

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

Injury No.: 98-103055

Employee: Nancy Werner-Leible
Employer: Le Lu Metalcraft
Insurer: American Protection Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: September 17, 1998
Place and County of Accident: St. Louis County

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. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated February 7, 2007.

I. Preliminary Matters

The Commission affirms all findings and conclusions of the administrative law judge, but for the finding that employee is permanently and totally disabled as a result of the work injury alone. The administrative law judge concluded that 1) employee's back injury was medically and causally related to her work injury; 2) employee is entitled to future medical care and treatment for her knees and back; and 3) employee is permanently and totally disabled as a result of her work injury alone, and she is entitled to permanent total disability payments beginning March 30, 2005.

II. Second Injury Fund Liability

Permanent Total Disability

The Commission disagrees with the determination that employee is permanently and totally disabled due to the last injury in and of itself. Rather, we believe the evidence demonstrates that employee is permanently and totally disabled as a result of the combination of her work injury and pre-existing disabilities, triggering Second Injury Fund liability.

To trigger the liability of the Second Injury Fund, an employee must have a pre-existing permanent partial disability, whether from a compensable injury or otherwise. Section 287.220.1; "The permanent disability pre-dating the injury in question must 'exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed.'" See also 287.220.1. To determine whether a pre-existing partial disability constitutes a hindrance or obstacle to the employee's employment, "the Commission should focus on the potential that the pre-existing injury may combine with a future work related injury to result in a greater degree of disability than would have resulted if there was no such prior condition." Liability of the Second Injury Fund is triggered only "by a finding of the presence of an actual and measurable disability at the time the work injury is sustained."

E. W. v. Kansas City, Missouri, School District, 89 S.W.3d 527, 537 (Mo.App. W.D. 2002), overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

The record demonstrates that employee did suffer from actual and measurable disabilities at the time of her work-related injury that were a hindrance or obstacle to employment. Therefore, employee is not permanently and totally disabled as a result of the work injury alone. The evidence supports a finding that employee's pre-existing disabilities combined with her work-related injury to render her permanently and totally disabled.

Employee provided testimony with regard to her pre-existing conditions. She testified that she was diagnosed with fibromyalgia several years preceding her work-related injury. She testified that her symptoms from the condition included: chronic fatigue, depression, sleep deprivation, achiness, weakness, poor grip, tenderness and difficulty raising her arm. She stated that most days she feels like she has the flu. Employee testified that she has received continuous treatment for the condition since she was diagnosed. She takes prescription medication and receives trigger point injections when she needs additional relief. Employee testified that prior to 1998 that she was having a lot of problems with sleep and depression as well as pain and fatigue. She testified that she experienced these symptoms on a daily basis. Employee also testified that she had carpal tunnel syndrome on the right and subsequently had surgery in 1983 or 1984. Following the surgery employee had a resumption of her symptoms including tingling and numbness in her right hand as well as to pain in her wrist and arm.

Employee also provided testimony regarding disabilities resulting from her work injury. She testified that she continues to experience persistent pain in her back and bilateral knees. Employee testified that she must elevate her legs for approximately half the day in order to help alleviate her knee pain. She testified that she began experiencing persistent back pain following her right total knee replacement in 2001. An MRI in November 2001 revealed a moderate central disc protrusion. Employee testified that the back pain persisted after her left total knee replacement in 2002. A second MRI in December 2003 revealed a central disc herniation with degenerative findings and facet disease. Employee testified that she continues to suffer chronic back pain for which she receives epidural steroid injections.

Employee's testimony was supported by expert opinions of Dr. Poetz and Mr. England. With regard to her work-related injury, Dr. Poetz opined employee suffered a 50% permanent partial disability to the lower right extremity as measured at the right knee directly resultant from the September 17, 1998 injury and a 50% permanent partial disability to the lower left extremity as measured at the left knee directly resultant from the September 17, 1998 injury. Dr. Poetz opined employee suffered a 40% permanent partial disability (30% work-related and 10% pre-existing) rated at the spine.

Dr. Poetz provided ratings regarding employee's pre-existing conditions. He concluded employee suffered a 25% permanent partial disability to the body as a whole due to fibromyalgia; a 35% permanent partial disability to the upper right extremity as measured at the right hand and wrist; and a 20% permanent partial disability to the body as a whole as measured at the cardiovascular system. Dr. Poetz opined employee was permanently and totally disabled as a result of the combination of the September 17, 1998 injuries and her pre-existing conditions.

Furthermore, Mr. James England, vocational expert, evaluated employee on January 3, 2003. He opined that employee's pre-existing problems, predominately fibromyalgia, combined with her work injury to render her permanently and totally disabled. Mr. England provided competent testimony that employee's pre-existing conditions impeded her employment and affected her ability to compete in the open labor market.

Employee has sustained her burden of proving Second Injury Fund liability as her testimony along with both medical and vocational experts support a finding that she is permanently and totally disabled as a result of the combination of pre-existing disabilities and her work-related injury.

After considering the entire record, including the expert opinions of Dr. Poetz and Mr. England, we conclude that employee is permanently and totally disabled due to a combination of her pre-existing disabilities and September 17, 1998 work-related injury.

III. Future Medical Care and Treatment

The Commission agrees that employee has proven the need for ongoing medical care and treatment with regard to her bilateral knees and back condition. The need for future medical care was established as being reasonably

probable through competent, medical testimony. Dr. Maloney's records establish that employee will need ongoing treatment with regard to her knee replacements. Employee has also undergone epidural steroid injections which were recommended by Dr. Metzler to treat her chronic back condition. He also opined that he would not completely rule out the possibility of surgical referral in the future if employee's pain should become more severe or if she should develop new neurological symptoms. Therefore, we award future medical care and treatment for employee's bilateral knees and back condition.

IV. Conclusion

The Commission concludes that the competent and substantial evidence supports a finding that employer is liable for 50% permanent partial disability to the body as a whole referable to bilateral knees and low back as a result of her work injury of September 17, 1998. We find employee suffered the following pre-existing disabilities: 20% permanent partial disability to the body as a whole due to fibromyalgia; 12.5% permanent partial disability to the body as a whole referable to the right upper extremity; and 20% permanent partial disability to the body as a whole referable to the cardiovascular system. We find the combination of employee's pre-existing disabilities and her work-related injury render her permanently and totally disabled.

Employer shall pay employee permanent partial disability benefits in the weekly amount of \$294.73 and the Second Injury Fund shall pay the difference of \$38.60, beginning March 30, 2003 for 200 weeks; and thereafter, employee shall receive permanent total disability benefits from the Second Injury Fund in the weekly amount of \$333.33 for the remainder of her lifetime, or until as modified by law.

We award future medical care and treatment to cure and relieve employee from the residuals and effects of her injury related to her bilateral knees and back, pursuant to the provisions of section 287.140 RSMo.

As stated above, all remaining findings of fact and conclusions of law are affirmed.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued February 7, 2007, as modified, 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 25th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Nancy Werner-Leible Injury No.: 98-103055

Dependents: n/a

Before the

Division of Workers'

Employer: Le Lu Metalcraft

Compensation

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: American Protection Insurance Company

Hearing Date: November 29, 2006

Checked by: KMH

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: September 17, 1998
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:
Claimant tripped at work.
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: Both lower extremities and back
14. Nature and extent of any permanent disability: Permanent and total
15. Compensation paid to-date for temporary disability: \$108,498.59
16. Value necessary medical aid paid to date by employer/insurer? \$217,541.12

Employee: Nancy Werner-Leible Injury No.: 98-103055

17. Value necessary medical aid not furnished by employer/insurer? None

- 18. Employee's average weekly wages: \$500.00
- 19. Weekly compensation rate: \$333.33/\$294.73
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Future medical expenses: *

Permanent total disability benefits from Employer beginning
March 30, 2005, for Claimant's lifetime **

(all use of an asterisk denotes uncertain contingent benefits)

22. Second Injury Fund liability: No

TOTAL: * **

23. Future requirements awarded: See 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:

James Herd

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Nancy Werner-Leible

Injury No.: 98-103055

Dependents: n/a

Before the

Employer: Le Lu Metalcraft
Additional Party: Second Injury Fund
Insurer: American Protection Insurance Company

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

Checked by: KMH

PREFACE

A hearing was held on the above captioned matter November 29, 2006. Nancy Werner-Leible (Claimant) was represented by attorney James Herd. Le Lu Metalcraft (Employer) and American Protection Insurance Company (Insurer) were represented by attorney Martin Klug. The Second Injury Fund (SIF) was represented by Assistant Attorney General Eileen Krispin.

A Temporary Award was issued on this case September 10, 2003, by another Administrative Law Judge. Pursuant to that award, Employer has provided ongoing medical treatment for Claimant's knees and back as well as temporary disability benefits (TTD). The parties appeared for trial November 29, 2006, seeking a final award. At the beginning of that hearing, the parties stipulated Employer has paid a total of \$217,541.12 in medical benefits and TTD benefits were paid through March 29, 2005, totaling \$108,498.59.

ISSUES

The parties stipulated the issues to be resolved by way of final hearing are as follows:

1. Whether Claimant is entitled to future medical care.
2. Whether Claimant is entitled to TTD benefits after March 29, 2005.
3. Whether Claimant is entitled to permanent partial or permanent total disability.
4. Second Injury Fund liability.

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FINDINGS OF FACT

Based on all the previous findings of facts and on the substantial and competent evidence adduced at both hearings as well as the reasonable inferences to be derived therefrom, I find the following facts:

1. I hereby adopt and reissue all previous findings of fact as if fully set forth herein.
2. Since the temporary award was issued, Employer has provided TTD benefits and medical treatment to Claimant for both knees and her back.
3. Claimant began having back problems for the first time in 2000. As a result of ongoing complaints of pain, an MRI was performed in December 2003 which revealed a herniated disc at the L4-5 level. She has had, and she continues to receive, injections every few months to relieve the pain. Dr. Metzler discussed but recommended she not pursue surgery. He believes the surgery would be a fusion with unpredictable

medical consequences, and this should only be considered if her pain becomes severe and she develops new neurological symptoms. Claimant is getting relief with the injections, and Dr. Metzler believes this is the best way to manage her pain. Although Claimant continues to have pain in her back and lower extremities, she is fearful of surgery and prefers to continue managing her pain through injections.

4. Claimant had her right knee replaced in 2001 and her left knee replaced in 2002. Claimant's knee surgeon moved out of the state, so Employer sent her to Dr. Williams in early 2005. He found she had reached maximum medical improvement regarding her knees on March 8, 2005. At that time, she had just finished a round of physical therapy which the doctor noted aggravated Claimant's back condition. Claimant continues to see a doctor annually for her knees.
5. Due to Dr. Williams' finding of maximum medical improvement with regard to the knees, Employer filed a motion to suspend TTD payments. This motion was heard May 3, 2005, and Judge Schwendemann allowed Employer to discontinue TTD payments effective March 29, 2005. Claimant has received no TTD payments since that time and has not worked since Dr. Haupt released her from treatment in March 2000.
6. Claimant continues to have significant physical restrictions on her daily activities. She has constant back pain which radiates into both legs. If she stands for even a short time, she has intense pain in her back and her knees swell. She has to lie down or elevate her legs at least half of the day. She is unable to lean forward without pain in her low back. She is unable to lift more than five pounds without pain in her right side. Driving aggravates her low back, right leg and right foot. Claimant ascends and descends stairs one at a time, and she can not kneel because of pain in her knees. Her left leg buckles two or three times a week, and her right leg occasionally buckles. She is unable to squat to do housework. She has difficulty sleeping more than a few hours because of her pain. She has carpal tunnel in her left hand and surgery was recommended. This is not related to this claim. She continues to take Vicodin daily to relieve her back and knee pain. She also has visible bruising and staining on her skin. Dr. Lauter told her she may have developed Cushing's disease, a serious side effect of her cortisone treatments.
7. Each of Claimant's treating doctors, except Dr. Williams, has given her significant permanent restrictions.
8. Prior to her 1998 injury, Claimant participated in exercise classes and water sports. She is unable to continue these activities due to her injuries and has gained 52 pounds since her 1998 injury.
9. Claimant has been receiving Social Security Disability benefits since March 6, 2000.
10. Claimant was diagnosed with fibromyalgia in the early 1990s. While she had some treatment before her work injury, this condition has gotten worse since the injury as it is triggered by stress and anxiety. Claimant also was diagnosed with depression and anxiety before her work injury. Since her work injury, these conditions have gotten worse and Claimant continuously feels achy, depressed, nervous and anxious.
11. In 1994, Claimant had a cardiac ablation to relieve her rapid heartbeat. She continues to take medication which controls this condition.
12. Claimant had left knee surgery in 1994. Within a few weeks of surgery, her knee felt better and she was able to return to work full time. She worked eight to ten hour days and often wore high heels to work even after this surgery.
13. Claimant graduated from high school in 1969. She has no other vocational training or education. She worked as a receptionist for a few years and as an order taker for a few years before going to work for Employer in 1976.
14. Claimant is credible. During her testimony, she was in obvious discomfort and sat with her right leg extended. She testified in a very straightforward manner and had a good understanding of her medical history.

RULINGS OF LAW

I hereby adopt and incorporate as if fully set forth herein all previous Rulings of Law to the extent they do not conflict with the rulings herein. Based upon the previous and the above Findings of Fact, the testimony, the

competent and substantial evidence presented, the applicable law, and having given careful consideration to the entire record, I find the following:

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1. Claimant's back injury is medically and causally related to her work injury.

Employer argues in his proposed award that Claimant's back condition is not medically and causally related to her knee injuries. Judge Vacca previously ruled on this issue and found Claimant's back was injured due to her altered gait from her knee injuries. He found Claimant's work accident was a substantial factor in producing her back injury.

The initial medical causation of Claimant's back condition was not identified as an issue at the second trial. At the beginning of the second trial, the parties stipulated the issues to be tried were future medical, TTD, PPD, PTB, and SIF liability. The question of the scope of an award was addressed by our appellate courts in *Boyer v. National Express Company*, 49 S.W.3d 700 (Mo. App. E.D. 2001). The *Boyer* court stated as follows:

"...the administrative law judge should confine the evidence during the hearing to the stated contested issues. ...Stipulations are controlling and conclusive, and the courts are bound to enforce them. ...A stipulation should be interpreted in view of the result, which the parties were attempting to accomplish. ...In *Lawson*, our colleagues in the Southern District concluded that the Commission acted in excess of its powers in making its award on grounds not in issue. *Lawson v. Emerson Electric Company*, 809 S.W.2d at 126."

While the court in *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, 558 (Mo.App. E.D. 2006) found that "findings and conclusions made by an ALJ in a temporary award are not binding on any subsequent proceeding", the court also found that in order "to modify a temporary award, the ALJ in the final award must find there was "additional significant evidence" not before the ALJ at the temporary award." *Id.* 558

At this hearing for a final award, no significant new evidence was produced to show Claimant's back injury was not related to her work injury as was determined at the temporary award hearing. Therefore, consistent with *Jennings* and *Boyer*, and the stipulations of the parties, I have no jurisdiction, no significant evidence, and no good reason to alter that finding or ruling.

2. Claimant is entitled to ongoing medical care for her knees and her back.

Section 287.140.1 "entitles the worker to medical treatment as may reasonably be required to cure and relieve from the effects of the injury." *Ford v. Wal-Mart Associates, Inc.*, 155 S.W.3d 824, 828 (Mo.App. E.D. 2005) (citations omitted). It is sufficient to award future medical benefits if the claimant shows by reasonable probability that he is in need of additional medical treatment by reason of his work-related accident. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 437 (Mo.App. E.D. 2001).

Claimant testified, and the medical records corroborate, she continues to receive medical attention for her back and her knees. She has annual appointments for her knees. She has an injection every few months and takes prescription medications to relieve her pain. She may need a fusion surgery when and if the back pain becomes intolerable. Employer is hereby ordered to provide open medical treatment to continue to cure and relieve Claimant of the effects of her injuries to her right knee, her left knee, and her low back.

3. Claimant is permanently and totally disabled as a result of her work injury alone, and she is entitled to PTB payments beginning March 30, 2005.

Claimant alleges she is permanently totally disabled. *Chatmon v. St. Charles County Ambulance District*, 55 S.W.3d

451 (Mo. App. E.D., 2001) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo., 2003)) outlines the basis for permanent total disability.

“Total disability” means inability to return to any employment and not merely... inability to return to the employment in which employee was engaged at the time of the accident.” §287.020.7 (RSMo 2000). “The test for permanent total disability is a worker’s ability to compete in the open labor market in that it measures the worker’s potential for returning to employment.” *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. 2000). “The critical question then becomes whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition.” *Reese v. Gary and Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. 1999).

Dr. Morrow, Dr. Poetz, Dr. Metzler and Dr. Haupt each imposed significant restrictions on Claimant as a result of her knee injuries. Dr. Lauter found Claimant had an “overall inability to function normally.” Dr. Williams is the only doctor to testify Claimant’s knees are better than before their surgeries and she has no restrictions at all.

Employer’s vocational expert, Michael Brethauer, found Claimant was employable. However, he did not personally interview or observe Claimant before coming to this conclusion. He also did not consider Claimant’s self-reported complaints or the medical opinion of her expert. He testified he only considered what the medical practitioners believe she can or cannot do. He did agree that if in fact Claimant does have to lay down every few hours to relieve her pain, she would not be employable in the open labor market. The only credible testimony on this issue was Claimant’s. She testified she must rest and elevate her legs for half the day to relieve pain and swelling in her legs.

Claimant’s vocational expert, Jim England, found Claimant was unable to compete in the open labor market in January 2003 due to her work restrictions and her need to frequently elevate her legs.

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Based on the substantial and competent evidence, I find Claimant is unemployable in the open labor market and is permanently and totally disabled. The evidence shows she suffers chronic pain that will inevitably return even with treatment and that this pain prevents her from sustaining employment. I next must determine whether the total disability is the result of Claimant’s work injury alone or is due to a combination of her injuries. In *Hughey v. Chrysler Corp.*, 34 S.W.3d 845 (Mo. App. E.D. 2000), the court held that:

“In deciding whether the Second Injury Fund has any liability, the first determination is the degree of disability from the last injury. Until that disability is determined, it is not known whether the second injury fund has any liability. Accordingly, a claimant’s preexisting disabilities are irrelevant until employer’s liability for the last injury is determined. If a claimant’s last injury 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.”

Id at 847 (citations omitted)

I find Claimant’s permanent and total disability is a result of her work injury alone. Claimant worked more than full time before her injury. She has not been able to work for several years due to her constant pain and her significant restrictions as a result of the last injury. While Claimant did have some pre-existing conditions, these were significantly worsened after her work injury, and I find her restrictions resulting from her work injury are substantial enough considered alone to render her totally disabled. This finding is corroborated by the deposition testimony of Dr. Poetz, Jim England and Michael Brethauer.

I find Claimant’s disability become permanent when she was released from treatment for her knees and determined to be at maximum medical improvement in March 2005. Employer paid temporary disability benefits through March 29, 2005. Employee is hereby awarded PTD benefits from Employer beginning March 30, 2005, at the stipulated rate of \$333.33/week, and the benefits continue for as long as Claimant lives.

4. The Second Injury Fund has no liability and is hereby dismissed.

Based on the findings of fact and rulings of law heretofore made, the SIF has no liability and is dismissed.

Date: _____

Made by:

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Nancy Lieble v. Le Lu

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