

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

Injury No.: 05-099965

Employee: Donna E. Todd
Employer: Wal-Mart Associates, Incorporated (Settled)
Insurer: American Home Assurance 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 § 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 August 27, 2012. The award and decision of Administrative Law Judge Gary L. Robbins, issued August 27, 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 March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Donna E. Todd Injury No. 05-099965
Dependents: N/A
Employer: Wal Mart Associates Incorporated
Additional Party: Second Injury Fund
Insurer: American Home Assurance Company
Appearances: Chris N. Weiss, attorney for employee.
Jonathan J. Lintner, attorney for Second Injury Fund.
Hearing Date: June 4, 2012 Checked by: GLR/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? October 4, 2005.
5. State location where accident occurred or occupational disease contracted: Cape Girardeau 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: The employee was pulling a pallet jack when she slipped and fell backwards striking her left arm, tailbone and back.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left wrist, tailbone and mid-back.
14. Nature and extent of any permanent disability: The employee settled her case with the employer-insurer by Stipulation For Compromise Settlement for 60% permanent partial disability of her body as a whole in regard to her thoracic spine, 15% permanent partial disability of her body as a whole for her coccyx injury, and 30% permanent partial disability of her left wrist/\$112,394.63
15. Compensation paid to date for temporary total disability: Not disclosed at trial.
16. Value necessary medical aid paid to date by employer-insurer: Not disclosed at trial.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$433.42.
19. Weekly compensation rate: The employee's rate for all purposes is \$288.95 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

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: Chris N. Weiss.

FINDINGS OF FACT AND RULINGS OF LAW

On June 4, 2012, the employee, Donna E. Todd, appeared in person and with her attorney, Chris N. Weiss for a hearing for a final award. The employer-insurer was not present as they already settled their portion of the case with the employee. Assistant Attorney General Jonathan J. Lintner represented the Second Injury Fund. 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 a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Wal Mart Associates Incorporated was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by American Home Assurance Company.
2. On October 4, 2005 Donna E. Todd was an employee of Wal Mart Associates Incorporated and was working under the Workers' Compensation Act.
3. On October 4, 2005 the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$433.42. Her rate for all purposes is \$288.95 per week.
7. The employee injury was medically causally related to the accident or occupational disease.
8. The amount of medical aid that the employer-insurer paid is unknown.
9. The amount of temporary disability benefits that the employer-insurer paid is unknown.
10. The employee has no claim for previously incurred medical bills.
11. The employee has no claim for mileage or future medical care.
12. The employee has no claim for any temporary disability benefits.
13. The employee has no claim for permanent partial or permanent total disability against the employer-insurer.

ISSUE:

Liability of the Second Injury Fund for permanent partial or permanent total disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Medical records of Cape Neurological Surgeons/Kee B. Park, M.D.
- B. Medical records from St. Francis Medical Center.
- C. Medical records of Orthopaedic Associates/R. August Ritter, M.D.

- D. Medical records from the Hand Center.
- E. Medical records of Cape Neurological Surgeons/Kee B. Park, M.D.
- F. Medical records of Sonjay J. Fonn, D.O.
- G. Medical records of Jackson Primary Care/Deanna Siemer.
- H. Deposition of Raymond E. Cohen, D.O.
- I. Deposition of Jeffrey F. Magrowski, Ph.D.
- J. Medical records of Cape Neurological Surgeons/Franklin Hayward, II, D.O.
- K. Stipulation for Compromise Settlement

Second Injury Fund Exhibits

None.

STATEMENT OF THE FINDINGS AND RULINGS OF LAW-

STATEMENT OF THE FINDINGS OF FACT

Donna E. Todd, the employee, was the only person to testify live at trial. All other evidence was presented in the form of written reports, medical records or by deposition testimony.

Donna Todd was sixty-three years of age at the time of the hearing. She is now a single person and has two children who are grown and not dependent upon her. She attended school in Rector, Arkansas and attended through the ninth grade. She did not receive any further education or training following that.

The employee began work following her divorce in 1984. She worked a variety of retail positions with various companies and then began work for Wal Mart in Cape Girardeau in 1990 and eventually moved to the Jackson area. At Wal-Mart she worked as a cashier, worked at the service desk, stocked shelves and worked security. Her normal week was full time at forty hours per week with some overtime. She testified that \$433.42 was correct for her average weekly wage. Her duties included stocking shelves, breaking packs and sometimes doing security work.

Ms. Todd testified that in 1990 she injured her back while working at Wal Mart. She sought chiropractic treatment for many years and finally was referred to Dr. Park in Cape Girardeau and underwent a two-level low back fusion involving the placement of a metal bar with six screws in her low back on August 1, 2001. Even though she felt this surgery was due to a work related injury there was no settlement involving that injury. Following the surgery, Dr. Park gave her some restrictions including avoiding ladders, not driving long distances because of numbness in her leg, not lifting over ten to fifteen pounds and avoid being a cashier because of the twisting and turning at the waist area. She returned to work at Wal Mart and first worked with electronics during the night shift because of the lighter lifting. She also would stand at the door as a greeter. She sought and received help in lifting heavier items at Wal Mart. She testified that she would get injections for her low back occasionally at lunch and return to work. She took Advil and Tylenol Extra for her low back pain. She testified that she did return to full time work but did not receive as much overtime because of her back condition. She testified that her family doctor,

Dr. Siemer, or her nurse practitioner gave her hydrocodone and Lidocaine patches for her low back pain. She testified that following the low back surgery she could not go out in the yard and play with the kids, go to games or go to graduations. She testified that her right leg was approximately one-half inch shorter after the surgery and that this affected her when she walked. She stated that the low back continued to hurt with a burning sensation and that she would develop numbness into her right thigh.

In general, Ms. Todd testified that the low back injury was a significant injury in that she had restrictions at work, it affected her family duties, she continued to take over-the-counter pain medications following her surgery and it affected her level of income in that she was not able to work as many hours overtime at her job.

On October 4, 2005, the employee was pulling a pallet of cookbooks to put on a pallet jack. The box tore and she fell backwards striking her tailbone, back and left wrist. She was referred to Dr. Ritter of Orthopaedic Associates and underwent surgery on her wrist. No surgery was provided for the broken tailbone. She was referred to Dr. Park for treatment of the mid-back. Surgery on that was delayed because she needed to recover from a broken arm and also suffered a stroke on March 15, 2007 brought on by a prescription for Percocet that was given to her by the pain clinic. Dr. Park performed surgery on May 14, 2007 on the mid-back and did a three-level fusion involving rods and bolts. The employee testified that there was not any improvement following the surgery because there was "not enough room" for the rod along her spine. She was told by the doctors that they had to wait one year after that surgery for another back surgery and on May 20, 2008, Dr. Fonn removed the hardware. There was still not much improvement and she sought treatment for pain with the pain clinic and received Lidocaine patches, prescription pain medications and a dorsal column stimulator for pain that was first implanted, removed and then re-implanted. The employee estimated that she had approximately eight separate surgeries on her back over the years. She tried to return to her job at Wal Mart after the back surgery where she was placed at the service desk. She had to have a chair to sit when doing that work. She was given two months off work and given Percocet as a pain medication and was unable to return to work. She applied for and received Social Security disability without the services of an attorney and without a hearing.

The employee testified that her wrist bothers her in cold weather, it hurts up into the forearm and that she drops things such as glasses. She estimates her loss of strength in her left wrist at twenty-five percent.

The employee testified that she continues to have some pain in the coccyx area as she sits. She testified that her mid-back never stops aching and described it as a five to six on a scale of zero to ten. When the pain increases she turns up the stimulator or takes pain medications. She said that she can only sit for up to thirty minutes before she has to get up and move. She cannot stand for very long either. She lies down in bed for relief. She cannot drive very far because of the pain in the low back and was not able to attend her mother's funeral in Arkansas because of her inability to sit.

On an average day the employee described that she does not sleep very well, gets up and takes a shower in the morning, plays with her puppies, watches TV and does some things on the computer. She receives Meals on Wheels for her lunch every day and also receives in-home help which is paid for by either Medicare or Medicaid, seven days a week. Those services include: shopping, cleaning, cooking and taking her to appointments. That service is for three hours a day. It is provided through SADI (Southeast Alliance for Disability Independence) and American Home. She does not drive a vehicle unless she has to and relies upon her son or friends to take her to appointments. On the date of the hearing her son brought her to the hearing. Her son also helps install various things to make it easier for her to get around her home including a ramp for a motorized chair. She does not do any shopping and stated she settled her primary case for sixty percent permanent partial disability of the body as a whole for the injury to the mid-back, fifteen percent permanent partial disability of the body as a whole for the injury to the tailbone and thirty percent permanent partial disability of the left wrist. At times, she requires a walker to ambulate.

Upon cross-examination the employee testified that she continues to have the pain in the right leg and also has numbness and tingling. It starts in the hip and goes down into her right thigh. It continues on a daily basis and there are times when her right leg will simply give way and she falls. She also testified that the home health care started approximately five years ago. The employee has been unable to travel a long distance by vehicle for approximately five years for the reason that she cannot sit that long. Before her work accident she was able to travel to Memphis which is approximately a three hour drive if she were to stop three times along the way to get out and stretch and walk. Before 2005, she was able to travel a long distance by vehicle because she was able to reposition herself to alleviate the low back discomfort. She has trouble sleeping at night and uses oxygen. Her legs go to sleep and her entire back hurts.

Employee's Exhibit "A" are the records from Cape Neurological Surgeons. Those records indicate that the employee was seen by Dr. Park on June 4, 2001 for neck and mid and low back pain. On August 1, 2001, Dr. Park performed a fusion at the L4-5 and L5-1 levels. The operative report indicates that six screws were implanted along with a rod. Ms. Todd was released on January 21, 2002 with mention that she could seek additional chiropractor manipulations if she desired.

Employee's Exhibit "B" are the records from Saint Francis Medical Center indicating that Ms. Todd was seen at the Emergency Room on October 4, 2005 after pulling on a box, falling backwards breaking her wrist and having pain in the tailbone area.

Employee's Exhibit "C" are the records of Orthopaedic Associates. This indicates the employee was seen by Dr. Ritter and those records indicate that the employee suffered a distal radius fracture on her left wrist and underwent surgery to repair that on October 10, 2005.

Employee's Exhibit "D" are the records from the Hand Center. These records indicate Ms. Todd underwent physical therapy for the hand.

Employee's Exhibit "E" are the records from Cape Neurological Surgeons. This indicates that

Ms. Todd was originally seen by Dr. Park on April 26, 2006 for thoracic back pain. On May 14, 2007, she underwent a posterior fusion in the mid-back at levels T9-10, T10-11 and T11-12. This involved placement of screws at the T9, T10, T11 and T12 pedicles on both sides and rods.

The records include an office note from Dr. Fonn dated March 20, 2008 indicating that Ms. Todd went in to have the screws removed but that she would have to wait twelve months after the surgery to have that done. This indicates that the employee would be referred to the Auburn Surgery Center for selective nerve root blocks at the L4-5 and L5-S1 levels on the right. The records also include a letter from Dr. Hayward, a neurosurgeon, discussing the employee's "failed back syndrome".

Employee's Exhibit "F" are the records of Dr. Fonn. This includes an operative report of May 20, 2008 indicating that the screws were removed from the employee's mid-back.

The Employee's Exhibit "G" are the records from Jackson Primary Care. These records discuss complaints of elevated blood pressure and mention of slight strokes in March 2007.

Employee's Exhibit "H" is the deposition of Dr. Cohen. Dr. Cohen is a medical doctor specializing in neurology. Dr. Cohen performed an independent medical evaluation on behalf of the employee.

Dr. Cohen gave a diagnosis:

- Status post multilevel thoracic fusion from T9 through T12 for symptomatic thoracic spondylosis due to a work-related trauma;
- Intractable pain syndrome due to the thoracic-spine condition;
- Coccygeal fracture; and
- Status post left wrist surgery for distal radial fracture.

He said this was all caused by the October 4, 2005 fall/ the prevailing factor. He also reported that the employee already had a fusion to the lumbar spine and that because her spine was less flexible, she was more susceptible to injury. He also reported that the employee had no prior problems with her thoracic spine

Dr. Cohen assessed ten percent permanent partial disability of the body as a whole for the tailbone fracture, forty percent permanent partial disability at the level of the left wrist and sixty percent permanent partial disability to the body as a whole for the injury to the thoracic spine. He recommended restrictions of lifting no more than ten pounds, no standing or sitting greater than thirty minutes without changing positions, no climbing, no ladder work, no repetitive bending, no twisting at the waist, no stooping, no working around heights, no walking on uneven surfaces, no walking greater than short distances and referred that to the October 4, 2005 accident and the pre-existing condition from the low back surgery from Dr. Park. Dr. Cohen testified that a majority of the restrictions are due to the 2005 accident. Some are due to the lumbar spine surgery that Dr. Park did, but the majority is related to the 2005 injury except for those he already gave her.

He testified that there was a pre-existing condition that caused disability of forty percent permanent partial disability to the body as a whole at the level of the lumbar spine from the two-level fusion in the low back.

It was his opinion that this pre-existing condition and the primary work related injury of October 4, 2005 created a greater overall disability than the simple sum and that the employee was permanently and totally disabled and not capable of gainful employment in today's open labor market. He also stated it is difficult to differentiate the source of the pain when dealing with injuries in the low back area and thoracic area because you are dealing with the same paraspinus muscles because of the multiple fusions that Ms. Todd has in her back.

On cross-examination, Dr. Cohen noted that Ms. Todd could no longer be a cashier or work at the service desk and ended up working the night shift in electronics because that was physically easier than her prior positions before her low back surgery in 2001. Dr. Cohen also clarified that the restrictions that he recommended involving no climbing of ladders or lifting greater than fifteen pounds were implemented by Dr. Park after the low back surgery in 2001. Dr. Park felt that Ms. Todd had degenerative disc disease at the time of her surgery in May 2007 and this was not caused by the work injury. He explained that Ms. Todd also had spondylosis which was a degenerative condition that developed over time. He explained that when you have fusions in the lower level of the spine that makes the rest of the spine less flexible and transfers force of impact, such as Ms. Todd's fall in 2005, up the spine rather than being absorbed in the lower levels. Dr. Cohen reiterated on cross-examination that his opinion was the employee was permanently and totally disabled due to a combination of her conditions and not just the October 4, 2005 work injury standing alone by itself. He testified that the employee's accident required the first surgery and that she would have not needed the subsequent surgeries except that the first surgery did not help her.

Upon cross-examination Dr. Cohen explained that a part of his restrictions were from pre-existing conditions and some were from the last accident of 2005. He felt the restrictions recommended by Dr. Park after the 2001 surgery including no ladder work and no lifting over fifteen pounds would be related to the 2001 surgery. Counsel on behalf of the Second Injury Fund quizzed Dr. Cohen as to whether or not the employee could perform some type of work following the effects of the 2005 injury alone. That question was objected to as it called for speculation and assumes facts not in evidence. Despite the objection Dr. Cohen testified that the employee would have significant restrictions from that accident alone. Dr. Cohen stated that the prior fusion in the low back and the mid-back fusion both presented significant disability with restrictions.

Employee's Exhibit "T" is the deposition of Dr. Magrowski. Dr. Magrowski is a vocational expert. He performed a vocational evaluation on behalf of the employee. He reviewed the medical records; met with the employee and issued a report finding that based on the combination of Ms. Todd's conditions she was unemployable in the open labor market. Dr. Magrowski felt that the restrictions imposed upon her following the 2001 low back surgery would have been a hindrance to her employment. He felt that Wal Mart accommodated those restrictions. He felt that based upon the restrictions recommended by Dr. Cohen that she could

do no work on a regular basis. He did not think there was any type of vocational services that could be provided to her to assist her to return to any type of employment. Upon cross-examination he stated Dr. Cohen's evaluation was comprehensive and that based upon those restrictions Ms. Todd was unemployable.

Employee's Exhibit "J" is the medical records of Cape Neurological Surgeons. Those records indicate that Dr. Hayward examined Ms. Todd on September 26, 2008 and diagnosed "failed back syndrome". He offered a permanent placement of a dorsal column stimulator and referred Ms. Todd to a pain management physician.

Employee's Exhibit "K" is a copy of the Stipulation for the primary injury indicating that the employee settled her claim against the employer for sixty percent permanent partial disability of the body as a whole for the injury to the thoracic spine, fifteen percent permanent partial disability of the body as a whole for the coccyx injury and thirty percent permanent partial disability of the left wrist.

The Court observed the employee during the trial. She repositioned herself several times in the chair during her testimony and got up from the chair and stood leaning against a wall for a period of time before returning to her chair. She appeared to stand very stiff and needed to either lean on or keep her hand on other objects for her balance. In the Court's opinion, she gave every impression that she was in a lot of discomfort and pain.

Other than cross-examination, the Second Injury Fund offered no evidence. No exhibits were offered, no witnesses were called and no professional opinions concerning permanent total disability were presented to off-set the opinions and testimony of Dr. Cohen and Dr. Magrowski.

RULINGS OF LAW

The employee settled her case with the employer-insurer for \$112,394.63. She claims that she is permanently and totally disabled due to a combination of the disabilities that arose from her 2001 lumbar fusion surgery at L4-5, L5-S1 and her 2007 thoracic fusion surgery from T9 to T12. The Second Injury Funds claims that the employee is not permanently and totally disabled and is only entitled to an award for permanent partial disability.

The only expert evidence that was presented was offered by the employee. She offered the deposition testimony of Dr. Cohen and Dr. Magrowski who both opined that the employee was permanently and totally disabled. They also indicated that the permanent total disability was due to a combination of the prior and primary disabilities. The Court finds this evidence persuasive as there is no contrary expert medical evidence.

The Second Injury Fund offered no contrasting expert opinion to comment upon, contrast or attack the credibility and opinions of Drs. Cohen and Magrowski. The Second Injury Fund did not send the employee for an evaluation or have an expert conduct a records review.

The Court found the employee to be entirely credible. Just as important, the Court observed the employee during the trial and her action and motions were entirely consistent with the disabilities that she is claiming. In the Court's opinion, there is no question that the employee is permanently and totally disabled. She has offered more than ample evidence to meet her burden of proof and support this position.

The ultimate question presented is whether the employee is permanently and totally disabled due to the last accident alone or in combination. As there are no opinions other than those of Drs. Cohen and Magrowski, the Court feels compelled to find that the employee is permanently and totally disabled in combination. While the Court may attack the credibility of an expert witness, the Court should not substitute its opinion for that of an expert medical opinion just based on the fact that the Court may come to a different conclusion.

Based on a consideration of all of the evidence in this case, the Court finds that the employee is permanently and totally disabled due to a combination of disabilities due to her 2001 and 2007 surgeries. The employee is not employable in the open labor market and no employer is likely to hire her. The Court orders that the Second Injury Fund pay permanent total disability benefits to the employee. The Second Injury Fund's liability for permanent total disability does not begin until July 8, 2012 as they are entitled to credit due to the settlement between the employee and the employer-insurer. The Court computes the settlement for the primary injury to equate to 352.50 weeks of disability.

The Court finds that the employee reached maximum medical improvement as of October 4, 2005. Giving the Second Injury Fund the credit that they are due the Second Injury Fund shall begin making permanent total disability payments of \$288.95 per week beginning July 8, 2012. These payments for permanent total disability shall continue for the remainder of the employee's lifetime or until suspended if the employee is restored to her regular work or its equivalent as provided in Section 287.200 RSMo.

ATTORNEY'S FEE:

Chris N. Weiss, 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

Employee: Donna E. Todd

Injury No. 05-099965

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation