

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

Injury No.: 02-127557

Employee: Audrey Taylor  
Employer: Bi-State Development Agency  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: November 7, 2002  
Place and County of Accident: City of St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (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 (ALJ) 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 September 2, 2004. The award and decision of Administrative Law Judge Edwin J. Kohner, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the lay and medical testimony in reaching his conclusions as to disability and causation. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522 (Mo. App. E.D. 2002), *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001), *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240 (Mo. banc 2003).

The Commission further approves and affirms 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.

Given at Jefferson City, State of Missouri, this 21<sup>st</sup> day of April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

Attest: \_\_\_\_\_  
John J. Hickey, Member

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Audrey Taylor

Injury No.: 02-127557

Dependents: N/A  
Employer: Bi-state Development Agency  
Additional Party: Second Injury Fund (Open)  
Insurer: Self-Insured  
Hearing Date: August 5, 2004

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

Checked by: EJK

### 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: November 7, 2002
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, 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? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The employee, a commercial bus operator, developed bilateral carpal tunnel syndrome.
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: Both wrists
14. Nature and extent of any permanent disability: 20 % permanent partial disability to each wrist, plus an additional 20% for multiplicity and two weeks for disfigurement
15. Compensation paid to-date for temporary disability: \$7,434.09
16. Value necessary medical aid paid to date by employer/insurer? \$11,091.77

Employee: Audrey Taylor Injury No.: 02-127557

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$736.39
19. Weekly compensation rate: \$490.93/\$340.12
20. Method wages computation: By agreement

### COMPENSATION PAYABLE

21. Amount of compensation payable:

84 weeks of permanent partial disability from Employer

\$28,570.08

2 weeks of disfigurement from Employer \$ 680.24

22. Second Injury Fund liability: Open

TOTAL: \$29,250.32

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: John Malec, Esq.

### FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Audrey Taylor	Injury No.:	02-127557
Dependents:	N/A		
Employer:	Bi-state Development Agency		
Additional Party:	Second Injury Fund (Open)		
Insurer:	Self-Insured		
Hearing Date:	August 5, 2004	Checked by:	EJK

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a commercial bus operator, developed bilateral carpal tunnel syndrome. The sole issue for determination is permanent disability. The Second Injury Fund claim remains open pursuant to an agreement among the attorneys. The evidence compels an award for the claimant.

At the hearing, the claimant testified in person and offered a deposition of Shawn L. Berkin, D.O., and medical records from the Orthopedic Center of St. Louis, Hand and Physical Therapy of Ferguson Florissant, Barnes Jewish West County Hospital, and Cynthia D. Byler, D.O. The defense offered a deposition of David M. Brown, M.D., and medical records from Hand and Physical Therapy of Ferguson Florissant.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the occupational disease was contracted in Missouri.

#### **SUMMARY OF FACTS**

This fifty-four old claimant, a commercial bus operator for eighteen years, performs a variety of arm movements at work, including issuing transfers, pagers, changing the sign, using the radio and turning the wheel. She also opens and closes the door at every stop and uses a lever, which she pushes with her left wrist. Taking a transfer involves taking a piece of paper and tearing it a hundred times a day. She issues passes, which are normally swiped at the fare box. She grasps and turns the steering wheel for all the time she was driving the bus.

She testified that her usual shift required her to work the morning rush hour with a heavy customer load. She sometimes cancels hundreds of transfers per day. She normally works eight-hour shifts, five days per week, and overtime whenever offered. The buses have power steering.

The claimant developed bilateral carpal tunnel syndrome with numbness and tingling in her fingers, and swelling in her hands. The claimant noticed pain, numbness, and tingling in both her hands after driving the bus and mentioned it to her family physician, who ordered a nerve conduction test. The nerve conduction test revealed that she had Carpal Tunnel Syndrome and needed surgery. On November 7, 2002, she was unable to hold on to the steering wheel sufficiently to maintain control of the bus. Her employer sent her to Dr. Byler who took her off work and referred the claimant to a hand surgeon, Dr. Brown who performed a right Carpal Tunnel Release on February 11, 2003, and a left carpal tunnel release on February 25, 2003. See Exhibits B, E.

After surgery, she went to Hand Therapy Network through March 2003. On April 4, 2003, she reported soreness in both palms, cramping in the thumbs and numbness of the distal tip of the right thumb. See Exhibit B. Dr. Brown recommended that she continue with her own physical therapy program and one more week of supervised physical therapy. See Exhibit B. Dr. Brown released her to return to work without restrictions as of April 14, 2003, and she returned to her regular assignment as a bus driver without restrictions. See Exhibit B. On April 15, 2003, the physical therapy records noted that she had no complaints of bilateral pain but had hand cramping in her right hand. Physical therapy was discontinued, and the claimant received instructions to continue home exercises. See Exhibit 2. On June 6, 2003, Dr. Brown reported that her symptoms were much improved than what they were prior to surgery. See Exhibit B. She had good active range of motion of both wrists at all digits of both hands. See Exhibit B. She had good sensation to all digits of both hands. See Exhibit B. His impression was that she had done well enough and no further treatment was necessary. She was at full duty without restriction. See Exhibit B. Dr. Brown examined the claimant again on June 28, 2004, and reviewed an additional nerve conduction study from June 22, 2004, which revealed findings consistent with residual carpal tunnel syndrome but no ongoing compression neuropathy. See Exhibit G. His examination was negative for ongoing peripheral compression neuropathy. She was at full duty with no restrictions. See Exhibit G. The claimant testified that shortly after she started working her symptoms increased and caused considerable difficulty.

The claimant testified her hands are still sore after returning to work, although she performs her same job duties as before the surgery. The claimant testified she still experiences numbness and swelling after returning to work. The claimant testified that while driving the bus she frequently has to remove one of her hands and shake it to get the tingling and numbness to go away. She testified that her hands frequently become fatigued with very little work. She testified that she had difficulty holding the steering wheel at times and fears that she may not be able to continue in her profession. While driving the bus, she frequently has to alternate hands on the wheel and shake the free hand to restore feeling and use. The claimant testified that her hands swell after driving. The claimant wore the wrist braces from her physical therapy at work until they became so worn that she could not grasp the steering wheel while wearing them. She still wears them at night.

The claimant testified that she has difficulty sleeping at night and in order to alleviate some of the pain in her wrists, she sleeps with both hands above her head on pillows. The claimant still uses splints nightly, provided by Dr. Brown. She testified that she, in her private life, tries to avoid driving completely and relies upon her husband and friends to drive her places because of the premature fatigue, numbness, tingling, and pain caused by gripping a steering wheel. The claimant stated she had difficulty picking up a half a gallon jug of milk from the weakness in her wrists and hands. She reports that she frequently drops things making such everyday tasks such as cooking impossible without the help of her husband. She also has had to curtail her leisure activities such as shopping and going to the casinos because of her wrist fatigue and pain. The claimant testified she has trouble picking up her grandchildren and that she takes Ibuprofen and Advil. The claimant testified that she has been a diabetic since 1987. The claimant testified that she has reduced her cooking and laundry around the house since she developed this condition. The claimant testified that when she attempts to pinch things or grab things with her thumb and fore finger, the muscles in her hands begin to tremble.

The claimant's spouse testified that on the day before the hearing, when the couple went out to dinner for their anniversary, he had to cut the claimant's steak and salad for her to eat. He testified that she cannot do cleaning and cooking like she did before this condition.

Dr. Peebles

Because of the post surgery symptomology, the claimant went to Dr. Peebles, a neurologist, for diagnostic studies.

Dr. Peebles evaluated both the pre-surgery nerve conduction studies and the post-surgery studies from June 2004. On June 22, 2004, he reported that the pre-operative study documents "severe carpal tunnel syndrome with absent median sensory responses bilaterally". The current studies revealed, even after the surgery, prolonged bilateral distal motor latencies in the median nerve. Both the right and left median distal sensory latencies were also prolonged and the median sensory response voltages were reduced. Chronic denervation in both the right and the left limb was noted. When Dr. Peebles did a physical exam, he noted atrophy of both thenar eminences of her wrist. Although Tinel and Phalen signs were negative on the date of the exam, Dr. Peebles found decreased sensation in the median distribution of both hands. Dr. Peebles concluded that her current problems were the result of residual problems "likely indicative of the severe degree of median nerve compression prior to surgery".

#### Dr. Berkin

Dr. Berkin examined the claimant in September 2003, and the claimant reported pain on her right and on full flexion and extension and a positive Tinel on the left wrist. Dr. Berkin reported that the claimant's pinch strength was significantly absent on both hands. Dr. Berkin's examination findings showed a negative Phalen's test and normal range of motion of the right wrist. See Dr. Berkin deposition, pages 25, 26. Dr. Berkin diagnosed carpal tunnel syndrome in both hands, status post surgery for bilateral carpal tunnel releases and opined that the claimant has a forty percent permanent partial disability of each wrist and that the combination of her disability is significantly greater than her individual disabilities, such that a loading factor should be applied. See Dr. Berkin deposition, page 15. Dr. Berkin recommended non-steroidal anti-inflammatory medication to control the pain in her wrists, in addition to undertaking a home exercise program to strengthen and improve the mobility and flexibility of her hands and wrists. Dr. Berkin opined that the claimant should avoid any forceful gripping with her hands and activities that would involve alternating flexion and extension movements. If she continues to remain symptomatic at the level of activity of her bus driving, she should consider alternative, less hand-intensive employment.

#### Dr. Brown

Dr. Brown opined that the claimant has a "severe carpal tunnel syndrome" and that "it is not uncommon for patients with severe carpal tunnel syndrome even after a successful carpal tunnel release to have residual symptoms." Dr. Brown opined that the claimant's work at Bi-State was a substantial factor in the development of carpal tunnel syndrome. See Exhibit F. On June 6, 2003, Dr. Brown examined the claimant and found her condition normal and unremarkable other than the scars. See Dr. Brown deposition, pages 13, 14, 16. Dr. Brown opined she had done well. See Dr. Brown deposition, pages 16, 22. Her symptoms, subjective complaints, were much improved and she regained good connection of the hand. He opined that she did not require further treatment and that she was at maximum medical improvement. See Dr. Brown deposition, page 14. She could work without restrictions. See Dr. Brown deposition, page 22. Dr. Brown opined that considering "the severity of the carpal tunnel," she had "excellent result". Dr. Brown opined she had five percent permanent partial disability of each wrist. See Dr. Brown deposition, page 16. She had no ongoing compression neuropathy. The nerve conduction studies showed good decompression of both nerves and the nerve conduction studies did not reveal any evidence of ongoing compression neuropathy. See Dr. Brown deposition, page 20. Dr. Brown opined, the fact that she had a number of risk factors for carpal tunnel syndrome including diabetes, age and gender contributed to this carpal tunnel syndrome. See Dr. Brown deposition, pages 23, 24.

### **PERMANENT DISABILITY**

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." *Rana v. Landstar TLC*, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." *Id.* A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. *Id.* "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." *Id.* "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." *Id.* In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. *Id.*

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

A multiplicity factor is "a special or additional allowance for cumulative disabilities resulting from a multiplicity of injuries." Sharp v. New Mac Electric Cooperative, 92 S.W.3d 351, 354 (Mo. App. S.D. 2003). The commission has the discretion to include a multiplicity factor in assessing cumulative disabilities but is not required to do so. Id.

Dr. Berkin examined the claimant in September 2003 and the claimant reported pain on her right and on full flexion and extension and a positive Tinel on the left wrist. Dr. Berkin reported that the claimant's pinch strength was significantly absent on both hands. Dr. Berkin's examination findings showed a negative Phalen's test and normal range of motion of the right wrist. See Dr. Berkin deposition, pages 25, 26. Dr. Berkin diagnosed carpal tunnel syndrome in both hands, status post surgery for bilateral carpal tunnel releases and opined that the claimant has a forty percent permanent partial disability of each wrist and that the combination of her disability is significantly greater than her individual disabilities, such that a loading factor should be applied. See Dr. Berkin deposition, page 15. Dr. Berkin opined that the claimant should avoid any forceful gripping with her hands and activities that would involve alternating flexion and extension movements. If she continues to remain symptomatic at the level of activity of her bus driving, she should consider alternative, less hand-intensive employment.

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Although the claimant had a good result from her surgery, her bilateral carpal tunnel appears to be severe. The claimant reported severely impaired functioning at work and in the ordinary affairs of life. Although the claimant works full time without restrictions in the same position she held before the occurrence, her un rebutted testimony suggests severe limitations. The reports from Dr. Brown and the physical therapists suggest much less impairment than the claimant's testimony and Dr. Berkin's findings. Assuming the credibility of all of the witnesses, the testimony can be reconciled by the fact that the observations were made at different times. The treating medical providers examined the claimant relatively soon after the surgery and before the claimant had a long exposure to her pre-surgical work duties. Given the severity of the claimant's condition before the surgery and her recovery period away from work after the surgery, one could logically infer that the claimant's work caused substantial and progressive deterioration after Dr. Brown's last examination. Dr. Berkin's findings appear to find more disability and reduced functioning. The claimant's testimony suggests even less favorable results.

Based on the entire record of evidence, the claimant suffered a twenty percent permanent partial disability of each wrist from her carpal tunnel syndrome and is awarded an additional twenty percent for multiplicity. In addition, she is awarded two weeks for disfigurement.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Reneé T. Slusher  
*Director*  
*Division of Workers' Compensation*