

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

Injury No.: 02-153748

Employee: Dorothy Thompson
Employer: Super 8 Motel (Settled)
Insurer: Royal Indemnity Company (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 section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 19, 2010. The award and decision of Administrative Law Judge Carl Strange, issued November 19, 2010, 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 July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Dorothy Thompson

Injury No. 02-153748

Dependents: N/A

Employer: Super 8 Motel

Additional Party: Second Injury Fund

Insurer: Royal Indemnity Company

Hearing Date: August 19, 2010

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? August 30, 2002.
5. State location where accident occurred or occupational disease contracted: Scott 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 slipped on a mat which started to slide and employee's feet went out from under her and she fell backwards causing injury to her lumbar spine.

12. Did accident or occupational disease cause death? N/A
13. Parts of body injured by accident or occupational disease: Body as a whole referable to the lumbar spine.
14. Nature and extent of any permanent disability: (See Findings)
15. Compensation paid to date for temporary total disability: \$138.66.
16. Value necessary medical aid paid to date by employer-insurer: \$22,351.24.
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$260.00.
19. Weekly compensation rate:

\$173.34 for permanent partial disability and permanent total 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 beginning May 23, 2008 (See Findings).
22. Second Injury Fund liability: Yes.
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 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: Boyd Green.

FINDINGS OF FACT AND RULINGS OF LAW

On August 19, 2010, the employee, Dorothy Thompson, appeared in person and by her attorney, Boyd Green, for a hearing for a final award. The Second Injury Fund was represented at the hearing by its attorney Frank Rodman. 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 August 30, 2002, Super 8 Motel was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by Royal Indemnity Company.
2. On or about August 30, 2002, the employee was an employee of Super 8 Motel and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about August 30, 2002, the employee sustained an accident during 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 \$260.00, and her rate for permanent total disability and permanent partial disability is \$173.33.
7. The employee's injury is medically causally related to the work injury on or about August 30, 2002.
8. The employer has furnished \$22,351.24 in medical aid to employee.
9. The employer has paid temporary total disability benefits at a rate of \$173.33 per week for a total of \$138.66.
10. The employee reached maximum medical improvement (MMI) from the primary injury in this case on September 14, 2005.
11. The Second Injury Fund's liability, if any, will begin on May 23, 2008.

ISSUES:

1. Nature and Extent
2. Liability of the Fund

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records packet from Primary Injury, with subsections as follows:
 1. St. Francis Occupational Medicine (Dr. Straubinger);
 2. Cape Imaging;
 3. St. Francis Center for Health & Rehabilitation;
 4. Orthopedic Specialists- Dr. Chabot;

5. Des Peres Hospital;
 6. Healthpoint;
 7. Garnett Chiropractic Center;
 8. Immediate Healthcare (Dr. Spearman);
 9. Cape Radiology Group;
 10. Southeast Hospital;
 11. Brain & Neurospine Clinic of Missouri (Drs. Vaught et al.); and
 12. Advanced Pain Center.
- B. Medical records packet from prior injuries, with subsections as follows:
1. St. Francis Medical Center (1993 neck injury);
 2. Orthopaedic Associates (1995-2002 left wrist injuries); and
 3. Orthopedic Specialists (1995-2002 left wrist injuries).
- C. Deposition of Dr. Raymond Cohen, with attachments; and
- D. Deposition of Ms. Susan Shea, with attachments.

Second Injury Fund Exhibits:

- I. Deposition of Dr. Dennis Straubinger, with attachments.

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

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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).

- In *Spencer v SAC Osage Electric Coop, Inc.*, 302 S.W.3d 792 (Mo.App. W.D. 2010) & *Angus v Second Injury Fund*, ---S.W.3d--- WL3955449 (Mo.App. W.D. 2010), the court emphasized that without findings of fact to the contrary "[i]n a workers' compensation proceeding the ALJ cannot substitute his or her own opinion for uncontroverted medical evidence regarding causation." *Elliott v. Kansas City, Mo., Sch. Dist.*, 71 S.W.3d 652, 657-58 (Mo. App. W.D. 2002) (citing *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 599 (Mo. banc 1994)).
- In *Daly v. Powell Distributing, Inc. et al.*, ---S.W.3d--- WL3744092 (Mo.App. W.D. 2010), the court emphasized that the Commission has the power to believe or disbelieve an expert's testimony. *Kuykendall v. Gates Rubber Co.*, 207 S.W.3d 694, 711 (Mo. App. S.D. 2006). However, disregarding uncontradicted expert's testimony as to causation must be supported by substantial and competent evidence. *Id.* at 712; *see also Wright v. Sports Assoc., Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003). Moreover, the Commission cannot find there is no causation if the uncontroverted medical evidence is otherwise." *Id.*

FINDINGS OF FACT & RULINGS OF LAW:

Issue 1. Nature and Extent of Disability & Issue 2. Liability of the Fund

The employee has requested an award of permanent total disability benefits against the Second Injury Fund. In support of her position, the employee has offered the opinions of Dr. Raymond F. Cohen and Vocational Rehabilitation Expert, Susan Shea. The Second Injury Fund has offered the opinion of Dr. Dennis J. Straubinger in support of their position that the employee's primary injury was just a low back strain. If the 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 the employee's last injury occurring on August 30, 2002. The Second Injury Fund is not liable if the last injury alone caused the employee to be permanently and totally disabled.

On the question of whether the employee is permanently and totally disabled as a result of the employee's pre-existing injuries and the August 30, 2002 injury, it is significant to note that the Second Injury Fund failed to provide any expert opinion that the employee was capable of competing in the open labor market after the August 30, 2002 injury or that she was permanently and totally disabled as a result of the last injury alone. Both the opinions of Dr. Cohen and Susan Shea found that the employee was permanently and totally disabled as a result of a combination of the employee's pre-existing injuries and the primary injury. Although the Second Injury Fund has argued that their opinions are against the weight of the evidence, it has failed to provide a contradictory opinion or sufficient evidence to discredit each expert's opinion.

The Second Injury Fund's reliance on Dr. Straubinger's opinion to contradict Dr. Cohen's opinion is misplaced. Dr. Straubinger did not issue any opinion regarding the permanent ability of the employee to work and whether the primary injury combined with her pre-existing injuries to render her permanently and totally disabled. At his deposition, Dr. Straubinger testified that

the employee's complaints were inconsistent with his clinical findings, but that her complaints consistently continued. Further, he noted that the employee's vague or non-specific complaints could be consistent with an annular tear, but that the significance of the annular tear was unknown to him (Second Injury Fund's Exhibit I, Deposition Pages 58, 63, 67, 77). Thus, I find that by his own testimony and records, Dr. Straubinger acknowledges and admits that he cannot fully assess the employee's medical condition and how it relates to the work related injury.

Although the Second Injury Fund has argued that the employee is not credible, it has failed to provide sufficient evidence to discredit her testimony. Thus, I find that the employee is credible. Based on the evidence and my above findings, I find the opinions of Dr. Cohen and Ms. Shea to be credible and supported by the evidence. Further, I cannot substitute my own opinion for uncontroverted medical evidence and expert opinions.

Based on the evidence, I find that the employee is permanently and totally disabled as a result of a combination of the employee's primary injury and pre-existing injuries. Based on the stipulation of the parties, the employee reached maximum medical improvement on September 14, 2005. Further, based on my above findings and the stipulation of the parties, I find that the Second Injury Fund's liability for permanent and total disability benefits began on May 23, 2008. The Second Injury Fund is therefore directed to pay to the employee the sum of \$173.34 per week commencing on May 23, 2008, 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:

Boyd Green, attorney at law, is allowed a fee of 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

Date: _____

A true copy: Attest:

Ms. Naomi Pearson