

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

Injury No.: 07-023867

Employee: Annette Smith
Employer: B F & B Enterprises
d/b/a TDL Personnel Service (Settled)
Insurer: Missouri Retailers 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 February 22, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued February 22, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20TH day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Annette Smith Injury No.: 07-023867
Dependents: N/A
Employer: BF&B Enterprises, d/b/a TDL Personnel Service (Settled) Before the
Additional Party: Second Injury Fund Department of Labor and Industrial
Insurer: Missouri Retailers Insurance (Settled) Relations of Missouri
Hearing Date: November 26, 2012 Jefferson City, Missouri

Checked by: SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: March 22, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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:
Claimant sustained injury to her right index finger when it became caught in a punch press machine.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right index finger
14. Nature and extent of any permanent disability: 10% permanent partial disability of the right hand
15. Compensation paid to-date for temporary disability: \$538.24
16. Value necessary medical aid paid to date by employer/insurer? \$3,649.73

Employee: Annette Smith

Injury No.: 07-023867

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for the rate listed in number 19 below.
- 19. Weekly compensation rate: \$163.31
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

(Previously settled with Employer)

22. Second Injury Fund liability: Denied

TOTAL:

None

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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kurt Hoener

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Annette Smith	Injury No.: 07-023867
Dependents:	N/A	Before the
Employer:	BF&B Enterprises, d/b/a TDL Personnel Service (Settled)	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri
Insurer:	Missouri Retailers Insurance (Settled)	Jefferson City, Missouri
Hearing Date:	November 26, 2012	

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on November 26, 2012 for a hearing for a final award to determine the Second Injury Fund's ("SIF") liability for benefits at the request of Annette Smith ("Claimant"). Attorney Kurt Hoener represented Claimant. Assistant Attorney General E. Joy Hudson represented SIF. The court reporter was Kathy Rethemeyer. The record closed after presentation of the evidence. Venue is proper and jurisdiction properly lies with the Division of Workers' Compensation. Proposed awards were submitted by December 11, 2012.

Prior to the start of the hearing, BF&B Enterprises ("Employer") and their Insurer, Missouri Retailers Insurance, settled their claims with Claimant for 10% permanent partial disability ("PPD") of the right hand and did not participate in the proceeding.

Claimant submitted two claims for disposition, injury numbers 07-031458 and 07-023867. Both awards contain similar facts but separate awards were written.

The parties stipulated that on or about March 22, 2007:

1. Claimant was employed by Employer in St. Louis, Missouri.
2. Claimant sustained an accident which arose out of and in the course of employment in St. Louis City.
3. Claimant and Employer operated pursuant to Chapter 287 RSMo.¹
4. Employer's liability was fully insured.
5. Claimant filed the claim within the time allowed by law.
6. Employer received proper notice of the claim.
7. Claimant's average weekly wage was sufficient for a rate of \$163.31 for temporary total disability ("TTD"), permanent partial disability ("PPD"), and permanent total disability ("PTD") benefits.

¹ All references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated. All references to the Employer also include the Insurer, unless otherwise stated.

8. Employer paid TTD benefits totaling \$538.24, which represents 3 2/7 weeks, and medical benefits totaling 3,649.73.
9. Claimant achieved maximum medical improvement ("MMI") on March 12, 2008.

The sole issue for disposition is the nature and extent of SIF liability for PPD or PTD benefits, if any.

EXHIBITS

Claimant's Exhibits A through P and SIF's Exhibit I were offered and received into evidence without objection. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, they were made prior to being made part of this record, and were not placed there by the undersigned administrative law judge.

SUMMARY OF EVIDENCE

All evidence was reviewed but only evidence that supports this award is discussed below.

1. At the time of the hearing, Claimant was 50 years old, and single. She received her GED and completed office skills training at Harris Stowe State University in 2004.
2. Claimant's past employment includes kitchen manager at Calico's, manager at Church's Chicken, and she also worked at McDonald's and during several periods for the U.S. Post Office. Each job required Claimant to stand on her feet all day. Before March 2007, Claimant worked full duty.

Preexisting Disability

1. In the early 1980's Claimant had burns to both arms, and did not receive treatment in the five years leading up to March 2007.
2. Before March 2007 Claimant sustained a lumbar injury in a car accident. Claimant's back flared up occasionally, but was not a constant problem. Occasionally she had difficulty standing or sitting. The biggest problem occurred in December 2006 when she bent to pick up items and had pain for four days. Claimant has not received medical care for her back in the last five years before March 2007.
3. In 1999 Claimant developed swelling and water on her right knee, and in 2000 she received medication from Grace Hill to remove it. Medical records show left knee complaints in May 2002 and two right knee complaints in July 2002, a day apart. First Claimant developed right knee pain at work when she bent to pick up an item. At home that night she needed help to get up from the toilet because of right knee and leg pain. Claimant developed fluid on her knees, which was relieved with medication. Her knee problems improved before March 2007.

4. In 2000, Claimant developed varicose veins. Claimant had leg swelling and pain. Medical treatment included stockings and home exercise. Her legs problems flared up at least once a month. To relieve symptoms, Claimant took a bath, applied heat and ice, and relaxed.
5. Claimant had an anxiety attack in May 2002 due to stress, and was prescribed Xanax for a short period. Claimant had no other problems with depression prior to March 2007.
6. Employer hired Claimant in August 2006. Claimant placed orders, cut and sized belts, handled returns, and packed boxes. Claimant last worked for Employer on March 22, 2007, and has not worked anywhere else.
7. On March 16, 2007 Claimant's right knee buckled and became painful after Employer assigned her to transport cases of belts, up and down ladders.
8. In May 2008, Dr. Kieffer diagnosed patellar dislocation and subluxation, and performed a lateral patellar release and shaved Grade 3 chondromalacia. Claimant settled the case with Employer for 15% of the right knee. Employer transferred Claimant to a punch press machine, but her knee symptoms remained the same.²

Work Accident

9. On March 22, 2007, Claimant was transferred to a punch press. While operating the punch press, Claimant's right index finger became caught in the press, and she sustained a fracture and crush injury.
10. Employer provided treatment at BarnesCare, and referred Claimant to Dr. Macklin who explored and debrided the wound on March 22, 2007, and prescribed medication and physical therapy. Claimant missed work until June 2007. She voluntarily stopped work after the March 22, 2007 accident.³
11. Current complaints from the finger injury include cramps and numbness several times a month, difficulty opening jars and dropping items due to loss of strength. She is right-handed and gets assistance with cleaning from family and friends because it takes a long time for her to clean. She limits the amount she lifts. To relieve symptoms, Claimant soaks the finger in salt water for 30 minutes.
12. Claimant testified she cannot work because she can only move for 15 or 20 minutes then she has to sit down because of problems with her knees.
13. Claimant is active in her church, New Beginners' Full Gospel Ministry. She oversees the women and usher ministries. She sends women to two nursing homes and accompanies them on some occasions. Claimant meets with members of the women's ministry one Monday per month for 30 minutes.

² Claimant also testified her knee pain remained the same between February 2007 and March 2007.

³ Claimant testified she was terminated.

14. Claimant meets with ushers, reminds them to wear the correct colors, and recruits new members. Also, Claimant serves as an usher and greets people at the door, hands them a program, directs parishioners to their seats, and monitors the use of food and drink in the sanctuary. She can sit as needed.
15. Claimant creates “tricklets,” for visitors. For example, November was “frangelism” month. Each week, Claimant make presents for visitors from milk bottles. She writes a Bible verse on each bottle, such as: “Come and buy milk and honey without money,” and “Blessed are the pure in heart.” She puts ribbon around gift and presents it to guests. An Elder buys the material and Claimant makes the gifts at home.

Medical Treatment-Right Index Finger

16. On March 22, 2007, BarnesCare diagnosed an open fracture of the right index finger, and a crush injury, with partial nail and soft tissue loss at the distal phalanx. The finger was injected, and Claimant was referred to a hand specialist.
17. On March 22, 2007, X-rays revealed a fracture at the tuft of the second finger with minimal displacement. **Melvin M. Maclin II., M.D.**, diagnosed a through and through crush injury to the distal phalanx of the right index finger with a distal tuft fracture and nail bed injury. Dr. Maclin repaired the nail bed and soft tissue of the finger, and prescribed physical therapy.
18. On April 17, 2007, Dr. Maclin returned Claimant to work light duty.
19. On May 8, 2007, the wound was healed and a third of the new nail had grown back. Dr. Maclin returned Claimant to limited duty until May 22, 2007 when she was scheduled to return in two weeks. However, that was the last time she saw Dr. Maclin.
20. Dr. Crandall ordered physical therapy in May and June of 2007. (Based on Claimant’s testimony, medical records are not in evidence). Claimant’s grip strength, range of motion, and use of her hand improved.
21. May 31, 2007 Dr. Crandall released Claimant to light duty, and full duty work on June 7, 2007. Claimant was terminated after Dr. Crandall released her.⁴
22. Claimant received additional physical therapy at the Anheuser Bush Institute.

Expert Medical Evidence

23. **Russell Cantrell, M.D.**, a physician board certified in physical medicine and rehabilitation, examined Claimant on November 30, 2009, and wrote a report at the request of Employer. Examination was unremarkable except for a crooked press-on nail on the right index finger. No nail bed deformity was present in the visible portion of the nail bed.

⁴ Dr. Crandall’s medical records are not in evidence.

24. Dr. Cantrell opined the accident was the prevailing factor that caused the fracture to Claimant's right index finger. However, he found no connection between her subjective complaints of numbness to the entire finger, thumb, right hand and wrist.
25. Dr. Cantrell concluded Claimant had reached MMI for the work accident, and rated 5% PPD of the distal phalanx of the right index finger.
26. **Robert Poetz, M.D.**, a physician board certified in family medicine, performed an independent medical examination ("IME") on May 5, 2009, wrote a report, and testified at the request of Claimant's attorney.
27. For the primary injury, Dr. Poetz diagnosed a distal tuft fracture and nail bed injury, and loss of the tip of the finger for the March 22, 2007 work injury. Dr. Poetz opined Claimant's work activities were the prevailing factor that caused her right index injury in March 2007.
28. Dr. Poetz noted a loss of a half a centimeter to Claimant's right index finger, and decreased grip and pinch strength. He opined Claimant received appropriate treatment for her right index finger, and had reached maximum medical improvement MMI. Dr. Poetz rated 25% PPD of the right hand for the injury to Claimant's right index finger.
29. Dr. Poetz diagnosed the following preexisting medical conditions: hypertension, tubal ligation, burns on her arms, and a 1994 motor vehicle accident, where she sustained injuries to her ribs and low back. Also, knee swelling began ten years ago and resolved with a water pill, and right knee sprain and chronic patellar subluxation, with exacerbation of right knee degenerative joint disease from the March 16, 2007 injury, status post surgery, and b) Left knee sprain with exacerbation of left knee degenerative joint disease.
30. Dr. Poetz imposed the following restrictions: avoid prolonged sitting, standing, walking, stooping, bending, squatting, twisting, climbing, pushing, pulling, overhead use of upper extremities, excessive repetitive use of upper extremities, avoid equipment that creates torque, vibration, or impact to the upper extremities, and activity that exacerbates symptoms.
31. Dr. Poetz recommended a multiplicity factor of 15 to 20%.

Vocational Expert Opinion

25. **Mr. James England Jr.**, a rehabilitation counselor, examined Claimant at the request of her attorney on January 18, 2011.
26. Mr. England administered the Wide-Range Achievement Test, Revision 3, where Claimant scored post high school in reading and beginning high school level in math. Mr. England concluded these scores were sufficient for Claimant to develop additional skills.

27. Mr. England noted a difference in medical opinions about Claimant's ability to function. Dr. Kieffer opined Claimant was unable to work due to chronic knee pain.
28. Based on Dr. Cantrell's findings, Mr. England concluded Claimant could return to her former work. But for the level of Claimant's complaints, Mr. England believed Claimant could work at the light level of exertion.
29. Based on Dr. Poetz's restrictions, Mr. England concluded Claimant would have "tremendous difficulty" competing for employment, and would be unable to sustain employment due to her combined medical problems. He explained that Claimant's upper extremity problems limit her to sedentary work. However, he did not believe Claimant could sustain sedentary work because of her need to elevate her legs, inability to get adequate sleep⁵, and numbness in her dominate right hand.
30. Based on Dr. Poetz's restrictions and Claimant's ability to function, Mr. England expected Claimant to remain totally disabled.

ADDITIONAL FINDINGS OF FACT & RULINGS OF LAW

After giving careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, Claimant's demeanor during the hearing, and the applicable law of the State of Missouri, I find Claimant did not meet her burden to show she is permanently totally disabled for the reasons stated below.

Claimant sustained permanent partial disability from the last injury

Claimant asserts she is PTD due to a combination of the primary injury and preexisting disabilities. SIF denies liability for PTD benefits.

In order to establish SIF liability for permanent total disability benefits, the Claimant must prove the following:

- 1) Claimant sustained permanent disability resulting from a compensable work-related injury; and
- 2) Claimant has permanent disability predating the compensable work-related injury which is 'of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployable.' § 287 RSMo., *Messex v. Sachs Electric Company*, 989 S.W.2d (Mo.App. 1997); *Garibary v. Treasurer*, 964 S.W.2d 474 (Mo.App. 1998); *Rose v. Treasurer*, 899 S.W.2d 563 (Mo.App. 1995); and

To obtain permanent total disability benefits,

3) The combined effect of the disability from the work-related injury and the disability from the medical conditions that existed at the time of the last injury combine to create permanent total disability. *Boring v. Treasurer*, 947 S.W.2d 483 (Mo.App. 1997) (Citations omitted).⁶

A claimant has the burden to prove all elements of his claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo.App. 2008). Section 287.808 requires claimants to establish the proposition is more likely to be true than not true.

The first requirement has been met. I find Dr. Poetz opinion is credible that the right index finger was one-half centimeter shorter than the left with decreased grip and pinch strength. I find Claimant sustained a 10% PPD of the right hand referable to the March 22, 2007 work accident.

However, I find Claimant did not meet her burden to show she had permanent knee disability that predated the compensable finger injury and was serious enough to constitute a hindrance or obstacle to employment or to obtaining reemployment if she became unemployed. Dr. Poetz diagnosed preexisting degenerative joint disease in both knees, but did not find it was a hindrance or obstacle to employment or reemployment. Also, Claimant did not testify her preexisting disabilities were a hindrance or obstacle when she performed work activities.

Claimant had bilateral knee pain and swelling between 2000 and 2003. She developed right knee symptoms when she bent to pick up an item at work. That night, Claimant needed help getting up from the toilet because of right knee pain. However, she continued to stand and work full duty before and after March 16, 2007 and leading up to the March 22, 2007.

I find Claimant's testimony credible that her knees improved after taking medication in the early 2000's. However, medical evidence shows Claimant's bilateral knee complaints increased after she injured her right index finger on March 22, 2007.

Claimant sought treatment three times for right knee pain and swelling in April and May of 2007. Claimant testified she injured her shoulder when she fell after her leg buckled prior to right knee surgery.

In 2008 Dr. Kieffer performed a right lateral patellar release after physical therapy and medication treatment failed. Dr. Kieffer recommended the same surgery for the left knee. In 2009 and 2010, Dr. Kieffer diagnosed osteoarthritis, prescribed more physical therapy and a brace, and injected both knees multiple times. Medical records show Claimant fell in 2010 and developed arthrosis.

In 2011, Dr. Mitchell diagnosed a medial collateral ligament strain to the right knee after Claimant increased her workout at the gym. In February 2012, Claimant reported increased right

⁶ Overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 230 (Mo. banc 2003). No further reference will be made in this award to the *Hampton* case.

knee pain, and Dr. Mitchell injected her knee. In April 2012, Claimant reported two left knee incidents where her knee buckled. Dr. Mitchell diagnosed a MCL sprain and recommended a brace.

At the hearing, Claimant testified that walking and steps increase knee pain and swelling. Also, she is unable to return to her former employment or any employment because she can only sit for 30 minutes because of her knees. During the hearing, I observed Claimant stand because of knee pain.

The record contains no evidence that Claimant's increased knee problems after March 22, 2007 were caused by the injury to her right index finger. Therefore SIF is not liable for the progression of Claimant's preexisting bilateral knee disabilities that were not caused by the last injury. See *Frazier v. Treasurer*, 869, S.W.2d 152, 155 (Mo.App. 1993) (Citations omitted).

Having found SIF is not liable, all other issues are moot.

CONCLUSION

The Second Injury Fund is not liable for permanent partial or permanent total disability benefits. The Second Injury Fund claim is denied.

Made by: _____

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation