

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

Injury No.: 08-058112

Employee: Linda Thompson

Employer: Frene Valley Healthcare South

Insurer: Self-Insured through
Health Care Facilities of Missouri Self-Insurance Fund

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 January 9, 2012. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued January 9, 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 2nd day of July 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 Thompson

Injury No. 08-058112

Dependents:

Employer: Frene Valley Healthcare South

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Self-insured through Health Care Facilities of
Missouri Self-Insurance Fund

Hearing Date: November 30, 2011

Checked by: RJD/cs

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: July 2, 2008.
5. State location where accident occurred or occupational disease was contracted: Gasconade 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? Employer was Self-insured through Health Care Facilities of Missouri Self-Insurance Fund.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was cleaning a patient's room when the loop of her shoestring became caught in a bed crank handle, causing Employee to fall.
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: left ankle, left Achilles tendon.
14. Nature and extent of any permanent disability: total disability.
15. Compensation paid to-date for temporary disability: \$3,798.30.

Employee: Linda Thompson

Injury No. 08-058112

16. Value necessary medical aid paid to date by employer/insurer? \$33,721.89.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.
18. Employee's average weekly wages: \$287.25 for permanent partial disability benefits and permanent total disability benefits.
19. Weekly compensation rate: \$191.50 for permanent partial disability benefits and permanent total disability benefits.
20. Method wages computation: Section 287.250.3.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability benefits of \$191.50 per week beginning February 19, 2009 for Claimant's lifetime. Employer and Insurer are also ordered to provide Claimant with future physical therapy and ankle braces for her left Achilles tendon tear.

22. Second Injury Fund liability: None.
23. Future Requirements Awarded: See Paragraph 21.

Said payments to begin immediately 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: Randall Barnes

Employee: Linda Thompson

Injury No. 08-058112

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Linda Thompson

Injury No. 08-058112

Dependents:

Employer: Frene Valley Healthcare South

Insurer: Sedgwick Claims Management
Services

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

Additional Party: Second Injury Fund

Checked by: RJD/cs

ISSUES DECIDED

An evidentiary hearing was held in this case on November 30, 2011 in Jefferson City. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on December 23, 2011. The hearing was held to determine the following issues:

1. Claimant's average weekly wage and resultant compensation rates;
2. Whether there has been an underpayment of temporary total disability ("TTD") benefits, and, if so, the extent thereof;
3. Whether Employer shall be ordered to provide Claimant with additional medical treatment pursuant to Section 287.140, RSMo;
4. The liability of Employer, if any, for permanent partial disability benefits or permanent total disability benefits; and
5. The liability of the Second Injury Fund, if any, for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;

Employee: Linda Thompson

Injury No. 08-058112

2. That venue is proper in Gasconade County and adjoining counties; the parties agreed to a change of venue to Cole County for the evidentiary hearing;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That Claimant sustained an accident arising out of and in the course of her employment with Frene Valley Healthcare South on July 2, 2008;
6. That Employer paid \$33,721.89 in medical benefits, and \$3,798.30 in TTD benefits;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation herein; and
8. That Frene Valley Healthcare South was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times through the Health Care Facilities of Missouri Self-Insurance Fund.

EVIDENCE

The evidence consisted of the testimony of Claimant, Linda Thompson; the testimony and report of Philip Eldred, a vocational rehabilitation counselor; wage information; medical records; the deposition testimony and narrative report of Dr. George Carr; and the deposition testimony and narrative report of Dr. Saul Trevino.

DISCUSSION

Claimant, Linda Thompson, was born on October 5, 1955. She graduated from Belle High School in 1974 and was licensed by the State of Missouri as a cosmetologist for several years. She has worked as a librarian, a dental assistant, a clerk for a state agency, and as a housekeeper in a nursing home. Claimant is 5'3" tall and weighs over 300 pounds.

Claimant began working for Employer (Frene Valley Healthcare South) in December 2006 as a housekeeper. In December 2007, Claimant underwent surgery on her left knee for a medial meniscus tear. Claimant testified that the left knee injury was not work-related but rather caused by an accident she sustained at her home. Claimant was off work after the left knee surgery. In April 2008 Claimant began working part-time for Employer on a limited duty basis. Claimant was still working part-time for Employer at the time of her July 2, 2008 work injury.

As stipulated, Claimant sustained a work-related accident on July 2, 2008. Claimant was

Employee: Linda Thompson

Injury No. 08-058112

performing her job duties as a housekeeper when the loop of her shoelace became caught in a bed-crank, causing her to fall onto the floor. She immediately felt pain in her left ankle. Diagnostic scans performed on July 2, 2008 at Hermann Area District Hospital were suggestive of an Achilles tendon tear. An MRI performed on July 7, 2008 confirmed an Achilles tendon tear. On July 30, 2008, Dr. Jason Calhoun performed a left Achilles tendon repair and excision of posterior tuberosity of the calcaneus.

After surgery, physical therapy, and work hardening, Dr. Saul Trevino determined that Claimant had reached maximum medical improvement on February 18, 2009. Based upon Claimant's demonstrated atrophy of her calf and weakness and plantar flexion, Dr. Trevino rated a 21% impairment of the lower extremity and an 8% of the whole person. As a result of the primary injury, Dr. Trevino indicated that Claimant required the use of a cane. Dr. Trevino restricted Claimant from climbing, prolonged standing, lifting, and carrying.

Claimant did not return to work at Frene Valley Healthcare South following her July 2, 2008 work injury, as Employer would not accommodate her use of a cane, which she began using following her injury. Claimant began taking narcotic pain medications on a daily basis following her July 2, 2008 work injury. Her left ankle pain prevents her from sleeping more than two hours at one time. She also elevates her ankle multiple times per day to relieve swelling.

After her termination by Employer, Claimant has not been employed. She now receives Social Security disability benefits.

Dr. George Carr evaluated Claimant for an Independent Medical Evaluation on November 3, 2010. Dr. Carr found a 50% permanent partial disability at the 155 week level to the left ankle as a direct result of injuries sustained on July 2, 2008. This rating accounted for Claimant's chronic left ankle pain with reduced range of motion and limited endurance. Dr. Carr determined that Claimant had a pre-existing 15% permanent partial disability to the left knee based on Claimant's left knee chronic pain post meniscus repair and accounts for her lost range of motion, limited mobility, and limited endurance. On cross-examination, Dr. Carr testified that Claimant in fact had normal range of motion in the left knee. Dr. Carr determined that Claimant had a pre-existing 12.5% permanent partial disability of the body as a whole related to the lumbosacral spine based on chronic pain with reduced range of motion and limited endurance. On cross-examination, Dr. Carr testified that Claimant had a normal range of motion to the cervical, thoracic, and lumbar spine. Dr. Carr determined that Claimant had a pre-existing permanent partial disability to the body as a whole from exercise-induced asthma. When Dr. Carr evaluated Claimant in 2010, she was not taking medications for exercise-induced asthma.

In December 2007, Claimant underwent a left medial meniscus repair. Claimant testified that she does not have chronic pain in her left knee. Claimant testified that she was diagnosed with exercise-induced asthma in the 2000s. Although she had been prescribed an inhaler, she did not have any asthma attacks at work prior to her 2008 ankle injury. Claimant's exercise-induced asthma did not prevent her from walking one mile on a daily basis prior to 2008. Claimant testified that she experienced pain in her lower back and hips prior to her July 2008 work injury. She testified that she did have continuing pain in her hips but her lower back symptoms had lessened with time.

Employee: Linda Thompson

Injury No. 08-058112

Phillip Eldred, a certified rehabilitation counselor, evaluated Claimant on September 10, 2010. Based on Claimant's test scores, education, and work history, Mr. Eldred identified 41 sedentary occupations that Claimant could work assuming that she was capable of working sedentary jobs. However, Mr. Eldred determined that Claimant was unable to work in a sedentary position based on her most limiting restrictions, those of Dr. Trevino. Mr. Eldred also determined that Claimant's use of narcotic pain medication made it more difficult for her to be retrained in a formal job training program. Mr. Eldred opined that Claimant was permanently and totally disabled as a result of the July 2, 2008 injury combined with her pre-existing injuries and medical conditions. Mr. Eldred characterized Claimant's job with Frene Valley Healthcare South as a being a "heavy" physical demand level position. Mr. Eldred was unaware of any job duties Claimant was unable to perform prior to July 2, 2008 based on her pre-existing medical conditions.

Under Missouri Workers' Compensation Law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim,¹ including establishing that he is an "employee" as that term is defined in Section 287.020.1 RSMo.² Proof is made only by competent and substantial evidence, and may not rest on speculation.³ Medical causation not within lay understanding or experience requires expert medical evidence.⁴ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.⁵

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.⁶ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.⁷

Under Section 287.020.3(1), a compensable "injury" is one that arises out of and in the course of employment. The injury is only compensable if the work related incident is the "prevailing factor in causing the resulting medical condition and disability."⁸ The term "prevailing factor" shall be defined as the "primary factor, in relation to any other factor, causing both the resulting medical condition and disability."⁹

¹ *Fischer v Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. W.D. 2002).

² *Busby v. D.C. Cycle Ltd.*, 292 S.W.3d 546, 549 (Mo. App. S.D. 2009).

³ *Griggs v. A.B. Chance Company*, 503 S.W.3d 697, 703 (Mo. App. W.D. 1974).

⁴ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

⁵ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. S.D. 1984).

⁶ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

⁷ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. E.D. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. S.D. 1986).

⁸ Section 287.020.3(1).

⁹ *Id.*

Employee: Linda Thompson

Injury No. 08-058112

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.¹⁰ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.¹¹ A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.¹² It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.¹³

The Second Injury Fund is a creature of statute, and benefits from the Second Injury Fund are awarded only if the claimant proves that under § 287.220.1 RSMo, he or she is entitled to such benefits. The claimant has the burden of proving all essential elements of his or her workers' compensation claim¹⁴

The term "total disability" as used in the workers' compensation statute means an inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.¹⁵ The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment.¹⁶ The primary inquiry is whether an employer can reasonably be expected to hire the claimant, given his present physical condition, and reasonably expect the claimant to successfully perform the work.¹⁷

Where a preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work related injury.¹⁸ In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first.¹⁹ If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made.²⁰ It is, therefore, necessary that Employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.²¹

Based upon the testimony of Claimant, Dr. Carr, and Mr. Eldred, I find that the Claimant is permanently and totally disabled as a result of the last injury alone. Dr. Trevino's restrictions

¹⁰ *Hawthorne v. Lester E. Cox Medical Center* 165 S.W.2d 587, 594-595 (Mo. App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1999).

¹¹ *Rana v. Land Star TLC*, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001).

¹² *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo. App. E.D. 1998).

¹³ *Rana*, 46 S.W.3d at 626.

¹⁴ *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d, 789, 793 (Mo. App. S.D. 1992).

¹⁵ Section 287.020.6 RSMo 2000.

¹⁶ *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. E.D. 2007).

¹⁷ *Id.*

¹⁸ *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo. App. E.D. 1992).

¹⁹ *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-43 (Mo. App. S.D. 1996).

²⁰ *Id.*

²¹ *Id.*

Employee: Linda Thompson

Injury No. 08-058112

from the primary injury of no climbing, prolonged standing, lifting and carrying were considered by Mr. Eldred to be below the sedentary level. Mr. Eldred testified that he considers the most limiting restrictions when considering whether someone is employable in the open labor market because employers look to the most limiting restrictions in their hiring decisions. Dr. Trevino's restrictions, combined with Claimant's daily use of narcotic pain medications, sleep disturbances, and the need to recline are evidence that she is permanently and totally disabled as a result of the last injury alone.

Although no further inquiry is required once permanent total disability is determined to be caused by the last injury alone, I do find that the testimony of Dr. Carr was not credible regarding Claimant's pre-existing conditions. In my review of the exhibits, I find very few records that pre-date July 2, 2008, the date of the primary injury. Dr. Carr based his 15 % permanent partial disability rating to the left knee in part due to chronic left knee pain, something which Claimant denied. Dr. Carr also based his ratings to the left knee and low back due to Claimant's reduced range of motion; on cross-examination, Dr. Carr admitted that Claimant had normal range of motion in her left knee as well as her cervical, thoracic, and lumbar spine. Despite a rating of 10% permanent partial disability to the body as a whole due to exercised induced asthma, Claimant is not currently taking medication for her asthma. Prior to July 2, 2008, she walked one mile on a daily basis.

I find the testimony of Phillip Eldred to not be credible regarding Claimant's pre-existing conditions as well. Mr. Eldred relied upon the opinions of Dr. Carr, who reviewed few records regarding the alleged prior conditions. Furthermore, Claimant was able to work in a Heavy physical demand level job without restriction prior to the injury of July 2, 2008. Mr. Eldred was unable to indicate any job duties Claimant was unable to perform prior to July 2, 2008 based on her pre-existing conditions.

Regarding the issue of average weekly wage and compensation rates, it is clear that Claimant was a part-time employee at the time of her accident on July 2, 2008. Section 287.250.3 states:

If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

The second page of Employer's Exhibit 2 chronicles the wages paid and hours worked for the two-week pay periods beginning May 1, 2008 and ending July 10, 2008. Dividing the wages by the hours, the hourly pay appeared to range from \$7.50/hour (7-10-08 paycheck) to \$7.70/hour (5-1-08 paycheck). The total amount paid during this period was \$1,750.70 and the total hours worked were 228.44; the average is \$7.66 per hour. The third page of Employer's Exhibit 2 chronicles the hours Claimant worked each pay period during 2007, but does not show the wages

Employee: Linda Thompson

Injury No. 08-058112

earned. Although the greatest number of hours worked in 2007 by Claimant in a two-week period was 74.23 hours, page three of Employer's Exhibit 2 also states: "Full time in 2007 was 75.00 hours for a 2 week pay period." It is logical to assume that full time in 2008 was likewise 75.00 for a 2 week pay period, or 37.5 hours per week. Following the mandate of section 287.250.3, Claimant's average weekly wage for permanent partial disability, permanent total disability and death benefits (but not for temporary total disability benefits) is based upon 37.5 hours per week at the hourly rate of \$7.66, or \$287.25. The average weekly wage for permanent total disability benefits is \$287.25 and the compensation rate for permanent total disability benefits is \$191.50. As section 287.250.3 does not apply to temporary total disability benefits, I find that there has been no underpayment of temporary total disability benefits.

Employer-Insurer paid TTD benefits from July 3, 2008 through February 18, 2009 (February 18, 2009 being the date Claimant was released at maximum medical improvement by Dr. Saul Trevino). Employer-Insurer is liable for permanent total disability benefits of \$191.50 per week beginning February 19, 2009.

Regarding the issue of future medical treatment, Claimant carries the burden of proving that she is entitled to future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. W.D. 1997) overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003). In order to receive future medical benefits, a claimant must show by a reasonable probability that he will need future medical treatment to cure and relieve from the effects of the work injury. Concepcion v. Lear Corporation, 173 S.W.3d 368, 372 (Mo. App. W.D. 2005).

Neither Dr. Trevino nor Dr. Carr testified that Claimant would require any further surgery as a result of her work injury. Dr. Carr did feel that Claimant might require ongoing pain medication, but Dr. Miller's June 16, 2008 records indicate that the claimant was already on narcotic pain medication prior to the work injury. The record indicates that Claimant has many pain complaints in various parts of her body. There is no testimony that Claimant will need pain medication specifically for her left ankle alone. Dr. Carr testified: "Well, I think she's always going to need anti-inflammatories, and then periodically she's going to need stuff for pain as needed."

Dr. Trevino did agree on cross-examination that Claimant would need to do some physical therapy, but indicated this could be done at home, but that she would need to see a physical therapist on occasion for reinforcement. He also indicated that if Claimant got very weak, she may need an AFO brace for her ankle.

Claimant has met her burden of proof regarding the need for future physical therapy as well as the need for an ankle brace.

Employee: Linda Thompson

Injury No. 08-058112

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. Claimant cannot compete in the open market for employment;
2. Claimant is permanently and totally disabled;
3. Claimant's condition of permanent total disability is from the July 2, 2008 work injury considered alone;
4. The Second Injury Fund has no liability for benefits in this case;
5. Employer paid temporary total disability benefits through February 18, 2009, the date Claimant's left ankle condition reached maximum medical benefit;
6. Claimant's average weekly wage for permanent partial disability benefits and permanent total disability benefits is \$287.25;
7. Claimant's compensation rate for permanent partial disability benefits and permanent total disability benefits is \$191.50;
8. Employer-Insurer is liable for permanent total disability benefits of \$191.50 per week beginning February 19, 2009;
9. There was no underpayment of temporary total disability benefits; and
10. Claimant is entitled to future medical benefits for physical therapy and ankle braces.

ORDER

Employer and Insurer are ordered to pay permanent total disability benefits of \$191.50 per week beginning February 19, 2009 for Claimant's lifetime. Employer and Insurer are also ordered to provide Claimant with future physical therapy and ankle braces for her left Achilles tendon tear.

Claimant's attorney, Randall Barnes, is allowed 25% of all weekly benefits awarded as and for necessary attorney's fees, including future weekly benefits, and the amount of such fees shall constitute a lien thereon.

Made by /s/Robert J. Dierkes 1/9/2012
ROBERT J. DIERKES
Chief Administrative Law Judge
Missouri Division of Workers' Compensation