

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

Injury No.: 99-075143

Employee: Terri Rice
Employer: Dierbergs Markets, Inc. (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 2, 1999
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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 February 3, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge William L. Newcomb, Jr., issued February 3, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this ____10th__ day of March 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Terri Rice

Injury No. 99-075143

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

Dependents: N/A
Employer: Dierbergs Markets Inc. (Settled)
Additional Party: Second Injury Fund
Insurer: Self-insured
Hearing:

December 3,
2004
Checked by: WLN

FINDINGS OF FACT AND RULINGS OF LAW

Are any benefits awarded herein? No Second Injury Fund benefits.
Was the injury or occupational disease compensable under Chapter 287? Yes for the primary injury.
Was there an accident or incident of occupational disease under the Law? Yes.
Date of accident or onset of occupational disease: July 2, 1999
State location where accident occurred or occupational disease was contracted: St. Louis
Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
Did employer receive proper notice? Yes.
Did accident or occupational disease arise out of and in the course of employment? Yes.
Was claim for compensation filed within time required by Law? Yes.
Was employer insured by above insurer? Yes.
Describe work employee was doing and how accident occurred or occupational disease contracted: Lifting, mixing and stirring food products for decorating cakes.
Did accident or occupational disease cause death? No. Date of death? N/A.
Part(s) of body injured by accident or occupational disease: Head, neck and back.
Nature and extent of any permanent disability: N/A.
Compensation paid to date for temporary disability: unknown_____
Value of necessary medical aid paid to date by employer/insurer? unknown_____
Value necessary medical aid not furnished by employer/insurer? unknown
Employee's average weekly wages: unknown
Weekly PPD compensation rate: \$303.01
Method wages computation: stipulation

COMPENSATION PAYABLE

Amount of compensation payable:
100 weeks of permanent partial disability from Employer: (previously paid)
Second Injury Fund liability: No

Total: (previously paid)

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law. N/A

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: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Terri Rice Injury No. 99-075143
Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Dierbergs Markets Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing: December 3,
2004
Checked by: WLN

PRELIMINARIES

The Claimant, Terri Rice, was represented by Inez Ross and Stacey Hancock Robinson, the Employer/Insurer was not represented since that claim had been previously settled. The Second Injury Fund was represented by Jennifer Sommers. Ms. Ross sought a fee of 25% of claimant's award.

STIPULATIONS

The parties stipulated to the following:

ISSUES:

1. Was the Claimant's Second Injury Fund claim made within the statutory limitation time period provided by Section 287.430.1 RSMo 2000?

EXHIBITS:

All offered exhibits were admitted into evidence.

The Claimant offered the following joint exhibits:

Claimant's Exhibit A-IV Joint Stipulated Facts

The Second Injury Fund offered the following exhibits:

Second Injury Fund Exhibit I	Claim for compensation
Second Injury Fund Exhibit II	SIF only Claim for compensation
Second Injury Fund Exhibit III	Answer to Claim for compensation
Second Injury Fund Exhibit IV	Joint Stipulated Facts

FINDINGS OF FACT

Based upon the parties' stipulated facts, I find:

1. On July 2, 1999, Terri Rice, Claimant, was employed by Dierberg's Markets (Employer). The applicable PPD rate was \$303.01.
2. On July 2, 1999, Claimant sustained an injury involving her right and left shoulders while working for the Employer in St. Louis County, Mo.
3. Claimant filed a claim only against the Employer on December 21, 2000. See Exhibit I.
4. Claimant filed an amended claim only against the Second Injury Fund on October 10, 2002. See Exhibit II.
5. The Employer received proper notice of the accident and the accident arose out of and in the course of employment.
6. The basis for the claim was Claimant's work as a cake decorator and this caused her left and right shoulder injuries.
7. Claimant alleges a prior history of a left shoulder acromial fracture.
8. On October 10, 2002, Claimant settled her claim against the Employer for 24% PPD of the right shoulder and 38% PPD of the left shoulder. The Second Injury Fund claim was left open.
9. If the Second Injury Fund is found liable, the Second Injury Fund and Claimant agree that the total liability of the Second Injury Fund will be 22.388 weeks of PPD equaling \$6,783.79 (38% PPD of the left shoulder with a 10% load plus 24% PPD of the right shoulder with a 15% load, plus 15% PPD of the left shoulder with a 15% load.

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RULINGS OF LAW

Based upon the above findings of fact I find:

Statute of Limitations

Section 287.430.1 RSMo 2000 provides that a claim against the Second Injury Fund must be filed within two years after the date of injury "**or**" within one year after a claim is filed against an employer or insurer, "**whichever is later**" (emphasis added). The intent of the legislature is determined by the plain and ordinary meaning of a law. Here the statute provides two time limits within which to file a second injury fund claim. Both time limits have a conditional clause that modifies them, "**whichever is later**". Thus a claimant has two methods to determine within which to file a claim. A claimant is not limited to either method and can choose "**whichever is later**", that is, longest. Here the Claimant filed her claim against the Second Injury Fund on October 10, 2002. This was not within one year of December 21, 2000, the date of her claim filed against the

employer, nor within two years from the date of the injury of July 2, 1999. For that reason her claim was not timely filed and the Second Injury Fund is not liable.

Date: _____ Made by: _____ William L. Newcomb, Jr.
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

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Patricia "Pat" Secrest
Director
Division of Workers' Compensation