

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

Injury No.: 02-090985

Employee: Pattie Wilson  
Employer: Perry Oaks Manor, LLC  
Insurer: Legion Insurance  
c/o Illinois Insurance Guaranty Fund  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: August 16, 2002  
Place and County of Accident: Perry 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 March 13, 2006. The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., issued March 13, 2006, 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 20<sup>th</sup> day of November 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION  
**FINAL AWARD**

Employee: Pattie Wilson

Injury No. 02-090985

**Employer: Perry Oaks Manor LLC**

Additional Party: Second Injury Fund

Insurer: Legion Insurance c/o Illinois Insurance Guaranty Fund

Hearing Date: Commenced October 24, 2005 Checked by: JK/kh  
Completed December 15, 2005

**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? August 16, 2002.
5. State location where accident occurred or occupational disease contracted: Perry 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 (Legion Insurance Company became insolvent, and the defense was assumed by the Illinois Insurance Guaranty Fund)
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee aggravated a pre-existing herniated disc at L5/S1 level when she was struck by a resident at Perry Oaks Manor.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 10% permanent partial disability of the body as a whole.
15. Compensation paid to date for temporary total disability: \$9,098.32
16. Value necessary medical aid paid to date by employer-insurer: \$7,539.12
17. Value necessary medical aid not furnished by employer-insurer: None (see findings)
18. Employee's average weekly wage: \$568.62
19. Weekly compensation rate: \$379.10 temporary total disability and \$340.12 permanent partial disability
20. Method wages computation: By agreement.
21. Amount of compensation payable:  
40 weeks of permanent partial disability at \$340.12 per week (\$13,604.80)  
TOTAL: \$13,604.80
22. Second Injury Fund liability: Second Injury Fund claim denied
22. 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: Mr. Albert Lowes

## **FINDINGS OF FACT AND RULINGS OF LAW**

On October 24, 2005, Mr. Albert Lowes appeared on behalf of the employee, Pattie Wilson, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Mr. Dale Gerecke. The Second Injury Fund was represented by Assistant Attorney General, Frank Rodman. At the time of the initial setting, the employee, Pattie Wilson, was ill, but the employee had subpoenaed a witness, and the parties agreed to start the hearing on August 16, 2002, and complete the hearing at a later date. The employee was subsequently able to appear for the conclusion of the hearing on October 24, 2005. 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 the findings of fact and rulings of law, are set forth below as follows.

### **UNDISPUTED FACTS:**

1. On or about August 16, 2002, Perry Oaks Manor, LLC was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Legion Insurance Company. Legion Insurance Company subsequently became insolvent, and the employer-insurer's liability has been assumed by Illinois Insurance Guaranty Fund.
2. On or about August 16, 2002, the employee sustained an accident that arose out of and in the course of her employment.
3. The employer had notice of the employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage was \$568.62 and her rate of compensation is \$379.10 for temporary total disability and \$340.12 for permanent partial disability.
6. The employer-insurer furnished medical aid in the amount of \$7,539.12.
7. The employer-insurer paid temporary total disability benefits in the amount of \$9,098.32. This covered 24 weeks from August 17, 2002 though February 3, 2003.

### **ISSUES:**

1. Medical Causation
2. Additional medical aid
3. Nature and extent of disability
4. Liability of Second Injury Fund

### **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

#### Employee's Exhibits

- A. Medical records of Perry County Memorial Hospital
- B. Medical records of Dr. Robert Hunt
- C. Medical records of Southeast Missouri Hospital
- D. Medical records of Dr. Robert Schultz
- E. Medical records of Dr. Latha Ravi
- F. Medical report of Dr. Mary Frances Werner-Luckey
- G. Functional Capacity Evaluation by Bill Merink
- H. Medical reports of Dr. Kenneth DeCoursey
- I. Medical bills related to surgery performed by Dr. Robert Shultz

Employer-Insurer's Exhibits

1. Medical records of Dr. Romeo R. Eugenio
2. Medical records of Dr. Mohammad Moaddabi
3. Medical records of Dr. Brian Schafer of Orthopedic Associates
4. Medical report of Dr. Peter Merkin
5. Medical records of Dr. David M. Peeples
6. Medical records of Memorial Hospital in Chester, Illinois

Second Injury Fund Exhibits

None Offered

**FINDINGS OF FACT:**

Based on the medical records, the testimony of Pattie Wilson (employee), the testimony of Vickie Rollet and the deposition of Dr. Kenneth DeCoursey, I find as follows:

- At the time of her accident on August 16, 2002, the employee was working as an LPN for Perry Oaks Manor, LLC.
- The employee's accident occurred when she was attempting to subdue a resident. The resident struck the employee in the stomach and ribs, causing an aggravation of a pre-existing low back condition.
- Several years prior to August 16, 2002, the employee had a serious motor vehicle accident that involved life-threatening injuries to her face, neck, head, left arm, liver, spleen and other areas.
- In February of 2000, the employee suffered a low back sprain at work. She experienced pain in her right buttocks and leg while rolling a resident over in his bed (Employer-insurer's exhibit 6).
- On April 14, 2006, the employee was at a McDonald's restaurant and backed her car into a concrete post. This accident caused the employee to experience low back pain on the right side and neck pain.
- After conservative treatment by Dr. K. Chamness, the employee was referred to Dr. Robert Shultz, who is a neurosurgeon in Belleville, IL. Dr. Shultz treated the employee from August 15, 2001 through May 13, 2002 (Employee's exhibit D).
- An MRI performed June 28, 2001 showed the employee had a disc protrusion at the L5/S1 level. Dr. Shultz felt the employee had degenerative disc disease at the L5/S1 level with a right sided bulge or possible herniation (Employee's exhibit D). Dr. Shultz treated the employee with physical therapy, and series of nerve blocks and prescribed Vicodin and Celebrex. On May 13, 2002, three months prior to her August 16, 2002 accident, Dr. Shultz recommended a discogram. Dr. Shultz indicated that if the discogram was positive, they would consider a surgical procedure for the employee.
- Prior to her August 16, 2002, the employee was working as an LPN with no restrictions, and was able to perform her job. The employee, however, was experiencing pain and discomfort on the right side of her low back, and was taking Vicodin and Celebrex on a daily basis to relieve her symptoms.
- The employee's accident at Perry Oaks Manor aggravated her right-sided low back pain, and the employer-insurer authorized and paid for treatment by several physicians. The employee received conservative treatment from Dr. Eugenio, Dr. Moaddabi and Dr. Schafer that included physical therapy, injections and medication (employer-insurer's exhibits 1,2 and 3).
- An MRI performed on October 3, 2002 revealed identical findings to the pre-accident MRI. The employee had a disc protrusion at the L5/S1 level.
- The employer-insurer authorized a second opinion by Dr. Peter Merkin on October 16, 2002. Dr. Merkin agreed that the disc protrusion pre-existed the August 16, 2002 accident, but felt the employee's accident may have aggravated her condition. Dr. Merkin suggested therapy, and indicated that if therapy did not help, the employee should receive epidural injections (Employer-insurer's 4).
- The employer-insurer then authorized additional treatment with Dr. David Peeples, who is a neurologist in St. Louis. In his initial report dated December 2, 2002, Dr. Peeples concluded the employee was suffering from chronic low back pain. Dr. Peeples agreed the L5/S1 herniated disc was present prior to the employee's accident. Dr. Peeples further acknowledged that the employee had been treating for several months before August 16, 2002 for the same complaints. Dr. Peeples concluded that her current symptoms and complaints were "at most an exacerbation of the prior injury" (Employer-insurer's Exhibit 5).
- Dr. Peeples treated the employee with therapy, medication and referred her to Dr. Graham for epidural steroid injections. On February 4, 2003, Dr. Peeples concluded the employee was at MMI, and did not feel she was a surgical candidate. Dr. Peeples gave the employee restrictions of no lifting greater than 20 pounds and no repetitive bending or twisting at the waist (Employer-insurer's exhibit 5).
- After her release by Dr. Peeples, the employee decided to schedule a follow up visit with Dr. Shultz. In his first office record after August 16, 2002, Dr. Shultz decided to proceed with the discogram that he had recommended on May 15, 2002. The discogram was positive and Dr. Shultz decided to proceed with surgery on July 14, 2003. The

operative records indicate that Dr. Shultz performed a transabdominal retroperitoneal interbody fusion at the L5/S1 level (Employee's exhibit D). Although the fusion was successful, Dr. Shultz's note of May 25, 2004 indicates the employee was still taking Vicodin and Celebrex for low back pain. Dr. Shultz did not believe the employee could work except in a sedentary job (Employee's Exhibit D). Dr. Shultz offered no opinion indicating that he believed the employee's surgery was related to her August 16, 2002 accident.

- The medical bills related to the surgery performed by Dr. Shultz totaled \$43, 885.84 and were admitted as employee's exhibit I.
- The employee offered a medical report from Dr. Mary Frances Werner-Luckey, and medical reports and deposition testimony by Dr. Kenneth DeCoursey. The medical report of Dr. Werner-Luckey was dated July 9, 2003 (prior to the employee's surgery). Dr. Werner-Luckey gave a detailed medical history of the employee's treatment, and offered disability ratings of 25%, 13% and 25%. Although her description and allocation of these ratings is confusing, it appears she assigned a 25% of the body as a whole for the 1996 motor vehicle accident, 13% for the April 14, 2001 McDonald's accident, and 25% for the August 16, 2002 accident (Employee's exhibit F).
- The medical records of Dr. Kenneth DeCoursey were admitted as employee's exhibit H, and the deposition of Dr. DeCoursey was admitted as Exhibit J. Dr. DeCoursey's ratings were AMA ratings, and were also somewhat confusing. Dr. DeCoursey's final numbers included a 36% disability for the problems the employee has with her upper extremities due to the 1996 motor vehicle accident, and 28% disability for her low back (Employee's Exhibit H and page 7 of Employee's J). On cross-examination, however, Dr. DeCoursey agreed that not all of the 28% disability was related to the August 16, 2002 accident. Based on the fact that the employee was working, Dr. DeCoursey assumed that most of the disability was related to the August 16, 2002 incident. He was not willing, however, to separate the disability between the 2001 and the 2002 accidents (Employee's Exhibit J, page 14, 15, 23 and 24). Dr. DeCoursey further testified that the combination of the disabilities had a synergistic effect equal to 10 – 15%, with a total disability of 74 – 79% (Employee's exhibit H and Employee's exhibit J, page 9).
- Although Dr. DeCoursey testified that medical bills from the employee's surgery were reasonable, he offered no testimony to support a finding that the surgery performed by Dr. Shultz was causally related to the employee's August 16, 2002 accident.
- At the time of the hearing, the employee was working part time in a retail store. The employee still experiences low back pain that gets worse if she stands more than 2-3 hours. The employee is able to sit for 1 – 1 ½ hours before experiencing an increase in symptoms. The employee is able to walk, but has difficulty if she walks for long distances. The employee is also suffering from emotional problems or depression, but does not relate these symptoms to her August 16, 2002 accident.

#### **RULINGS OF LAW:**

The employer-insurer has admitted that the employee had an accident that arose out of and in the course of her employment, but denies that all of her disability and the medical bills related to her surgery were causally related to her accident. The medical records all confirm that the employee's L5/S1 disc protrusion was present before August 16, 2002. The MRIs done before and after her accident are basically identical. Although the employee was working without restrictions prior to her accident, the employee admitted that she was experiencing back pain and taking Vicodin and Celebrex before her accident on a daily basis. It is also significant that Dr. Shultz had recommended a discogram and a possible surgery only three months before her accident at work. Dr. Shultz post accident notes make it clear that he viewed his treatment as a continuation of the treatment he had provided after the McDonald's parking lot accident. Dr. Shultz basically re-scheduled the discogram he had recommended prior to the August 16, 2002 accident, and when that procedure produced a positive finding, he followed his original plan and recommended the same surgery he was considering before August 16, 2002.

It is also significant that the employee has offered no medical opinion to support a finding that the employee's surgery and related expenses were medically causally related to her accident. None of the treating doctors reached that conclusion, and neither Dr. Werner-Luckey nor Dr. DeCoursey addressed this issue.

Based on this evidence, I find that the employee's August 16, 2002 accident was not a substantial factor in causing the need for the low back fusion performed by Dr. Shultz. The employee's need for surgery was based on degenerative, pre-existing disc pathology, and was not causally related to her August 16, 2002 accident. The employee's request for an award of previously incurred medical expenses is therefore denied.

Notwithstanding her pre-existing her low back problems, the evidence does support a finding that the employee's August 16, 2002 accident caused an aggravation of the employee's pre-existing herniated disc that raised it to a level where it became disabling. The employee was working without restriction prior to the accident, but was unable to continue her job as an LPN after she was struck by the resident on August 16, 2002. The employer-insurer's authorized treating physicians recognized this fact, and thus the employer-insurer paid over \$7,000.00 in medical expenses and over \$9,000.00 in temporary total disability benefits.

I therefore find that the employee's August 16, 2002 accident was a substantial factor in causing an aggravation of the employee's L5/S1 disc herniation that resulted in the need for the employee's initial medical treatment and temporary total disability payments.

The employee has also requested an award of mileage or travel expenses, and future medical aid. The employee has

offered no testimony or other evidence to support a claim for medical travel expenses. The employee has failed to offer any medical evidence to support an award of future medical aid. Although the employee is still taking medication, the medication she is taking for her back is the same medication she was taking prior to her accident. The employee's request for medical mileage and future medical must therefore be denied.

On the issue of nature and extent of disability, the employee has requested an award of additional temporary total disability and permanent partial disability. The employer-insurer paid temporary total disability benefits through the date the employee was released by Dr. David Peeples. The employee's request for additional temporary total disability relates to the time she was off work because of the surgery performed by Dr. Shultz. Given the finding that this surgery was not causally related to the employee's accident, the employee's request for temporary total disability during the time she was recovering from her surgery must also be denied.

Although the ratings provided by the employee's physicians were confusing, the evidence does support a finding that the employee's August 16, 2002 accident caused a sprain or strain of the employee's low back, and an aggravation of her pre-existing degenerative condition. Based on this evidence, I find that the employee has suffered a 10% permanent partial disability of her body as a whole that is directly related to her August 16, 2002 accident. Any additional disability to the employee's low back is related to either her pre-existing degenerative condition or the April 14, 2001 accident in the McDonald's parking lot.

The employer-insurer is therefore directed to pay to the employee the sum of \$340.12 per week for 40 weeks for a total award of permanent partial disability equal to \$13,604.80.

The employee has also filed a claim against the Second Injury Fund for permanent partial disability. Based on the finding that the employee's permanent partial disability from her primary injury is 10% of the body as a whole, I further find that the employee's claim against the Second Injury Fund fails to meet the required threshold level of 12.5% of the body as a whole. The employee's claim against the Second Injury Fund must therefore be denied.

**ATTORNEY'S FEE:**

Albert Lowes, 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.

**INTEREST:**

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

Employee: Pattie Wilson

Injury No.: 02-090985

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

Made by:

\_\_\_\_\_  
Jack H. Knowlan, Jr.  
Chief Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_  
Ms. Patricia "Pat" Secrest

*Director*  
*Division of Workers' Compensation*