

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

Injury No.: 95-193728

Employee: Cathy Werremeyer
Employer: Yesterdays Restaurant (Settled)
Insurer: Argonaut Great Central Ins. Co. (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 25, 2009. The award and decision of Administrative Law Judge Linda J. Wenman, issued August 25, 2009, 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 21st day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Cathy Werremeyer	Injury No.:	95-193728
Dependents:	N/A		Before the
Employer:	Yesterdays Restaurant (settled)		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Argonaut Great Central Ins. Co. (settled)		Department of Labor and Industrial
Hearing Date:	June 11, 2009		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	LJW

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: November 11, 1995
5. State location where accident occurred or occupational disease was contracted: St. Louis City, MO
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 slipped on a wet floor while carrying glasses sustaining a serious right hand injury.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right hand
14. Nature and extent of any permanent disability: 80% PPD referable to right hand previously paid by Employer. PPD benefits from SIF.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$280.00

Employee: Cathy Werremeyer

Injury No.: 95-193728

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$600.00
- 19. Weekly compensation rate: \$400.00 / \$257.29
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Second Injury Fund liability: Yes

20 weeks of permanent partial disability from Second Injury Fund	\$5,145.80
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TOTAL:	\$5,145.80
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22. Future requirements awarded: N/A

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 in favor of the following attorney for necessary legal services rendered to the claimant: William Gallagher

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Cathy Werremeyer	Injury No.: 95-193728
Dependents:	N/A	Before the
Employer:	Yesterdays Restaurant (settled)	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Argonaut Great Central Ins. Co. (settled)	Checked by: LJW

PRELIMINARIES

A Second Injury Fund hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on June 11, 2009. The case was formally submitted at the close of testimony. Attorney William Gallagher represented Cathy Werremeyer (Claimant). Assistant Attorney General Toni Camp represented the Second Injury Fund (SIF).

On January 15, 2004, Claimant and Yesterdays Restaurant (Employer) reached a compromise settlement regarding Employer's liability in this claim. The stipulation for compromise settlement represented 80% PPD referable to her right wrist due to an accidental injury.

Prior to the start of the hearing the parties identified the issue for disposition in this case as the liability of SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits. Claimant offered Exhibits A-J, and SIF offered Exhibit I. The exhibits were admitted into the record without objection. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. On the date of injury, Claimant was forty-three years old, completed either the 10th or 11th grade, and does not possess a GED. Claimant has held jobs as an elevator operator, airport shuttle bus driver, and as a waitress.

2. On November 11, 1995, Claimant was working as a waitress for Employer when she slipped on a wet floor while carrying glasses. Upon falling, Claimant sustained a severe right hand injury. Following a protracted period of medical treatment, Claimant declined further treatment and settled her case with Employer for 80% PPD referable to her right wrist. Claimant continues to struggle with significant disability involving her right hand. Claimant experiences numbness

in her 3rd, 4th, 5th fingers, and the ulnar side of her right hand. Claimant also has difficulty gripping with her right hand, and has finger deformity with her 5th finger crossing over her 4th finger. Claimant is right hand dominant.

3. Claimant has the following preexisting conditions: asthma that was diagnosed in 1993, and on July 31, 1995, was determined to be “very stable” by Dr. Henselmeier, her personal physician; osteoporosis that was diagnosed in 1993 by endocrine expert, Dr. Etzkorn, who found Claimant’s physical examination unremarkable, and recommended Claimant stop smoking, walk, take calcium supplements and Fosamax, and start estrogen replacement at the onset of menopause; a right clavicle fracture in 1992; right shoulder tendinitis treated by a cortisone injection; a thirty year history of narcolepsy that was diagnosed and treated by neurologist, Dr. Hanaway, who noted in 1994 through 1996 that Claimant’s condition was under good control with medication; chronic neck complaints with x-rays demonstrating disc space narrowing at C3-6; and cardiac surgery at age four to correct a septal defect without further cardiac problems.

4. Dr. Poetz, a general practitioner, examined Claimant at her request on June 22, 2004. Dr. Poetz rated Claimant’s primary injury at 80% PPD referable to the right hand. Dr. Poetz noted Claimant’s history of preexisting injuries, and rated Claimant’s preexisting injuries as follows: 20% BAW PPD referable to osteoporosis; 10% BAW PPD referable to asthma based on the history provided by Claimant and the use of an inhaler; 20% BAW PPD referable to metabolic syndrome due to a family history of coronary artery disease, without any objective abnormal laboratory studies or diagnosis by her family or other physician; 10% BAW PPD referable to narcolepsy; 20% BAW PPD referable to the heart, although Claimant had reported “no further problems” since the surgery at age four, and without medical records to review; and 20% BAW PPD cervical spine despite no records presented for Dr. Poetz to review. Dr. Poetz opined Claimant’s primary and preexisting injuries were a hindrance or obstacle to employment or reemployment, and the combination of disabilities created a substantially greater disability than the simple sum. Finally, Dr. Poetz opined Claimant was PTD due to a combination of her primary and preexisting conditions, and unable to compete in the open labor market.

5. Dr. Hanaway is Claimant’s treating neurologist, and responded to Claimant’s request for a rating regarding her preexisting conditions on April 19, 2004. Dr. Hanaway rated the following conditions: 5% BAW PPD for chronic asthma since 1993 for which Claimant took daily Allegra and a nasal spray; 10% PPD referable to Claimant’s right shoulder for tendonitis diagnosed in 1995; 30% BAW PPD referable to Claimant’s long history of narcolepsy;¹ and 7.5% BAW PPD referable to Claimant’s cervical spine for chronic neck pain. Dr. Hanaway declined to rate: Claimant’s osteoporosis acknowledging Claimant was on medication for the condition, but noting Claimant had not reached a clinical stage in treatment; a 1992 “completely healed” right clavicle fracture; and Claimant’s low back condition as it presented after 1995. Dr. Hanaway opined the rated conditions were hindrances and obstacles to employment or reemployment, and combined synergistically to exceed the total of their simple sum.

6. On April 11, 2004, Claimant was interviewed at her request by Samuel Bernstein, Ph.D., a licensed psychologist and vocational expert. In addition to his interview, Dr. Bernstein reviewed Claimant’s medical records, administered the Beck Anxiety Inventory and Hamilton Depression

¹ Dr. Hanaway initially rated Claimant’s narcolepsy at 10% BAW PPD, but later revised his rating to 30% after determining he had underrated the condition.

Inventory tests, and the BETA II and Wide Range Achievement educational testing. The testing revealed moderate to severe range of anxiety and sub-clinical range for depression, and Claimant scored an 8th grade level for reading and a 6th grade level for math. Reviewing Claimant's work history, Dr. Bernstein concluded Claimant's work had been unskilled, and she had not acquired any significant skills. Regarding Claimant's medical history, Dr. Bernstein noted Claimant severe right hand injury, and also considered preexisting conditions that included: Reynaud's phenomenon;² osteoporosis³; panic attacks;⁴ and narcolepsy, open heart surgery as a child, tumor removal, and dermatological problems.⁵ Based on his review, Dr. Bernstein concluded Claimant "would not be hired nor could she function in a work situation on a sustained and persistent basis. She would have a difficult time completing a normal work day without interruptions because of her symptoms." Dr. Bernstein opined Claimant was PTD and unemployable in the open labor market. Upon cross-examination, Dr. Bernstein conceded he would defer to Claimant's treating physician regarding the extent of her actual physical problems.

7. On March 30, 2005, Mr. James England, a rehabilitation counselor, submitted a vocational report after reviewing Claimant's medical and previous vocational reports. Mr. England also found Claimant has performed only unskilled work, and had not acquired any specific skills. Mr. England noted Claimant's limited educational skills, but found those skills would be adequate "for a variety of entry-level service employment settings." Mr. England acknowledged Claimant would not be able to return to work as a waitress due to her hand injury, but opined employment was available to Claimant within her permanent work restrictions despite her right hand injury.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues related to SIF liability for PTD benefits

Claimant seeks permanent total disability benefits from SIF. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled in part). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled in part). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled in part). The Second Injury Fund is implicated in all cases of permanent disability where there has been previous disability, and in

² A condition not rated or noted by Claimant's medical records in evidence.

³ Dr. Bernstein acknowledges Claimant's osteoporosis symptoms of difficulty sitting up, bending and laying down have increased since injured in 1995.

⁴ Dr. Bernstein acknowledges Claimant had no depression or anxiety problems before 1995.

⁵ Although noted by Dr. Bernstein that he could not ascertain any problems or residuals from these conditions.

cases of permanent total disability, the Second Injury Fund is liable for remaining benefits owed after the employer has completed payment for disability of the last injury alone. §287.220.1 RSMo. Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993).

Two medical experts and two vocational experts provided opinions regarding the extent of Claimant's disabilities. Dr. Poetz and Dr. Bernstein opined Claimant is PTD and unemployable in the open labor market. Mr. England disagreed and vocationally opined work is available within Claimant's educational and physical restrictions. Dr. Hanaway rated all of Claimant's disabilities on the basis of permanent partial disability, and never indicated Claimant was PTD. Vocational expert, Dr. Bernstein, indicated he would give "greater weight" to a treating physician's opinion regarding Claimant's physical problems versus the opinion of an evaluator. (Exhibit H, pg. 18). Dr. Poetz, an evaluator only, considered conditions that did not exist at the time of Claimant's injury, and conditions for which he had only Claimant's complaints, but for which no medical records were provided. I do not find the opinions of Dr. Poetz or Dr. Bernstein to be credible, and I find the opinions of Dr. Hanaway (a treating physician) and Mr. England to be persuasive. Based on the credible evidence presented, I do not find Claimant to be PTD.

Issues related to SIF liability for PPD benefits

Section 287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and preexisting conditions must produce additional disability greater than the last injury standing alone. Section 287.220.1 RSMo directs that the degree of disability be determined by "the degree or percentage of employee's disability that is attributable to all injuries or conditions existing *at the time the last injury was sustained*" (emphasis added). See also *Garcia v. St. Louis County and Treasurer of Missouri as Custodian of Second Injury Fund*, 916 S.W.2d 263 (Mo.App.1995) quoting *Frazier v. Treasurer of Missouri as Custodian of Second Injury Fund*, 869 S.W.2d 152 (Mo.App. 1993).

Employer and Claimant entered into a compromise PPD settlement of 80% referable to Claimant's right wrist to settle all issues regarding the primary injury. I find these percentages appropriate and supported by competent evidence, and I adopt the percentages when considering Claimant's SIF PPD claim. Claimant's preexisting conditions rated by Dr. Hanaway included: asthma at 5% BAW PPD; right shoulder tendinitis at 10% PPD; narcolepsy at 30% BAW PPD; and chronic cervical spine pain a 7.5% BAW PPD. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App.1983) (overruled on other grounds). I find the percentages rated by Dr. Hanaway regarding Claimant's asthma, right shoulder, and cervical spine also appropriate and supported by competent evidence, and I adopt these percentages when considering Claimant's SIF PPD claim. However, I find Claimant's narcolepsy condition to present a disability of 15% BAW

PPD, and I adopt this percentage when considering Claimant’s SIF PPD claim. I further find these conditions to have been a hindrance or obstacle to her employment or reemployment.

Based on the evidence presented, I find Claimant’s preexisting asthma, right shoulder tendinitis, and cervical spine disabilities fail to meet the statutory threshold necessary to trigger SIF liability for consideration of PPD benefits. Taking into account Claimant’s remaining preexisting disability of 15% BAW PPD referable to her narcolepsy, and when combining this disability with her work related right hand injury, I find the combination synergistically produces a disability greater than the simple sum. Applying a 10% load factor, I find SIF to be liable for 20 weeks of PPD disability or \$5,145.80.

CONCLUSION

Claimant’s work at Employer was a substantial factor in causing injury to her right hand. Claimant is not entitled to PTD benefits, but is entitled to PPD benefits from SIF. Claimant’s preexisting narcolepsy met the statutory threshold for SIF liability. Claimant’s preexisting condition was a hindrance or obstacle to her employment. SIF is liable for 20 weeks of additional PPD benefits. Claimant’s attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation