

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

Injury No.: 00-176994

Employee: Dwight Watson  
Employer: Ameristar Hotels and Resorts  
Insurer: American Protection Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: October 16, 2000  
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 3, 2007. The award and decision of Administrative Law Judge Margaret D. Landolt, issued May 3, 2007, 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 5<sup>th</sup> day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

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

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Dwight Watson

Injury No.: 00-176994

Dependents: N/A  
Employer: Ameristar Hotels and Resorts  
Additional Party: Second Injury Fund  
Insurer: American Protection Insurance Company  
Hearing Date: February 15, 2007

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

Checked by: MDL:tr

### 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: October 16, 2000
5. State location where accident occurred or occupational disease was contracted: St. Louis
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 was lifting chafing pans when he felt pain in his back.
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: Low back
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$84,489.66
16. Value necessary medical aid paid to date by employer/insurer? \$188,191.58

Employee: Dwight Watson Injury No.: 00-176994

17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$364.72/\$314.26
20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability benefits from Employer beginning July 13, 2005,  
and thereafter for Claimant's lifetime

\*

(\* represents an indeterminate lifetime amount)

22. Second Injury Fund liability: No

TOTAL: \*

23. Future requirements awarded: Future medical benefits pursuant to Award

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:

Ms. Linda Powers

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Dwight Watson	Injury No.:	00-176994
Dependents:	N/A	Before the	
Employer:	Ameristar Hotels and Resorts	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund	<b>Compensation</b>	
Insurer:	American Protection Insurance Company	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	MDL:tr

### PRELIMINARIES

A hearing was held on February 15, 2007, at the Division of Workers' Compensation in the City of St. Louis. Dwight Watson (Claimant) was represented by Ms. Linda Powers. Ameristar Hotels and Resorts (Employer) and its Insurer, American Protection Insurance Company, were represented by Mr. Martin Klug. The Second Injury Fund was represented by Assistant Attorney General Eileen Krispin. Ms. Powers requested a fee of 25% of Claimant's award.

The parties stipulated that on or about October 16, 2000, Claimant sustained an accident arising out of and in the course of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated the applicable rates of compensation are \$364.72 for total disability benefits and \$314.26 for permanent partial

disability benefits. Employer has paid \$84,489.66 in TTD benefits through the date of hearing for a period of 231 5/7 weeks of compensation and has continued to pay TTD benefits. Employer also paid medical benefits of \$188,191.58.

The issues for resolution by hearing are medical causation; liability of Employer for future medical treatment; what is the nature and extent of permanent disability sustained by Claimant; and what is the liability of the Second Injury Fund.

### FINDINGS OF FACT

Claimant is a 48 year old man who is not currently married. He has six children, two of whom are dependent upon him for support, his eleven year old son and a four year old girl who he is in the process of adopting. Claimant completed the 10th grade and started on the 11<sup>th</sup>, but never received his GED. Claimant had learning difficulties, and has always had trouble with math, English, and writing.

For twenty years, Claimant worked for Employer as a banquet set-up waiter. His job involved moving tables and chairs, setting up catering jobs, and waiting tables. The job involved heavy lifting and was very physical. Claimant has had no other jobs outside of the banquet/catering industry. Prior to October 2000, Claimant never experienced problems or injuries with his back, or sought medical treatment for his back. He worked overtime as needed and he sometimes worked 12-hour days.

On October 16, 2000, while lifting chafing pans, Claimant felt a pull with numbness and tingling down his left leg. He finished his shift. He continued to work through October and November, although he was having trouble with his back and left leg. On December 1, 2000, he was setting up a dance floor, and he felt a hard pull on his left side. This pain was in the same place as before, but was more intense. Claimant continued to work after that incident.

In December, Claimant saw Dr. Simpson, his personal physician. Dr. Simpson ordered an MRI which was performed on February 6, 2001, and revealed a large disc protrusion at L4-5 causing severe spinal canal stenosis and a broad disc herniation at L3-4 causing moderate spinal canal stenosis. There was also a disc bulge at L2-3. He also saw a chiropractor who referred him to a neurosurgeon. Employer then sent him to Dr. Covert, and he was eventually referred to Dr. Paul Young. Dr. Young performed an L5-S1 microdiscectomy on June 12, 2001. The postoperative diagnosis was noncontained extrusion of L5-S1, left. Following his surgery, Claimant underwent physical therapy.

Claimant testified his back got worse after his first surgery. Dr. Young recommended a second surgery which was performed on October 19, 2001. Claimant underwent a repeat lumbar microdiscectomy L5-S1, left. The postoperative diagnosis was recurrent disc herniation, L5-S1, left. Claimant had additional physical therapy following his second surgery.

Claimant returned to work after his second surgery for a short time, but had to be taken off work again when his symptoms increased. Dr. Young referred Claimant to Dr. Cantrell who ordered a Functional Capacity Examination. Claimant's FCE revealed Claimant was unable to function in the work demand level of a banquet server due primarily to his inability to carry a 30-pound food tray for greater than 105 feet. It was noted Claimant exerted acceptable effort. He had consistent subjective pain complaints, and exhibited physiological responses to pain with an increase of heart rate, sweating, and facial grimacing. Waddell signs were negative. Following his FCE, Claimant experienced an increase in symptoms which required him to go to the emergency room for treatment.

Because he was still in pain, Claimant was eventually referred to Dr. Scodari on July 1, 2002. After reviewing an MRI, Dr. Scodari felt Claimant had a large herniated disc at L5-S1 associated with significant scarring and degenerative disc disease. He recommended a posterior decompression, discectomy and possible fusion.

Before attempting a third surgery, Claimant attempted conservative treatment through Dr. Graham, a pain management specialist, who evaluated Claimant on July 24, 2002. He felt he had little to offer Claimant in the way of treatment and referred Claimant to Dr. Kennedy. On January 28, 2003, Dr. Kennedy performed Claimant's third

surgery, a lumbar laminectomy L4-5, and posterior spinal fusion with left iliac crest bone graft and Steffe instrumentation at L4-5. The postoperative diagnoses were recurrent herniated disc L4-5, transitional left; and transection of S1 nerve root L5, transitional. Following his third surgery, Claimant went to another rehabilitation program. Eventually, Claimant returned to work after his third surgery, but was unable to do his job and had more pain management.

Following Claimant's return to work, his symptoms increased. On January 13, 2004, Dr. Kennedy stated that in terms of the work injury, Claimant was at maximum medical improvement. He imposed permanent lifting restrictions of no lifting over ten pounds, and no bending, twisting or stooping. He stated Claimant would likely require ongoing treatment to include medicine in the future. Following a myelogram, Dr. Kennedy performed a fourth surgery on November 9, 2004. Claimant underwent a removal of instrumentation, exploration of fusion mass L4-5; right iliac bone graft harvest with Helios aspiration, decompressive laminectomy L3-4; and pedicle screw fixation and fusion L2-L4. The postoperative diagnoses were juxtafusal stenosis L2-4; and status post L4-5 fusion. Following his fourth surgery, Claimant was referred to Dr. Rachel Feinberg for pain management.

Dr. Feinberg treated Claimant extensively with injections, medications and exercise. Claimant felt somewhat better. On July 13, 2005, Dr. Kennedy found Claimant to be at MMI. He stated he felt it was unlikely Claimant would be able to return to work in a gainful capacity because of the ongoing pain he has, his difficulty with sitting or standing for more than a few minutes at a time without alternating positions, and a need for ongoing pain medications. Dr. Feinberg, on September 26, 2005, opined Claimant was completely and totally disabled and would need future ongoing narcotic medication and medication management. Claimant last saw Dr. Feinberg two months before the hearing. She will continue to treat him, and continues to give him injections when he needs them.

In a typical day, Claimant arises at 5:30 a.m. and takes care of his children. He is in constant pain. He does some chores, although it takes a while. He is able to do laundry. He does some gardening with the help of a friend. He is able to drive a car and does some grocery shopping. An older daughter helps him by cutting the grass and shoveling the snow. He uses a cane to walk longer distances. He has to lie down periodically during the day due to his back.

Before the back injury, Claimant had carpal tunnel syndrome. He underwent surgeries around 1996. He also had trigger finger on the right hand. The wrist surgeries were part of a workers compensation claim, and he received a settlement of approximately \$10,000.00.

Following his carpal tunnel surgeries and leading up to 2000, Claimant testified he had symptoms of numbness and grip strength problems. Sometimes he dropped things and he had problems picking up small items. He asked people to help him out. After Claimant had his carpal tunnel and trigger finger surgeries, he had no restrictions on his job duties. He was always able to complete his job duties. Before October of 2000, he was pretty active.

Claimant flunked classes in high school. He testified he can read newspapers and balance a checkbook. Claimant was never diagnosed with a learning disability and never went to any remedial classes in school. He trained as a welder in the Job Corps.

Claimant testified after his first back surgery, he helped out his common law wife who was head banquet manager at Washington University. He helped her out with a catering job at SIU. He did some cleaning and sweeping. After the third surgery, Dr. Kennedy gave Claimant permanent restrictions, and he did not try to find another job after that.

Claimant has been trying to get better. He can do more exercise now than he could immediately after his back surgeries. He can ride a bike and stretch now. He can sit for up to an hour if he takes his medications, and is able to take care of his children. He has good days and bad.

Dr. Kennedy testified on behalf of Claimant. Dr. Kennedy testified he did not think Claimant could work. Dr. Kennedy testified that the lifting incident in 2000 was the substantial and prevailing factor in causing Claimant's back condition, his need for surgeries and his current disability. According to Dr. Kennedy, his opinion with regard

to Claimant's permanent and total disability, including the effect his medications have or would have on him, are all due to his back pain specifically related to an injury in 2000.

Dr. Rachel Feinberg testified on behalf of Claimant. On December 2, 2004, Dr. Feinberg examined Claimant. Dr. Feinberg testified Claimant's thoracic spine had very poor movement, which indicated that any tension on the nervous system, such as lying on his stomach, would exacerbate the pain. She explained that he would get severe pain with certain motions.

According to Dr. Feinberg's review of the records, Claimant was injured when lifting a chafing pan. As he did not get treatment immediately, the spine got worse. It was this injury which led to a series of operations. This changed the alignment of the spine, which led to Dr. Feinberg's final diagnoses of complex chronic pain syndrome with severe mood disorder, hypersensitivity, post laminectomy syndrome post fusion, sacral torsion, thoracic spondylosis and cervical spondylosis.

Dr. Feinberg testified that the chafing pan incident in 2000 was a substantial factor in the injuries that led to the subsequent operations. She also testified that based upon a reasonable degree of medical certainty the injury in 2000 resulted in permanent total disability. When asked if the alleged incident in December of 2000 where his pain flared would change her opinion, she indicated that it would not.

Dr. Feinberg testified Claimant will periodically need some form of physical therapy and rehabilitation; radio-frequency ablation to maintain the function that he has; ongoing pain medication, and possibly injections.

Dr. Feinberg testified she did not review any records relative to Claimant's carpal tunnel syndrome. She also did not discuss any complaints of carpal tunnel syndrome. Dr. Feinberg testified that whether or not Claimant had carpal tunnel syndrome, he is disabled because of his spine.

Mr. England, a vocational expert, testified on behalf of Claimant. Mr. England reviewed medical records and other background information, and also personally met with Claimant. Mr. England found Claimant was totally disabled from a vocational standpoint absent significant improvement in his physical capabilities. Mr. England testified that the prior carpal tunnel condition did not represent a vocational impairment because of the description of the use of Claimant's hands all day long prior to 2000. Given someone with Claimant's age, education and work experience, Mr. England does not believe there are any jobs in the open labor market which would allow someone to lie down for 45 minutes to an hour an average of three times a day.

#### RULINGS OF LAW

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

Claimant is permanently and totally disabled due to the last injury alone. Claimant's work accident in October 2000 was the cause of Claimant's medical condition.

Section 287.220.1 Mo. Rev. Stat. (1994) provides that where previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Searcy v. McDonnell Douglas Aircraft Co, 894 S.W.2d 173, 177-78 Mo. App. 1995) (overruled on other grounds by Hampton v. Big Boy Steel Erectors, 121 S.W.3d 220 (Mo. 2003); Reiner v. Treasurer of State of Missouri, 837 S.W.2d 363, 366 (Mo. App. 1992) (overruled on other grounds by Hampton v. Big Boy Steel Erectors, 121 S.W.3d 220 (Mo. 2003); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo.App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

Where the last injury alone causes the employee to become permanently and totally disabled, the employer is liable for permanent disability compensation under Section 287.200. In determining Second Injury Fund liability, the first determination is the degree of disability from the last injury considered alone. Hughey v. Chrysler Corp. and Treasurer of Missouri, 34 S.W.3d 845, 847 (Mo. App. 2000). After that has been determined, then the extent of preexisting disabilities is to be determined. Lastly, the fact finder determines whether the preexisting disabilities combine with disabilities from the

primary injury to create permanent total disability. Where the combination of those disabilities causes permanent total disability, the Second Injury Fund is liable for permanent total disability, but only after the employer has paid the compensation due for the disability resulting from the primary injury. Searcy v. McDonnell Douglas Aircraft Co. 894 S.W.2d 173, 177-78 (Mo. App. 1995) (overruled on other grounds by Hampton v. Big Boy Steel Erectors, 121 S.W.3d 220 (Mo. 2003); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985) (overruled on other grounds by Hampton v. Big Boy Steel Erectors, 121 S.W.3d 220 (Mo. 2003). If the claimant's last injury considered in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. Hughey at 847.

The only two medical experts who testified were Drs. Kennedy and Feinberg. Their testimony is uncontroverted. Dr. Kennedy testified that the lifting incident in 2000 was the substantial and prevailing factor in causing Claimant's back condition, his need for surgeries and his current disability. According to Dr. Kennedy, his opinion with regard to Claimant's permanent and total disability, including the effect his medications have on him, are all due to back pain specifically related to an injury in 2000. Based upon a reasonable degree of medical certainty, Dr. Kennedy testified he did not think Claimant could work.

Dr. Feinberg testified that the chafing pan incident in 2000 was a substantial factor in the injuries that led to the subsequent operations. She also testified that based upon a reasonable degree of medical certainty the injury in 2000 resulted in permanent total disability.

Mr. England testified he does not see how Claimant would be able to sustain any kind of regular work activity. Mr. England took into account Claimant's performance on the vocational skills test and intelligence testing, his physical disabilities, his age, his vocational history and his educational history.

Claimant testified he did have symptoms of numbness and grip strength problems before 2000. However, he was able to perform his job duties and even worked overtime as needed. Sometimes he would work 12 hour days and he described his work as physical.

Mr. England testified he was not aware of any restrictions due to the carpal tunnel complaints. He even testified that the prior carpal tunnel condition did not represent a vocational impairment. Mr. England did not take Claimant's carpal tunnel complaints into account in his opinion of employability.

There are no medical records in evidence regarding carpal tunnel syndrome, nor is there any opinion of permanent partial disability relative to the wrists. In addition, Dr. Feinberg testified that whether or not Claimant had carpal tunnel syndrome, he is disabled because of his spine.

Based on all of the evidence, I find Claimant is permanently and totally disabled as a result of the primary work-related injury alone, and not as a result of the combination of the preexisting injuries and the primary injury. There is no liability on the part of the Second Injury Fund.

Employer shall provide future medical care to cure and relieve Claimant from the effects of his work related injury. Dr. Feinberg testified Claimant will need ongoing pain management. Employer shall provide Claimant with future medical care including, but not limited to, physical therapy, and pain management including medications, injections and other procedures deemed necessary by a pain management specialist.

This award is subject to an attorney's lien in the amount of 25% in favor of Claimant's attorney, Linda Powers.

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

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

Margaret D. Landolt  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secret  
Director  
Division of Workers' Compensation

