

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

Injury No.: 08-122532

Employee: Linda Taylor
Employer: Elite Laundry Dry Cleaners (Settled)
Insurer: Hartford Underwriters 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 April 18, 2012. The award and decision of Administrative Law Judge Margaret D. Landolt, issued April 18, 2012, is attached and incorporated by this reference.

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 26th day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Linda Taylor

Injury No.: 08-122532

Dependents: N/A

Employer: Elite Laundry Dry Cleaners (Settled)

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

Additional Party: Second Injury Fund

Insurer: Hartford Underwriters Insurance (Settled)

Hearing Date: January 24, 2012

Checked by: MDL

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: August 18, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis 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 occurred or occupational disease contracted:
Employee fell through a doorway
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left ankle and right elbow
14. Nature and extent of any permanent disability: 20% PPD of the left ankle and 15% PPD of the right elbow previously settled with Employer
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Linda Taylor

Injury No.: 08-122532

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Unknown
- 19. Weekly compensation rate: \$483.36/\$404.66
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: SETTLED

22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly differential (\$78.70) payable by SIF for 62.5 weeks beginning May 3, 2011
and, \$404.66 per week thereafter, for Claimant's lifetime

TOTAL: INDETERMINATE

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: Mr. David Plufka

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Linda Taylor

Injury No.: 08-122532

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Elite Laundry Dry Cleaners (Settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Hartford Underwriters Insurance (Settled)

Checked by: MDL

PRELIMINARIES

A hearing was held on January 24, 2012 at the Division of Workers' Compensation in the city of St. Louis, Missouri. Linda Taylor ("Claimant") was represented by Mr. David Plufka. Elite Laundry Dry Cleaners ("Employer") and its insurer Hartford Underwriters Insurance previously settled their liability with Claimant, and this matter proceeded to a hearing against the Second Injury Fund ("SIF") which was represented by Assistant Attorney General Kristin Frazier. Mr. Plufka requested a fee of 25% of Claimant's award.

The parties stipulated that on or about August 18, 2008, Claimant sustained an accidental injury arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the city of St. Louis, Missouri; Employer received proper notice of the injury; the claim was timely filed; the applicable Permanent Total Disability ("PTD") rate is \$483.36; the applicable Permanent Partial Disability ("PPD") rate is \$404.66; and in the event Claimant is found to be permanently and totally disabled, PTD benefits shall commence on May 3, 2011.

The only issue for resolution by hearing is whether the SIF is liable for benefits.

SUMMARY OF EVIDENCE

Claimant is a 52 year old, currently unemployed individual, who last worked for Employer on January 28, 2010. Claimant began working for Employer in early 2000 as a floor manager. Her job duties included forwarding payroll information, trouble shooting equipment, interacting with employees, and running the day to day operation of the plant.

In 1986, Claimant injured her low back at work when she lifted a 50 pound sack of flour. She was diagnosed with spondylolisthesis at L5, scoliosis of the spine, and a possible herniated disc. A CT Scan showed evidence of a large disc herniation at L4-5. Claimant was treated conservatively for this injury, and although surgery was offered, she declined.

Leading up to 2008, Claimant continued to receive treatment for her low back by a number of doctors including Dr. Heidi Prather. Claimant underwent injections and physical therapy, and took medication. Claimant identified two off work slips from the Washington University Department of Orthopedic Surgery from August and December of 2006 in which Dr. Prather restricted Ms. Taylor to lifting no more than 25 pounds, no twisting and bending, no overhead lifting, limit sitting and standing to 30 minutes, and to avoid overhead work and outstretch motion. Leading up to and beyond 2008, Claimant's pain ranged from a 3 to a 7 on a one to 10 scale of severity. Claimant experienced burning pain, and numbness and tingling down her left leg. She was unable to stand, sit or walk for long periods. She had reduced range of motion and difficulty bending and squatting. She slept on a special bed.

Claimant settled her workers compensation claim for over 30% PPD of the body as a whole.

In 1997, Claimant injured her left shoulder at work while lifting boxes of file folders. She was referred to an orthopedic specialist who diagnosed a labral tear, and performed surgery. Following surgery she went through rehabilitation with slow progress which led to a second surgery in January 1998 where she had an acromioplasty and open repair of a torn left rotator cuff. After her injury, Claimant had reduced range of motion, and could not work overhead. She left her job because of ongoing complaints, and an inability to lift as the job required.

Claimant settled the claim with her employer for 35% PPD of her left shoulder. In addition, she settled her claim with SIF for 27.5% PPD of the body as a whole for her low back.

In June 2006, Claimant was diagnosed with interstitial cystitis, and in June 2008, she was diagnosed with irritable bowel syndrome. Although she received treatment for these conditions, the irritable bowel syndrome and cystitis condition caused her to urgently need to go to the bathroom which required her to remain close to the bathroom at all times.

Prior to 2008, Claimant also suffered numbness and tingling in her hands. Claimant has received no treatment for this injury, but complained of dropping items and suffering numbness and tingling in her hands which woke her up at night.

In the years leading up to 2008, Claimant's ability to continue doing her job supervising the operations for Employer diminished. She was less able, as years went on, to make the rounds on the floor, because she was limited by back pain and her inability to be on her feet for the time it took to walk around the plant. In addition, the machines at the plant frequently broke down, and Claimant was unable to perform repairs because she was unable to get into the positions required underneath or over the top of the machines, and she could not reach, lift, pull and handle sufficient weights to make a number of these repairs. When that happened, Claimant stopped production, and asked her husband to come to the plant to make the repairs.

Claimant's medications for back and arm pain affected her comfort levels on the job, and her ability to concentrate. The condition of her back, neck and left arm continued to deteriorate and gradually got worse from 1999 to just before the work injury in August, 2008. This affected the pace at which she was able to perform her job duties, causing her to rely increasingly on co-workers to accomplish her duties.

On August 18, 2008, Claimant injured her left leg and right arm when she fell through a doorway. Initially, she was treated conservatively for her ankle, and attempted to work within restrictions while she underwent physical therapy, and took medicine. During most of 2009, Claimant relied more and more on an assistant to carry out her job duties. She spent most of her days in the office with her leg propped up and elevated, and sometimes she used ice to reduce swelling. When the pain in her back and ankle was too severe, Claimant worked from home.

Because of persistent complaints of pain and instability, Dr. Aubuchon recommended in late January 2010 that Claimant undergo an open tarsal release, and an arthroscopic synovectomy. On the eve of her ankle surgery in late January, 2010, Claimant was informed by Employer that the business was going to close over the next several months. Instead, the business closed within the next couple of weeks, and because she was just recovering from surgery, Claimant, though asked, was unable to help with the physical closing of the plant because of physical limitations caused by her ankle surgery.

Dr. Aubuchon continued treating Claimant until May 3, 2011, when he released her with permanent restrictions of no climbing, no ladders, and avoid uneven surfaces. When Claimant was released by Dr. Aubuchon in May 2011, Employer had been closed for more than a year. After she was released from treatment, she experienced pain every day in her left ankle, felt an increase in pain with any activity, took daily medication for pain, and experienced reduced range of motion in her left leg.

In addition to her left leg, Claimant injured her right elbow in the accident. She received treatment from Dr. Randolph who diagnosed her with a nondisplaced radial head fracture. The elbow healed with conservative treatment and did not require surgery. Nevertheless, Claimant experiences pain and weakness in her right arm which she attributes to the elbow injury. She is unable to fully extend her arm, and feels pain in her elbow with activity.

Claimant settled her workers' compensation claim with Employer for 20% PPD of the left ankle, and 15% PPD of the right elbow.

Following her release by Dr. Aubuchon, Claimant contacted over 100 employers who were advertising jobs. In no instance did she receive a job offer, and in many cases, she felt the Employer was unwilling to hire her given her physical restrictions.

Claimant is currently in pain every day. She experiences pain in her back, left leg, right arm, and into her shoulders. Any activity increases her pain. She limits the use of her left arm because of her previous surgeries. She is unable to climb ladders, and she feels unsteady descending steps. She has difficulty walking over uneven surfaces, and must frequently stop and rest because of increased pain in her lower extremities. She limits her carrying to no more than 10 pounds because of left and right arm and low back pain, and walks no longer than a half of block without stopping for rest. She limits climbing stairs at her home, and her husband has taken over doing the laundry because their washer and dryer are located in the basement. Claimant's sleep is interrupted frequently because of pain in her back, left arm, and leg.

Dr. Volarich testified on behalf of the Claimant. He performed an independent medical examination, reviewed the medical records, and conducted a physical examination in June 2010. He testified Claimant sustained 45% PPD of the left lower extremity at the ankle due to the ankle synovitis that required arthroscopic excision as well as tarsal tunnel syndrome that required tarsal tunnel decompression. He rated 25% PPD of the right upper extremity at the elbow due to the nondisplaced radial head fracture that required nonoperative treatment. He rated 7.5% PPD of the right hand due to the contusion of the palm that occurred during the fall. He found there was 5% PPD of the body as a whole rated at the low back due to the aggravation of her lumbar syndrome as a result of abnormal weight bearing on the left ankle. Finally, Dr. Volarich found 5% PPD of the right knee due to abnormal weight bearing as a result of the August 2008 accident.

Dr. Volarich found the following preexisting disabilities: 25% PPD of the body as a whole due to the low back and as a result of her chronic lumbar syndrome and disc bulges in both the thoracic and low spine; 12.5% PPD of the neck due to chronic cervical syndrome; 40% PPD of the left upper extremity due to the prior shoulder labral tear which required two surgical repairs; and 15% PPD of the left wrist due to largely untreated carpal tunnel syndrome. Dr. Volarich testified these disabilities combined with the disability from the work accident, to create a greater disability than the simple sum. He described the process of combining these disabilities and the synergistic effect as coming largely from the fact that these injuries are opposing, as well as affect both the upper and lower parts of her body. He said overhead work, anything requiring weight bearing, functions like carrying or reaching would involve overlapping disabilities to both her arm, low back, and her left lower extremity. Dr. Volarich testified that a load factor should be included to take into account this synergistic effect. Dr. Volarich testified that Claimant could return to work within a number of physical restrictions outlined in his report, and had no objection to her attempting to try and find work within those restrictions. However, if a vocational specialist could not identify work for Claimant, Dr. Volarich testified she was permanently and totally disabled as a direct result of the August 2008 injury in combination with her preexisting medical condition. Dr. Volarich testified her G.I. symptoms were a serious hindrance and obstacle to employment before 2008.

Vocational specialist and board certified vocational rehabilitation counselor James England, testified on behalf of Claimant. He conducted an interview with Claimant, performed some vocational testing, and reviewed Claimant's medical records. Mr. England testified in his opinion, Claimant was unemployable in the open labor market due to a combination of her physical restrictions related to the injuries and illnesses prior to August 2008, and combined with the physical disabilities attributable to that accident standing alone.

In reaching his conclusions, Mr. England testified the restrictions placed on Claimant by the examining doctors, including the restrictions placed by Dr. Volarich, restricted her to sedentary work or less. He wrote in his report "To her credit, it appears that she attempted to continue working at a job that was modified to the point that it was sedentary in nature. Despite that, however, she was at times having to go home early and was having to spend a lot of time in the restroom because of her bowel and bladder problems...she admitted that she no longer felt physically capable of even performing the limited duties she was doing at the end with her last employer. I cannot think of a job that would be less physically demanding than what she was doing [which] was sedentary in nature."

Vocational specialist Delores Gonzalez testified on behalf of the SIF. She did not conduct an interview with Claimant, but reviewed her medical records, and reviewed her November 29, 2011 deposition. Ms. Gonzalez opined Claimant was employable in the open labor market within the unskilled, sedentary/light level of exertion with the caveat that she alternate between sitting and standing as needed. Ms. Gonzalez identified a number of jobs within this restriction including cashier positions, surveillance system monitor, an order clerk and telemarketing positions. Further, Ms. Gonzalez testified since Claimant was able to work prior to her primary injury of August 18, 2008, her preexisting disabilities were not so serious as to constitute a hindrance or obstacle to employment. Ms. Gonzalez stated that prior to 2008, Claimant was under no physician imposed restrictions with regard to her low back or left shoulder. Ms. Gonzalez did not consider any of Claimant's testimony from her deposition or her statements to the doctors in rendering her opinion about Claimant's employability. She stated, on cross examination, that while she would consider Claimant's testimony, she could not use it in her opinion. She stated that she would not consider Claimant's uncontradicted testimony in rendering her opinion because she considered that evidence to be subjective.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon a comprehensive review of the evidence, my observations of Claimant at hearing, and the application of Missouri law, I find:

Claimant sustained a compensable injury to her left ankle and right elbow as a result of her work accident of August 18, 2008, when she fell through a doorway at work. The records of Dr. Aubuchon, and Mid County Orthopedics, and the testimony of Dr. Volarich confirm that as a result of this work accident claimant suffered left ankle tarsal tunnel syndrome, and a right elbow nondisplaced radial head fracture.

Based upon all of these findings, as well as on Claimant's testimony, the medical evidence, and the credible testimony of Dr. Volarich, I find Claimant sustained 20% PPD of the left ankle as a result of the injury and 15% PPD of the right elbow. Claimant settled her claim with Employer for that amount, and the evidence supports that level of disability.

Prior to her 2008 injury, Claimant had been substantially disabled at work by a number of injuries and illnesses. She began suffering low back symptoms as far back as 1986. As a result of a work injury that year, she collected compensation amounting to approximately 30% of the body as a whole. Claimant continued to obtain treatment for her back and neck from various doctors through the 1990s, and up through the work accident of August 18, 2008. As recently as 2006, her treating physician at Washington University restricted her from sitting and standing for more than 30 minutes on the job, participating in any overhead work or work requiring outstretched motion, and to limit her lifting to 25 pounds.

In addition, Claimant suffered an injury to her left shoulder in 1997 that required two surgeries including an acromioplasty and repair of the torn rotator cuff, and an arthroscopic surgery to remove torn cartilage. She settled her claim with her employer for 35% PPD of her left shoulder. In the years leading up to 2008, Claimant lost significant range of motion, and lost

quite a bit of strength in her left arm as a result of this accident. The physical restrictions were substantial enough that she left her job and sought work that did not require as much lifting and carrying with her left arm.

Prior to 2008, Claimant also suffered numbness and tingling in her hands. This condition was diagnosed by Dr. Volarich as carpal tunnel syndrome. Claimant has received no treatment for this injury, but complains of dropping items and suffering numbness and tingling in her hands which woke her up at night.

Prior to the 2008 work injury, Claimant was diagnosed with irritable bowel syndrome and interstitial cystitis. She testified at hearing she takes a number of medications for this condition. In addition, she experiences urgent need to frequently use the bathroom.

As a result of the combination of these disabilities, and the disability attributable to the work accident of August 18, 2008, I find Claimant is permanently and totally disabled, and unable to compete in the open labor market. Claimant is not permanently and totally disabled as a result of the last injury alone.

Under **Mo.Rev.Stat. S 287.020.6 (2005)**, "total disability" is defined as the "inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." The test for permanent total disability is claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. **Searcy v. McDonnell Douglas Aircraft Co.**, 894 S.W.2d 173 (Mo. App. E.D. 1995)

I find the opinion of Mr. England to be persuasive and more credible than that of Ms. Gonzales. Mr. England actually met with Claimant, and his observation of Claimant formed the basis of his opinion. Ms. Gonzales never had the benefit of meeting with Claimant.

Claimant is currently suffering daily pain in her back, her leg, and both arms. She takes more than a dozen medications for pain, and bowel symptoms. She is unable to walk longer than a block without having to rest. She is limited both by doctor's restrictions and her own experience to lifting only small weights with her arms. She is restricted from overhead work. She must alternate sitting and standing every 30 minutes due to back pain. She has trouble walking on uneven surfaces and can no longer climb ladders. Ms. Gonzalez's expert opinion did not take any of this uncontroverted testimony into account. Mr. England incorporated his conversations with Claimant, as well as the references to her symptoms and complaints in conjunction with the medical opinions expressed. Mr. England's vocational opinion is superior to that of Ms. Gonzalez because it is more complete and is based on all available credible testimony in the record. Given all the evidence presented at hearing, including Claimant's own testimony, I find Claimant is permanently and totally disabled and unemployable in the open labor market.

Based on all the evidence, I find Claimant has met her burden of proving she is permanently and totally disabled as a result of the combination of her primary left ankle and right elbow disabilities, and the preexisting left shoulder, low back, mid back, and

gastrointestinal/bladder illnesses. I find the vocational opinion of Mr. England, as well as the medical opinion of Dr. Volarich, support the finding that Claimant is permanently and totally disabled, and that her total disability is the result of the combination of her primary and pre-existing disabilities. Therefore, the Second Injury Fund is liable for PTD benefits.

A lien of 25% is awarded in favor of Claimant's attorney Mr. David Plufka.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation