



# AWARD

Employee: Sally D. Swartz

Injury No : 07-078450

Dependents: N/A

Employer: Nevada Habilitation Center (settled)

Additional Party: Second Injury Fund

Insurer: N/A

Hearing Date: September 15, 2011

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

Checked by:

## FINDINGS OF FACT AND CONCLUSIONS 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: JUNE 23, 2007
5. State location where accident occurred or occupational disease was contracted: VERNON COUNTY, MO
6. Was the above employee in employ of above employer at the 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 insured? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted. N/A
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: STRUCK BY CLIENT
14. Nature and extent of any permanent partial disability: N/A
15. Compensation paid to date for temporary disability : N/A
16. Value of necessary medical aid paid to date by employer/insurer? N/A
17. Value of necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: N/A

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20. Method of wage computation: N/A

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

22. Second Injury Fund liability: Permanent total disability from June 23, 2012, in the amount of \$238.31 per week.

TOTAL: UNDETERMINED

23. Future requirements awarded: NONE

Said payments to begin JUNE 23, 2012 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:

Darrin Morrison  
MORRISON, WEBSTER & CARLTON

Employee: Sally D. Swartz

Injury No. 07-078450

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

Employee: Sally D. Swartz

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## **AWARD**

### **Introduction**

On September 15, 2011, the undersigned Administrative Law Judge conducted a final hearing between Employee Sally D. Swartz and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund. Darren Morrison represented Employee. Assistant Attorney General Richard Wiles represented the Second Injury Fund. Employee and Employer, Nevada Habilitation Center, previously settled their dispute regarding the last work injury, Injury No. 07-078450 for 100% permanent partial disability of the right eye at the 140-week level. A copy of the Stipulation for Compromise Settlement was admitted into evidence as Employee's Exhibit C.

### **Issues**

1. Whether employee sustained an accident as a result of the primary claim which arose out of and in the course and scope of her employment.
2. Whether the Second Injury Fund is liable for permanent total disability as a result of the combination of claimant's preexisting disabilities and the disability from her last injury.

### **Stipulations**

The parties agreed that the average weekly wage was sufficient to create a permanent total disability rate of \$238.31. The parties agreed to venue in Joplin, Jasper County, Missouri.

### **Exhibits**

Employee offered the following exhibits, which were admitted:

Exhibit A                      Deposition of Dr. Brent Koprivica with exhibits

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- Exhibit B                    Deposition of Michael Lala with exhibits
- Exhibit C                    Stipulation for Compromise Settlement in Injury No. 07-078450
- Exhibit D                    Medical records are contained in a binder, including the records of Cedar County Memorial Hospital, Dr. Ricky D. Casey, Dr. Sami Khoshyomn, Dr. F. Allen Moorhead, Jr., Dr. Todd Harbach, Dr. Xiaoqi Kathryn Sun, St. John's Health Center, and Dr. Mike Frier.

The Second Injury Fund offered the deposition of Terry Cordray with exhibits, which was admitted.

### **Findings of Fact**

The Claimant testified at the hearing. I found her testimony to be quite credible.

The Claimant was born on September 15, 1958. She is 53 years old as of the date of the hearing.

The Claimant spent her childhood in Kansas, leaving school after the seventh grade to get married. After raising three daughters, Claimant obtained her GED in 1984. She completed a Bachelor's of Science in Human Resource Management at Bartlesville Wesleyan in 1999 and obtained her Master's degree in human resource development at Pittsburg State in 2005. She has never worked using her Master's degree, nor has she done any related work in human resources. She attempted to train as a registered nurse in 2006 but was unable to complete the program due to back pain from lifting.

Although Claimant is computer literate, she is a very slow typist and has difficulty using a computer both due to her depth perception problems from to her last work injury, as well as eye strain.

Claimant's work history begins in 1979, when she worked at the Dana Corporation as a material handler. She performed that job for 21 years, leaving Dana as a result of downsizing in 2000. She then went to work at Dunbrooke Sportswear as a sewing machine operator, where she worked for approximately a year. In December of 2002 the Claimant took a job as a secretary at Wilson Door, where she stayed until 2005. She then worked for about four months in 2006 as a nurse's aide at St. John's Hospital. In the middle of 2006 she went to work for Kelly Temporary Services at Prestige Cabinets, where she did various jobs including shipping, sanding, and other manufacturing tasks.

In February of 2007, the Claimant began work at the Nevada Habilitation Center as a client attendee trainer. This job involved taking care of mentally handicapped or challenged individuals who were unable to perform certain activities, such as feeding, bathing, and grooming. After her injury in 2007, she worked from March of 2009 until October of 2009 at

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Ozark Community Hospital in Gravette, Arkansas. Her job there was in housekeeping. She left that job due to difficulties with her back. She has not worked since.

The Claimant's history of pre-existing disability in her low back begins in about 1996. At that time, she was told by her physician that she had degenerative disk disease and that the low back pain she was experiencing was caused by that disease. She treated for a few weeks with traction and physical therapy, but continued to have ongoing back pain throughout the years. Back pain has affected her in the various employments she had, including her employment at the Dana Corporation, when in the 1990s she would occasionally drop packages due to low back pain. The sewing job she held at Dunbrooke was difficult for her due to the sitting requirement, and she never made quota because of the frequent breaks she would take to ease her back pain. Her secretarial job at Wilson Door was made more difficult due to her long sitting, but she was able to get up and move around as she needed. Her various tasks at Prestige Cabinets were hindered by her low back pain because of the lifting that was required, which significantly slowed her down in comparison to other employees. The job at Nevada Habilitation Center was also difficult for her because of lifting requirements, and she was written up for sleeping at Nevada because low back pain would prevent her from sleeping well at night. She was also written up for not being able to lift a patient and letting her slide down to the floor. Her last job at Ozark Medical Center, where she worked in housekeeping, was difficult for her due to her low back pain as well. She testified that she couldn't sweep and mop certain areas that were supposed to be cleaned every night, instead limiting her sweeping and mopping to once a week. She would also try to split the trash up into smaller and lighter bundles to lighten the weight. She testified that had her employer known of her difficulties of doing the job, she would have been fired.

Her last work injury at Nevada Habilitation Center occurred on June 23, 2007. She was "head butted" by a client at the Habilitation Center, ultimately resulting in the loss of vision in her right eye. She testified that she can differentiate light from dark in her right eye, and can see some movement. Her right eye was treated surgically and care was provided under the Workers' Compensation Act. She ultimately settled her right eye injury case for 100% disability of the right eye at the 140 week level.

The blindness in her right eye makes driving difficult for her, and she has occasionally struck stationary objects. She believes this is due to problems with her depth perception. She also experiences eye strain when reading or attempting to do anything on a computer. Computer work is difficult because her keyboarding skills, which were not good to begin with, have been made much worse by her lack of depth perception. She also has difficulty dialing a cell phone, and, in fact, has difficulty with the manipulation of small objects in general, such as threading a needle or handling change. Claimant's last day of work is October 16, 2009.

Dr. Koprivica examined the Claimant at the request of her attorney on March 6, 2008. At that time, he opined that she has a 100% disability in the right eye at the 140 week level, as well as a 25% permanent partial disability to the body as a whole from the low back problems that pre-existed her work injury, with noted extrusion at L5-S1 and diagnosed degenerative disk disease. Dr. Koprivica felt that she should not sit longer than two hours and she should only

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occasionally lift or carry, and should not lift or carry more than 20 pounds. Dr. Koprivica also noted in his deposition that she would not be able to do jobs where good hand-eye coordination is required, and should avoid heavy equipment operation.

The Claimant also saw Michael Lala, a vocational rehabilitation counselor, at the request of her attorney. Mr. Lala felt that the Claimant's blindness in her right eye would impact her in environments that were dangerous or hazardous, and also felt that doing visually intensive activities such as looking at small type, or using a computer screen, or inspecting things on the job would be difficult. After interviewing the Claimant and reviewing her education and job history, Mr. Lala felt that the Claimant is permanently and totally disabled due to the combination of her pre-existing disability with the disability resulting from her last work injury.

The Second Injury Fund offered the deposition testimony of Terry Cordray, a vocational rehabilitation counselor located in Lenexa, Kansas. Mr. Cordray never interviewed or met the Claimant. He opined that she would be eligible to work as a general office clerk, a file clerk, a retail sales clerk, or a bank teller. On cross examination, however, he testified that if she tells a potential employer about her lifting restrictions, sitting restrictions, and difficulties with eye strain, she will not be able to compete in the open labor market. In fact, he indicates she would be "sabotaging her application if she approached an employer and told them everything that was wrong with her." Cordray deposition, page 29 lines 12-22. Mr. Cordray also indicated that "you don't have to be honest" when applying for a job. Cordray deposition, page 29 lines 23-25.

### **Conclusions of Law**

The claimant's testimony was the only evidence presented on the issue of accident. I find claimant's testimony to be credible and no evidence was presented to the contrary. I therefore find that claimant sustained an accident on June 23, 2007, which arose out of and in the course and scope of her employment.

Permanent total disability is defined as the inability to return to employment in the open labor market. §287.020.6 RSMo. The central question is whether any employer in the usual course of business could reasonably be expected to employ the Employee in her present physical condition. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W. 2d 173, 178 (Mo. App. E.D. 1995), *overruled on other grounds in* Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003).

Dr. Koprivica, the only medical expert to testify, placed significant restrictions on claimant. He stated that she should not sit longer than two hours and only occasionally lift or carry and should never lift or carry more than 20 pounds. He further indicated that she would not be able to do jobs where good hand-eye coordination is required and should avoid heavy equipment operation.

Claimant was examined by vocational rehabilitation counselor, Michael Lala, who testified that the blindness in her right eye would limit her in environments that were hazardous and that visually intensive work requirements like looking at small type or a computer a screen

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would be difficult for her. He concluded that based upon her education, job history and combined disabilities she is permanently and totally disabled.

I find the opinions of Dr. Koprivica and Michael Lala to be credible and persuasive and I rely on these expert's opinions in finding that an employer in the ordinary course of business could not reasonably be expected to hire claimant in her present physical condition and that claimant is unable to compete in the open labor market. I find and conclude that claimant is permanently and totally disabled.

### **Extent of Second Injury Fund Liability**

To establish Second Injury Fund liability for permanent total disability benefits, the Employee must prove not only that she has a compensable permanent disability resulting from the last work injury, but also that she has a permanent disability predating the compensable work-related injury of such seriousness as to constitute a hindrance or obstacle to employment or reemployment. §287.220.1 RSMo. Employee must then show that the combined effect of the last work-related disability and the disability that is attributable to all conditions existing at the time of the last injury is permanent and total. *Boring v. Treasurer*, 947 S.W.2d 483, 489 (Mo. App. E.D. 1997), *overruled on other grounds in Hampton v. Big Boy Steele Erection*, 121 S.W.3d 220 (Mo. banc 2003).

I find and conclude that as a consequence of the primary injury on June 23, 2007, in combination with her pre-existing disabilities, Employee is permanently and totally disabled. The Second Injury Fund is liable for permanent total disability benefits in the amount of \$238.31 per week for Employee's lifetime. The Second Injury Fund shall begin payment of permanent total disability benefits as of June 23, 2012, which is 140 weeks from October 17, 2009, the day following the end of her last job. No differential is owed, as the permanent partial disability and permanent total disability rates are the same, and I find that the 140 weeks is an accurate reflection of her permanent partial disability sustained as a result of the injury of June 23, 2007. Payments shall be made from June 23, 2012 forward for the balance of Claimant's lifetime.

This award is subject to modification as provided by law.

Attorney Darren J. Morrison shall have a lien in the amount of 25% of all amounts awarded herein, which shall constitute a lien upon this award.

Dated: January 23, 2012

Made by: /s/ Karen Wells Fisher  
Karen Wells Fisher  
Administrative Law Judge  
Division of Workers' Compensation