

FINAL AWARD ALLOWING COMPENSATION
(Modifying the Award of the Administrative Law Judge)

Injury No.: 02-151850

Employee: Karen Soens
Employer: Huddle House, Inc. (Settled)
Insurer: Arrowpoint Capital (Settled)
f/k/a Security Insurance Company of Hartford
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ 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 May 16, 2013, 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.

On or about December 16, 2013, the parties filed with this Commission a Stipulation for Modification of Award (*Stipulation*). By their *Stipulation*, the parties agree that this matter may be resolved if we modify the award to add the following language:

Dependency under *Schoemehl*:

Under Missouri Workers' Compensation Law, when an Employee is entitled to compensation and death ensues, compensation ceases when the Employee dies from a cause other than her work injury, "unless there are surviving dependents at the time of death." Section 287.230(2) RSMo.; *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900, (Mo. 2007). The word 'dependent' is defined to mean a relative by blood or marriage of a deceased Employee, who is actually dependent for support, in whole or in part, upon the Employee's wages at the time of the injury. Section 287.240(4) RSMo. "As such any "dependent" would have to be born and dependent at the time of the injury." *Schoemehl*, 217 S.W.3d at 902.

Recovery under *Schoemehl* is limited to claims that were pending between January 9, 2007 and June 26, 2008. The original claim in this matter was filed in 2003. Ms. Soens' claim was pending during the relevant period.

¹ Statutory references are to the Revised Statutes of Missouri 2002, unless otherwise indicated.

Employee: Karen Soens

Employee has been awarded permanent total disability benefits from the Treasurer of the State of Missouri as Custodian of the Second Injury Fund. Therefore, although Employee in this case is still living, it is proper for this Commission to determine whether Employee had dependents at the time of the work injury to whom entitlement to that compensation may survive. Accordingly, we find that Russell Soens, the husband of Employee Karen Soens, was a total dependent of the Employee at the time of her work accident and injury and that Russell Soens has remained a total dependent of Employee since that time.

We accept the parties' *Stipulation* and we modify the award as set forth above. In all other respects, we affirm the award and decision 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.

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

The award and decision of Administrative Law Judge Carl Strange, issued May 16, 2013, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 9th day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Karen Soens

Injury No. 02-151850

Dependents: N/A

Employer: Huddle House, Inc.

Additional Party: Second Injury Fund

Insurer: Arrowpoint Capital f/k/a Security Insurance Company of Hartford

Hearing Date: March 4, 2013

Checked by: CS/rf

SUMMARY OF FINDINGS

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 22, 2002
5. State location where accident occurred or occupational disease contracted: Butler 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 happened or occupational disease contracted: Employee tried to break up a dispute between customers and was injured.
12. Did accident or occupational disease cause death? N/A

13. Parts of body injured by accident or occupational disease: See Findings.
14. Nature and extent of any permanent disability: See Findings.
15. Compensation paid to date for temporary total disability: \$20,263.85.
16. Value necessary medical aid paid to date by employer-insurer: \$90,759.45.
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$368.37.
19. Weekly compensation rate:
 - \$245.58 for temporary total disability and permanent total disability; and
 - \$245.58 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable:
 - a. Employee's claim against the employer-insurer previously settled by compromise settlement agreement.
 - b. Employee awarded permanent total disability benefits from Second Injury Fund at a rate of \$245.58 per week beginning January 2, 2009 (see Findings).
22. Second Injury Fund liability: Yes (see Findings).
23. Future requirements awarded: N/A

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the employee shall be subject to a lien in the amount of costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Ronald Little.

FINDINGS OF FACT AND RULINGS OF LAW

On March 4, 2013, the employee, Karen Soens, appeared in person and by her attorney, Ronald Little, for a hearing for a final award. The Second Injury Fund was represented by Assistant Attorney General, Jonathan Lintner. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about September 22, 2002, Huddle House, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Arrowpoint Capital f/k/a Security Insurance Company of Hartford.
2. On or about September 22, 2002, the employee was an employee of Huddle House, Inc. and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about September 22, 2002, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$368.37, her rate for temporary total disability and permanent total disability is \$245.58, and her rate for permanent partial disability is \$245.58.
7. The employee's injury is medically causally related to the work injury occurring on or about September 22, 2002.
8. The employer has furnished \$90,759.45 in medical aid to the employee.
9. The employer has paid temporary total disability benefits for 82 4/7 weeks at a rate of \$245.58 per week for a total of \$20,263.85.
10. If permanent total disability is awarded to employee from the Second Injury Fund, the parties stipulate that the employee was lawfully married to Russell Soens on the 22nd day of September 2002 and they have been continuously married since that date.
11. If permanent total disability is awarded to employee from the Second Injury Fund, the parties stipulate that Russell Soens is a total dependent of the employee.
12. The employee's disability from the September 22, 2002 work injury is 90% permanent partial disability of the right upper extremity at the shoulder.
13. The employee reached maximum medical improvement for the primary injury on December 30, 2004.
14. Second Injury Fund liability for permanent total disability, if any, will begin on January 2, 2009 at a rate of 245.58 per week.

ISSUES:

1. Nature and extent of disability.
2. Liability of the Second Injury Fund.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Deposition of Dr. Raymond Cohen;
- B. Deposition of James England;
- C. Medical Records of John J. Pershing VA Medical Center;
- D. Medical Records of Orthopaedic Associates of Southeast Missouri;
- E. Medical Records of Southeast Missouri Hospital;
- F. Medical Records of Ozark Foothills Industrial/Ozark Physical Therapy;
- G. Medical Records of Michael Milne, M.D.;
- H. Medical Records of Poplar Bluff Regional Medical Center;
- I. Medical Records of L. J. Plunkett, M.D.;
- J. Medical Records of Milton Eichmann, M.D.;
- K. Medical Records of Tony Knox, M.D.;
- L. Medical Records of Cape Neurological Associates;
- M. Medical Records of St. Francis Medical Center;
- N. Medical Records of Donald Piland, M.D.;
- O. Medical Records of Neurosciences Center of SEMO Hospital;
- P. Claim for Compensation & Stipulation for Compromise Settlement - Injury #02-151850;
- Q. Attorney Contracts; and
- R. Marriage Certificate.

Second Injury Fund Exhibit:

- I. Deposition of J. Stephen Dolan.

APPLICABLE LAW:

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:
 - “All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an

amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.
- Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or

normal employment”. *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

- Although the workers’ compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of her claim. *Melvie v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968).

Issue 1. Nature and extent of disability; and Issue 2. Liability of the Second Injury Fund.

Karen Soens (“Employee”) has requested an award of permanent total disability benefits against the Second Injury Fund. In support of her position, Employee has offered medical records and the opinions of Dr. Raymond Cohen and Vocational Rehabilitation Expert James England. The Second Injury Fund has offered the opinion of Vocational Rehabilitation Expert J. Stephen Dolan in support of their position that they are not liable for permanent total disability benefits for Employee. If Employee is permanently and totally disabled, the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing disabilities and Employee's last injury occurring on September 22, 2002. The Second Injury Fund is not liable if the last injury alone caused Employee to be permanently and totally disabled.

Employee graduated high school from Mount Vernon. Prior to working for Huddle House, Inc. (“Employer”), Employee was employed as an Army cook, an Army mechanic, an Army maintenance worker, an Army supply worker, an Army truck driver, a truck stop cook, a Butler County Sheriff’s cook, a Steak ‘n Shake waitress/cook/night shift manager, and a truck driver. In September 1995, Employee began working for Employer. While at Employer, Employee was a cook and shift manager. On September 22, 2002, Employee was breaking up a dispute between customers and was injured. Employee underwent a course of treatment that included two surgeries on her right shoulder. Following his examination of Employee, Dr. Raymond Cohen issued his medical report of September 11, 2008, and opined that Employee was permanently and totally disabled and not capable of gainful employment in today’s open labor market due to a combination of disabilities of neurogenic bladder, left knee, and primary work-related injury. Further, Dr. Cohen opined that these disabilities create a greater disability than their simple sum (Employee's Exhibit A). After examining Employee, Mr. James England opined that “considering the combination of her impairments along with her presentation and age I simply do not believe that she is competitively employable”. Further, Mr. England opined that he believes that Employee was likely to remain totally disabled from a vocational standpoint because of her overall problems. At the time of his deposition, Mr. England testified that “from what I gathered in the review of the medical, her problems are due to a combination of preexisting issues, as well as problems that have come about as a result of the primary injury”. Further, Mr. England noted “all I can say is just from what I see based on – the restrictions of the

shoulder alone, I think, would prevent her from doing the kind of work she did before. But I think it would be the combination of that and the psychiatric that would prevent her from doing other types of alternative work in combination, if you threw out the neck and the worsening of knee problems or things like that” (Employee's Exhibit B). Following a records review, Vocational Expert J. Stephen Dolan opined that “it seems apparent that the primary injury is the reason she now cannot work” and that the pre-existing disabilities involving her left knee, catheterization, and psychiatric problems “in no way eroded her access to the labor market”. At the time of his deposition, Mr. Dolan admitted that “I don’t really have – I mean, I don’t have any deeply felt feeling about whether or not she’s unemployable just because of the primary injury”. Mr. Dolan further testified that he doesn’t believe that employee had any pre-existing conditions that were an obstacle or hindrance to employment, but admitted on cross-examination under certain circumstances employee’s pre-existing conditions could be obstacles or hindrances to employment (Second Injury Fund Exhibit I).

At the time of the hearing, Employee also testified about her problems concerning her primary and pre-existing injuries. After reviewing all of the evidence, I find the testimony of Employee is credible and that the Second Injury Fund has failed to offer sufficient credible evidence to discredit the testimony of Employee. With regard to the Second Injury Fund’s expert opinion, I find that the opinions of Mr. Dolan are not credible. Based on my above findings and the evidence, I find that the Second Injury Fund has failed to offer sufficient credible evidence to discredit the opinions of Dr. Cohen and Mr. James England. Further, I find the opinions of Dr. Cohen and Mr. England to be more credible than Mr. Dolan’s opinions regarding the cause of Employee’s permanent and total disability.

On December 15, 2011, Employee settled her primary claim against Employer in this matter (Employee's Exhibit P). Based on the evidence and stipulations, I find Employee’s disability from the September 22, 2002 work injury is 90% permanent partial disability of the right upper extremity at the shoulder. With regard to Employee’s pre-existing conditions, I find that Employee’s permanent partial disability equals the percentages as identified by Dr. Cohen’s report and that Employee met her burden of proving that her pre-existing conditions amounted to actual and measurable disability at the time of the work injury and were of such seriousness as to constitute a hindrance or obstacle to employment. In accordance with Dr. Cohen’s opinion, I find that the combination of Employee’s impairments create a greater disability than the simple total of each separate injury.

Based on the evidence, I find that no employer would reasonably be expected to hire Employee in her present condition and that Employee is permanently and totally disabled as a result of a combination of her primary injury of September 22, 2002 and pre-existing injuries. Further, I find that Employee reached maximum medical improvement on December 30, 2004. Based on my above findings and the evidence, I find that the Second Injury Fund’s liability for permanent and total disability benefits at a rate of \$245.58 began on January 2, 2009. The Second Injury Fund is therefore directed to pay to Employee the sum of \$245.58 per week commencing on January 2, 2009, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is

restored to her regular work or its equivalent as provided in Section 287.200.2. Since part of the Second Injury Fund's liability has accrued prior to the date of the award, the Second Injury Fund shall make a lump sum payment for the appropriate amount that is past due.

ATTORNEY'S FEE:

Ronald Little, attorney at law, is allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation