

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 09-102433

Employee: Paula S. Neff
Employer: Fulton State Hospital (Settled)
Insurer: Office of Administration (CARO) (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and considered the whole record and we find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the September 16, 2011, award and decision of the administrative law judge, as modified herein. 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 administrative law judge awarded to employee enhanced permanent partial disability benefits from the Second Injury Fund. To calculate the extent of employee's enhanced permanent partial disability, the administrative law judge applied a multiplicity factor of 15% to the simple sum of employee's disabilities (stated in weeks). The administrative law judge erred in applying a 15% enhancement factor because the parties stipulated that a 10% enhancement factor should be applied in this case.

We modify the permanent partial disability award of the administrative law judge. The parties agree the Second Injury Fund is liable to employee for \$6,248.23 of enhanced permanent partial disability calculated as follows:

weeks of preexisting permanent partial disability		124.0
weeks of permanent partial disability from primary injury		52.2
simple sum of disability weeks		<u>176.2</u>
multiplicity factor representing synergistic combination	X	<u>.10</u>
weeks of enhanced permanent partial disability	=	17.62
compensation rate	X	<u>354.61</u>
compensation for enhanced permanent partial disability	=	\$6,248.23

In all other respects, we affirm and adopt the award of the administrative law judge. We further approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

¹ Statutory references are to the Revised Statutes of Missouri 2009, unless otherwise indicated.

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Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law David L. Zerrer, issued September 16, 2011, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 8th day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Paula S. Neff

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Dependents:

Employer: Fulton State Hospital

Additional Party: Second Injury Fund

Insurer:

Hearing Date: June 28, 2011

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

Checked by: DLZ

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: December 28, 2009
5. State location where accident occurred or occupational disease was contracted: Callaway 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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant reached while installing shelf when felt pain in shoulder
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 shoulder
14. Nature and extent of any permanent disability: 22.5% of the left shoulder at the 232-week level
15. Compensation paid to-date for temporary disability: \$455.93
16. Value necessary medical aid paid to date by employer/insurer? N/A

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$576.25
- 19. Weekly compensation rate: \$354.61
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: All issues previously settled with Employer

22. Second Injury Fund liability: Yes No Open

26.43 weeks of permanent partial disability from Second Injury Fund--\$9,372.34

TOTAL:

23. Future requirements awarded: None

Said payments to begin 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: Christine Kiefer/VanCamp Law Firm

Employee: Paula S. Neff

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Paula S. Neff

Injury No: 09-102433

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Fulton State Hospital

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

Additional Party: Second Injury Fund

Insurer:

Checked by: DLZ

On the 28th day of June, 2011, the parties appeared before the undersigned Administrative Law Judge for final hearing. The Claimant appeared in person and by her attorney, Christine Kiefer. The Employer previously settled and compromised all issues in the primary claim and did not appear at this hearing. The Treasurer of the State of Missouri, as Custodian of the Second Injury Fund, appeared by Assistant Attorney General David Zugelter.

The parties have entered into a stipulation as to certain facts which are not at issue in this claim as follows, to wit: On or about the 28th day of December, 2009, Fulton State Hospital was an Employer operating subject to the Missouri Workers' Compensation Law; on the alleged injury date of December 28, 2009, Paula S. Neff was an employee of the Employer; the Claimant was working subject to the Missouri Workers' Compensation Law; the parties agree that on or about December 28, 2009, Claimant sustained an accident, which arose out of the course of and scope of employment; the employment occurred in Callaway County, Missouri, and the parties agree that Cole County, Missouri, is the proper venue for this hearing; the Claimant notified the Employer of the injury as required by Section 287.420; the Claimant's claim was filed within the time prescribed by Section 287.430; at the time of the claimed accident, Claimant's average weekly wage was \$576.25, sufficient to allow a compensation rate of \$354.61 for temporary total disability, permanent partial disability, and permanent total disability; temporary disability

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benefits have been paid in the amount of \$455.93, prior to the date of this hearing; Claimant's attorney seeks approval of an attorney fee of 25% of the amount of any award.

ISSUE

The liability of the Second Injury Fund for enhanced permanent partial disability?

DISCUSSION

A legal file was established for this hearing, which consisted of the following documents, to wit: Report of Injury; Claim for Compensation, filed with the Division February 10, 2010; Answer of the Second Injury Fund, filed with the Division February 22, 2010; Stipulation for Compromise Settlement, approved by the Division April 6, 2011; Request for Final Hearing, filed with the Division May 13, 2011.

Paula S. Neff, claimant herein, testified in her own behalf. Claimant testified that she is not married and has no children. Claimant is 50 years of age at the date of hearing. Claimant has been employed by the Employer for eight years prior to the hearing and currently works in the maintenance department, being classified as a Maintenance II worker. Her job duties include helping any department when needed with painting, construction, maintaining the physical structures of the Employer. Claimant stated that her job task often includes climbing ladders and almost never involves being seated to perform a job task. At the date of hearing, Claimant was assigned to the electrical department of the Employer.

Claimant testified that prior to 2009, she was assigned to the paint and carpentry shop and that she was working in paint and carpentry at the time of her primary injury. Claimant testified that prior to her December 28, 2009, accident, she had no other work-related injuries.

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Claimant testified that on December 28, 2009, while helping a carpenter install a shelf, she was holding a board when she felt an immediate pain in her left shoulder. Claimant reported the incident and was sent to the emergency room where an x-ray was taken and Claimant was given a prescription for pain. Claimant was referred to Dr. Runde for follow-up. Dr. Runde ordered an MRI after which Claimant was referred to an orthopedic surgeon for treatment of a torn rotator cuff.

Claimant testified that she received surgery to repair her left rotator cuff tear from Dr. Carter who released Claimant without restrictions about six months after the surgery.

Claimant testified that she currently has symptoms which include difficulty in extending her arm, pain when reaching above her head, and pain when making side movements with her left arm. Claimant also stated that she favors her left arm use and accommodates by using her right hand and arm for heavier tasks. She also indicated that reaching up to change light bulbs in ceiling fixtures of secure areas is very difficult and painful because she has to stretch her arm and shoulder to reach the fixtures. Claimant testified that she had no injury to her left shoulder prior to December 28, 2009.

Claimant testified that when she was a teenager she fell from the back of a moving truck, which caused bilateral ankle fractures. Claimant received surgery to install hardware in each ankle. The hardware was later removed. Claimant also injured her back in the same accident. Claimant stated that she wore a back brace for two and one-half years as a result of the injury to her back from the truck accident. As a result of her injuries from this accident Claimant cannot wear high-heeled shoes. When the weather is cold or wet her ankles ache and sometimes her ankles are somewhat unstable when Claimant walks on uneven ground.

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Claimant testified that in 1998 she fell from a horse which resulted in the right heel fracture which was surgically repaired. Claimant stated that her leg was elevated for six months following this accident. Claimant testified that as a result of this injury she has lost some feeling in her right heel and foot. In addition, Claimant stated that her right foot feels tingly from time to time.

Claimant testified that she is accommodated to some extent at her work and that since she has moved to the electric department she does not have to carry heavy items as often as when she worked with the paint and carpentry department.

On cross-examination, Claimant admitted that she assisted in building her home and that she can drive for short distances without problem, but driving long distances becomes difficult and painful because of pain in her ankles. Claimant admitted that she maintains her own property.

Claimant admitted that Dr. Carter released her from treatment for her shoulder without permanent restrictions. She further admitted that she does not take prescription pain medication because of her shoulder pain, but that she does take Aleve from time to time for shoulder pain.

Dr. Cohen performed an independent medical evaluation on the Claimant and issued a report of his findings dated March 17, 2011. Dr. Cohen's report indicates that he took a history from the Claimant, reviewed certain medical records which were identified in the report, and conducted an examination of the Claimant. Dr. Cohen opined that Claimant suffered from left shoulder trauma secondary to a glenoid labral tear, glenoid and humeral chondromalacia, rotator cuff tears, and impingement as result of the primary injury of December 28, 2009.

Dr. Cohen also diagnosed Claimant's pre-existing conditions as status post two ankle surgeries for multiple fractures and status post multiple calcaneal fractures with hardware.

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Dr. Cohen opined that he concurred with the disability set out in the settlement of the primary claim at 22.5% of the left shoulder. Dr. Cohen rated Claimant's pre-existing conditions at 35% of the left ankle and 45% of the right ankle. He further opined that the disability from the primary injury combined with the disabilities from the pre-existing conditions create a greater overall disability than the simple sum. Dr. Cohen recommended a multiplicity factor of 15% should be added to the simple sum of the injuries and conditions. Dr. Cohen further opined that Claimant's pre-existing conditions were industrially disabling.

FINDINGS OF FACT AND RULINGS OF LAW

The liability of the Second Injury Fund for enhanced permanent partial disability?

Claimant's primary injury meets threshold for Second Injury Fund liability. Claimant testified concerning her pre-existing conditions, as well as the current effects those injuries have on her ability to work and perform her job tasks. Claimant testified that she self-accommodates her condition with extra caution and with help from co-workers. Dr. Cohen rated Claimant at 35% of the left ankle and 45% of the right ankle for pre-existing conditions. I find Dr. Cohen's opinions with regard to Claimant's disabilities, and particularly his ratings of the pre-existing conditions, to be credible. Claimant's testimony at the hearing is consistent with the history set out in Dr. Cohen's report.

After a review of all the evidence presented at the hearing, both oral and written, and based on the record as a whole, I find that Claimant has sustained her burden of proof to establish that she is entitled to benefits from the Second Injury Fund. I further find that Claimant has a permanent partial disability of 22.5% at the left shoulder as a result of the primary injury of December 28, 2009. I further find that Claimant has a 35% permanent partial disability of the

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left ankle and a 45% permanent partial disability of the right ankle as a result of pre-existing conditions. I further find that the combinations of all of Claimant's injuries and conditions create a greater disability than the simple sum of the disabilities. I find that a multiplicity factor of 15% of the simple sum of the combined disabilities, 26.43 weeks (52.2 weeks + 54.25 weeks + 69.75 weeks = 176.2 weeks x 15% = 26.43 weeks), should be added as an enhanced permanent partial disability.

The parties stipulated that the Claimant's compensation rate is \$354.61. The Treasurer of the state of Missouri, as Custodian of the Second Injury Fund, is hereby ordered to pay to Claimant the sum of \$9,372.34 (26.43 x \$354.61 = \$9,372.34) as and for an enhanced permanent partial disability benefit.

I find this issue in favor of Claimant.

Claimant's attorney requested approval of an attorney fee of 25% of the amount of any award. Claimant's attorney's fee request is hereby approved. Claimant's attorney is allowed an attorney fee of 25% of the amount of this award. Claimant's attorney is hereby granted a lien on the proceeds of this award unless and until the attorney fee shall have been paid in full.

Made by: _____

David L. Zerrer
Administrative Law Judge
Division of Workers' Compensation