performing in the *Rector* case, the Court essentially found the employee to be employable on the open labor market prior to his 2005 work injury.

The same application can be made in this case. Ms. Molder is currently performing work on the open labor market, albeit part time, thus she must be considered employable on the open labor market.

The administrative law judge oversimplifies the *Rector* Court's reasoning. After reviewing the evidence, the Court found that the Commission's conclusion that Mr. Rector was not permanently and totally disabled was supported by the evidence. That evidence included the opinions of two medical experts, as well as, evidence that Mr. Rector was able to return to work on a regular basis (albeit not always for forty hours a week).

By contrast, employee sporadically performs part-time work for Burch Automotive on an as-needed basis. Employee works zero to twenty hours a week. Employee has the option of not reporting to work if she is having a bad day. Burch Automotive accommodates employee by allowing employee to alternate between sitting, standing, and reclining to elevate her feet so long as there are no customers present. This irregular work is not employment in the open labor market.

More importantly, the uncontradicted opinions of three credible experts are in agreement that no reasonable employer could be expected to hire employee in her current condition.

Based upon this uncontradicted evidence, we find that employee is permanently and totally disabled due to a combination of her primary injury and her preexisting disabilities.

**Award**

Employee is entitled to permanent total disability benefits from the Second Injury Fund. For the period April 10, 2008, through March 25, 2009, the Second Injury Fund owes to employee the weekly amount of \$54.19, for a total of \$2709.50 (\$54.19 X 50 weeks). Thereafter, the Second Injury Fund shall pay to employee a benefit of \$290.29 weekly for her lifetime, or until modified by law.

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.

The award and decision of Chief Administrative Law Judge Paula McKeon, issued December 22, 2009, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 25<sup>th</sup> day of August 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

## SECOND INJURY FUND AWARD

Employee: Stancie Molder Injury No. 02-103900  
Dependents: N/A  
Employers: Bank of America  
Additional Party: Missouri Treasurer as Custodian for the Second Injury Fund  
Insurers: American Home Assurance c/o AIG Domestic Claims  
Hearing Date: November 4, 2009 Checked by: PAM/pd

### 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 25, 2002
5. State location where accident occurred or occupational disease was contracted: Kansas City, Clay 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:  
Ms. Molder, during the course and scope of her employment, developed pain and disability in her shoulders, hands and wrists as a result of her repetitive work.
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: Shoulders, hands and wrists
14. Nature and extent of any permanent disability: 12.5 percent body as a whole

15. Compensation paid to-date for temporary disability: \$1,161.16 (4 weeks)
16. Value necessary medical aid paid to date by employer/insurer? \$14,901.33
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$435.44
19. Weekly compensation rate: \$290.29/\$236.10
20. Method wages computation: By agreement
21. Amount of compensation payable: N/A
22. Second Injury Fund Liability: Yes  
37.178 weeks of permanent partial disability from the Second Injury Fund or \$8,777.73
23. Future requirements awarded: None

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Mr. James Humphrey

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

Employee: Stancie Molder Injury No. 02-103900  
Dependents: N/A  
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Hearing Date: November 4, 2009 Checked by: PAM/pd

On November 4, 2009, the employee and the Second Injury Fund appeared for hearing. The Employee, Ms. Stancie Molder, appeared in person and with counsel, Mr. Jim Humphrey. The Second Injury Fund appeared by counsel, Ms. Kimberley Fournier. At the hearing, the parties stipulated to the following:

- 1) that on or about September 25, 2002, Bank of America was an employer operating under the provisions of the Missouri Workers' Compensation Law and that their liability was fully insured;
- 2) that on or about September 25, 2002, Stancie Molder was an employee of Bank of America and was working under the provisions of the Missouri Workers' Compensation Law;
- 3) that the employer had notice of the injury and that a claim for compensation was filed within the time prescribed by law;
- 4) that the applicable compensation rate was \$290.29 per week for permanent total disability benefits and \$236.10 for permanent partial disability benefits;
- 5) that compensation has been paid by the employer in the amount of \$1,161.16 for 4 weeks; and
- 6) that medical has been provided in the amount of \$14,901.33.

### **ISSUES**

The issues to be determined by the hearing are as follows:

- 1) whether on or about September 25, 2002 Stancie Molder sustained an accident/occupational disease within the course and scope of her employment with Bank of America; and

- 2) the liability of the Second Injury Fund for permanent partial or permanent total disability benefits.

### **FINDINGS AND RULINGS**

Stancie Molder is a 61-year-old woman who resides in Kansas City, Kansas. The majority of Ms. Molder's employment history includes performing data entry. She worked for such companies as Thompson Hayward, Folgers and Manner/Colonial Baking Company as a data entry clerk. Ms. Molder's last employment was with Bank of America as a data entry processor. She held this job on a full-time basis from 1991 until April of 2007. Additionally, Ms. Molder worked for Disney taking telephone orders 20 hours per week as an extra part-time job for nine of the years she was with Bank of America. Ms. Molder testified that in 2005 she was working at least 60 hours per week.

Prior to retirement from Bank of America in 2007, Ms. Molder did suffer from pre-existing disabilities.

In 1987, Molder was involved in an automobile collision that resulted in low back surgery. Molder was given a 26-pound permanent lifting restriction due to this injury. She was not taking ongoing medications for her low back. Dr. Koprivica opined that Ms. Molder was able to get along pretty well with her back following this surgery.

In 1994, Ms. Molder underwent foot surgery. Following this surgery, Ms. Molder was off work for one year, but upon return to work was able to perform the functions of her job despite the injury to her foot. There were no permanent restrictions placed on Ms. Molder for the use of her foot following the surgery. Ms. Molder testified that she elevated her foot frequently to alleviate swelling and was accommodated by her employers to accomplish this. Both Bank of America and Disney accommodated her foot elevation request. Dr. Stuckmeyer did not find that her foot complaints rose to the level of Second Injury Fund liability.

In 2000, Ms. Molder had an accident while working for Bank of America that resulted in an injury to her right arm. Ms. Molder underwent surgery with Dr. Robinson for a right rotator cuff repair. No formal written restrictions were placed on Ms. Molder regarding the use of her right arm. Molder has significant complaints of pain attributable to her right shoulder.

In addition to injuring her shoulder in the 2000 incident, Ms. Molder alleges to have aggravated her lumbar spine as well. She received very limited conservative treatment for the back aggravation. Ms. Molder was not accommodated by her employer due to her low back prior to 2002 and advised Dr. Koprivica that she was able to successfully perform her job with Bank of America. Per Dr. Koprivica, Ms. Molder was also able to perform the functions of her second job prior to 2002 without accommodation.

Ms. Molder alleges that she has sustained cumulative trauma from the repetitive use of her bilateral upper extremities while working as a data entry processor for Bank of America. Ms. Molder alleges that the injury to her upper extremities began in 2002. Ms. Molder did not receive operative treatment until 2006 when she underwent left carpal tunnel release; and in

November of 2007, she underwent right carpal tunnel release, both surgeries performed by Dr. Toby. Ms. Molder was released from care by Dr. Toby following these surgeries without restrictions.

Dr. Koprivica found Ms. Molder to be permanently and totally disabled in April of 2007.

Dr. Koprivica opined despite the restrictions he would place on her injuries prior to 2002, Molder would still be able to perform data entry jobs. Dr. Koprivica placed Ms. Molder in a light physical demand or less category. Bud Langston, vocational expert, opined that all the positions in which Ms. Molder has worked over the past twenty-plus years fall within that stated category. Dr. Stuckmeyer agreed that Ms. Molder was able to perform the functions of her sedentary jobs prior to 2002 and that she has had no restrictions placed on her as a result of her 2000 or 2002 work injuries by any treating physicians.

Following her retirement from Bank of America, Ms. Molder applied for and received unemployment, citing in her application that she was ready, willing and able to pursue gainful employment.

Since retiring from Bank of America in the spring of 2007, Ms. Molder has obtained part-time work with Burch Automotive Repair performing such jobs as answering phones, taking messages, sorting mail, running errands and invoicing. She continues performing this part-time job even as of the date of this hearing.

Since leaving Bank of America in 2007, Ms. Molder is able to do her own grocery and general shopping, lives independently and has vacationed in Colorado.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ms. Molder has alleged she is permanently and totally disabled. In order to determine whether an employee is deemed totally disabled under the Missouri Workers' Compensation Law, it must be found that the Claimant is unable to return to any employment. §287.020(7) RSMo (1986) defines total disability as "an inability to return to any employment and not merely...inability to return to the employment which the employee was engaged at the time of the accident." The terms "any employment" mean any reasonable or normal employment or occupation. Reese v. Gary & Roger Link, Inc., 5 S.W. 3d 522 (Mo.App. 1999); Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo.App. 1996); Kowalski v. M-G Metal and Sales, Inc., 631 S.W. 2e 919, 921 (Mo.App. 1982); Groce v. Pyle, 315 S.W. 2d 482, 490 (Mo.App. 1958). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that they be unable to compete in the open labor market. See Reese v. Gary & Roger Link, Inc., 5 S.W. 3d 522 (Mo.App. 1958); Carlson v. Plant Farm, 952 S.W. 2d 369, 373 (Mo.App. 1997); Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo.App. 1996); Searcy v. McDonnell Douglas Aircraft, 894 S.W. 2d 173 (Mo.App. 1995); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo.App. 1992); Brown v. Treasurer, 795 S.W. 2d 478 (Mo.App. 1990).

Missouri courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the

employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition. See Garcia V. St. Louis County, 916 S.W. 2d 263 (Mo.App. 1995); Lawrence v. R-VIII School District, 834 S.W. 2d 789 (Mo.App. 1992); Carron v. St. Genevieve School District, 800 S.W. 2d 6 (Mo.App. 1991); Fischer v. Arch Diocese of St. Louis, 793 S.W. 2d 195 (Mo.App. 1990). In other words, a determination of permanent total disability should focus on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employments. Gordon v. Tri-State Motor Transit, 908 S.W. 2d 849 (Mo.App. 1995). The courts of this state have held that various factors may be considered, including a claimant's physical and mental condition, age, education, job experience and skills in making the determination as to whether a claimant is permanently and totally disabled. See e.g., Tiller v. 166 Auto Auction, 941 S.W. 2d 863 (Mo.App. 1997); Olds v. Treasurer, 864 S.W. 2d 406 (Mo.App. 1993); Brown v. Treasurer, 795 S.W. 2d 439 (Mo.App. 1990); Patchin v. National Supermarkets, Inc. 738 S.W. 2d 166 (Mo.App. 1987); Laturno v. Carnahan, 640 S.W. 2d 470 (Mo.App. 1982); Vogel v. Hall Implement Company, 551 S.W. 2d 922 (Mo.App. 1997). The commission is the sole judge of witness credibility and is free to disbelieve the testimony of any witness, even if there is no contrary or impeaching evidence. Anderson v. Emerson Elec. Co., 698 S.W. 2d 574, 576 (Mo. App. 1985).

The inquiry into permanent total disability is a factual one: whether Claimant is employable. Messex v. Sachs Electric Co., 989 S.W. 2d 206, 210 (Mo.App. 1999).

I find that Ms. Molder is employable on the open labor market. Ms. Molder was able to perform the functions of two jobs on a 60-hour-per-week basis prior to the 2002 upper extremity injuries and was doing so with virtually no physical restrictions having been placed on her by any of her treating physicians.

Moreover, Ms. Molder worked from the stated date of her cumulative trauma in 2002 until 2007 when she retired from by Bank of America. Molder was able to continue working sixty hours per week even after per primary disability was discovered.

Ms. Molder eventually did undergo surgical repair of her bilateral wrists.

Ms. Molder is, in fact, working in the open labor market on a part-time basis and has been doing so since shortly after retiring from Bank of America. In Jason Rector v. Gary's Heating and Cooling and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund, 293 S.W. 3d 143 (Mo. Ct. App. S.D. 2009), the employee injured himself in 2004, went back to his place of employment and performed work on a part-time basis, was accommodated by the employer and was taking high doses of narcotic pain medication during the day. The employee then injured himself again on the job in 2005. The administrative law judge found that the employee was "able to work" following the 2004 injury and the combination of the 2004 and 2005 injuries rendered the employee permanently and totally disabled. The Court of Appeals affirmed the findings of the administrative law judge.

Given the part-time accommodated work that the employee was performing in the Rector case, the Court essentially found the employee to be employable on the open labor market prior to his 2005 work injury.

The same application can be made in this case. Ms. Molder is currently performing work on the open labor market, albeit part time, thus she must be considered employable on the open labor market.

Based on these various factors, I find that the evidence presented is insufficient to support a showing that Ms. Molder is unemployable on the open labor market.

Because Ms. Molder is employable in the open labor market and for the foregoing reasons, I do not find the Second Injury Fund liable for permanent total disability benefits.

I do find Ms. Molder is entitled to compensation for permanent disability she sustained as a result of the 2002 injury.

Ms. Molder entered into a stipulation for compromise settlement with her employer for her 2002 work injury. She stipulated that as a result of her 2002 work injury, she has a 12.5 percent permanent partial disability to the body as a whole. She entered into a stipulation for compromise settlement in 2005 for her pre-existing conditions. Per that stipulation, she agreed that she had a 27 percent permanent partial disability referable to her right upper extremity, a 12.5 percent permanent partial disability to the body as a whole referable to her low back, and a 15 percent permanent partial disability to the body as a whole referable to her right foot.

Ms. Molder is bound to those stipulations for compromise settlement. "A settlement approved by an ALJ is conclusive and irrevocable, and when approved, a settlement of a workers' compensation claim is the basis of res judicata and estoppels by judgment. Any relief from a settlement approved by an ALJ under section 287.390 can be had only in a court of equity on proof of fraud or mistake. W.C. Conley V. Treasurer of the State of Missouri, 999 S.W. 2d 269, 274 (Mo. App. E.D. 1999).

I find that Ms. Molder should receive permanent partial disability pursuant to her stipulated amounts totaling 185.89 weeks of disability times a 20 percent loading factor for a sum of 37.178 weeks. This taken times her compensation rate of \$236.10 entitled Ms. Molder to \$8,777.73 in permanent partial disability from the Second Injury Fund.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Paula McKeon  
Chief Administrative Law Judge  
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this \_\_\_\_ day of \_\_\_\_\_, 2009 by:

\_\_\_\_\_  
Naomi Pearson  
Division of Workers' Compensation