

Appellant/Respondent Second Injury Fund, in its note at the bottom of page 7 of its brief, stated that Respondent/Appellant Elrod introduced no medical records into evidence. Respondent/Appellant Elrod directs the Court's attention to Claimant's Exhibit B, admitted into evidence, wherein Dr. Hoffman's medical records were admitted at pages 188-193. Also, Respondent/Appellant directs the Court's attention to Exhibit C, admitted into evidence, wherein Dr. Gondring's medical records were admitted at pages 210-217.

Additionally, all of Respondent/Appellant's medical records were sent to Appellant/Respondent Second Injury Fund as follows:

12/22/98	To Stacy Page, Assistant Attorney General Heartland Hospital East, St. Joseph MedClinic, St. Joseph William Gondring, M.D. William Bohn, M.D. Physical Therapy	2 pages 10 pages 7 pages 24 pages 9 pages
03/15/99	To Stacy Page, Assistant Attorney General Dr. Gondring's report of examination 2/4/99 Dr. Hoffman, Heartland Hospital Dr. Wempe	2 pages 7 pages 13 pages
03/26/99	To Stacy Page, Assistant Attorney General Wendell D. Bronson, D.O. Daniel Smith, D.O.	2 pages 2 pages
07/19/99	To Stacy Page, Assistant Attorney General Dr. Hoffman, Heartland Health Dr. Wempe, Heartland Health	5 pages 6 pages
08/25/2000	Bruce Levine, Assistant Attorney General, was sent Authorization For Release of Medical Records	

In response to Appellant/Respondent Second Injury Fund's note at the bottom of page 8 of its Brief, pay records had been sent to them as follows:

07/19/99	To Stacy Page, Assistant Attorney General Letter of Specialized Support Services, Inc., Detailing pay records of Ms. Elrod.
09/16/99	To Stacy Page, Assistant Attorney General Ms. Elrod's Pay Record for 36 th Street Food & Drink
08/25/2000	To Bruce Levine, Assistant Attorney General Authorization to Permit Copying of Employment Records; and Consent for Release of Confidential Information (Social Security)

Also, reference to the Legal File, page 1, Report of Injury, details Elrod's weekly wage at gross \$155.00 for here (3) work days per week, which calculates on an 8-hour day at \$6.41 per hour.

Appellant/Respondent Second Injury Fund misstates the evidence at page 10, lines 5 and 6, stating Employee admitted that she did not do much exercising to help control her weight, whereas the record was she could not do much exercising to help control her weight.

Appellant/Respondent Second Injury Fund argues at the bottom of page 16 of its Argument that the Commission's findings are not supported by competent and substantial evidence, overlooking the Commission's affirmance of Administrative Law Judge Nelson G. Allen's award and decision. Judge Allen made an extensive detailed Findings of Facts and Rulings of Law in his 8-page award.

ANSWER TO POINT I

Judge Allen found that Respondent/Appellant Elrod's claim was not barred by the Statute of Limitations. It was his opinion that Claimant had no way of knowing on April 8, 1997 if she had a compensable claim against the Second Injury Fund.

The Labor and Industrial Relations Commission affirmed Judge Allen's decision.

The facts proving that Elrod had no way of knowing on April 8, 1995 she had a compensable ongoing disability and claim against the Second Injury Fund are as follows:

Employee fell on April 8, 1995, injuring her left knee. After poor treatment at the MedClinic and discharge by the Workers' Compensation medical provider, she saw her own doctor who found she had a torn meniscus and needed an operation.

After referral to another Workers' Compensation medical doctor, he confirmed she needed an operation. Some six months later, she was operated on and after therapy, released with questionable results. Employee Elrod found that on occasion her left knee would lock up and cause her to fall.

In January, 1996, Elrod went back and saw the Workers' Compensation doctor and reported the problems she was having in her knee locking up and causing her to fall. Later, in May of 1996, her knee locked up and she fell, skinning both knees.

Elrod went down and saw the Workers' Compensation doctor who said she needed another MRI. During the presentation to Judge Allen, the Workers' Compensation attorney agreed to the MRI. The MRI on July 18, 1996 showed an extension of the tear in the meniscus.

After Elrod's deposition on June 23, 1997, Workers' Compensation agreed for Elrod to have another left knee operation, which was scheduled and performed on November 14, 1997. This was a continued handling resulting from Elrod's fall and injury on April 8, 1995.

After five months of therapy, Elrod was released on April 23, 1998.

Unfortunately, this was not the end of Elrod's ongoing disability. Her left leg continued popping and locking up and causing her to fall.

On September 18, 1998, she fell on both knees. She again contacted the Workers' Compensation doctor, who arranged for her to have another MRI, which showed no additional meniscus damage.

Elrod's ongoing disability has continued to date. She has also been unable to exercise for a period of years, making her diabetic condition difficult to control. Exercise and diet are controls for diabetes. Elrod's weight from the time of her injury to the present time has remained reasonably constant. Her loss of ability to exercise has been very detrimental in helping control her diabetes and she is in a desperate situation.

As her condition continued to deteriorate, Permanent Total Disability claims were filed, commencing on November 3, 1998.

ANSWER TO POINT II

The Second Injury Fund complains about proof of Judge Allen's assessment of Permanent Partial Disability of 81.875%.

Judge Allen has many years' experience in hearing cases. He found Respondent-Appellant to be a believable witness.

Observation disclosed Elrod was real obese and had some difficult in getting around. She brought her large, heavy leg braces and explained how she used them. The right brace was for the right ankle and came up the right leg to her right knee. It was for her ankle and leg injured in an automobile accident where she was a passenger. The right ankle had been splintered and could not be set, but was fused together. She explained she could not wear both braces at the same time, because they would lock together.

She also brought her large pill box which had compartments for the different 60 pills she was taking a day.

There were definitive figures for some of her disabilities and Judge Allen then decided, "The combination of her left knee, right ankle, morbid obesity, and diabetes combine in a manner that her permanent partial disability is vastly increased." He found the combination results in permanent partial disability of 81.875%.

Dr. Gondring testified that because of Elrod's knee injury, ankle injury, diabetic condition with neuropathy and her obesity, she was not employable. (p. 207 of the Transcript.)

The list of 60 drugs being taken by Elrod is shown on p. 329 of the Transcript. Dr. Gondring testified that the types of drugs Elrod was taking would absolutely negatively affect her employability. (Transcript, p. 348-349.)

The Fund is mistaken when it states Employee did not produce any medical evidence, credible, incredible, or otherwise, to support her testimony that she had pre-existing disabilities of diabetes and morbid obesity. (Transcript p. 188-193, Hoffman Medical records show Morbid Obesity and Diabetes with neuropathy.) Also see, Dr. Gondring's medical records at pages 210-218 of Transcript.

Elrod testified her diabetes started before 1988, that Dr. Berkowitz put her on insulin at that time.

Dr. Gondring's report of May 30, 1995 shows Elrod as diabetic, on insulin. Also shown in his record of February 4, 1999.

Elrod had control of her diabetes up until the time of her fall and injury to her left knee on April 8, 1995. Prior to her accident, she had been very active in her job activities. After the accident, with her left knee injured and her right ankle injury, she was unable to exercise to control her diabetes.

Elrod's diabetes, right ankle injury and morbid obesity were all pre-existing disabilities to her employment at 36th Street Food & Drink.

Elrod's medical treatment of her left knee was prolonged with the second unsuccessful operation on November 14, 1997. Her left knee was still locking and causing her to fall.

It was the restricted physical activity during her unsuccessful medical treatment over a period of years which caused the loss of control of her diabetes and the neuropathy of her hands and legs.

ANSWER TO POINT III

While Claimant Elrod was working part-time at 36th Street Food & Drink as a cook, she also worked at Specialized Support Services full-time, which was a sedentary job. She testified she was paid \$6.50 per hour. She worked at Specialized through 1995, except for medical leave for her left knee and in 1996 until November 15, 1996. On November 16, 1996, she commenced work at Unity, which was the same type of sedentary employment as at Specialized and at the same rate of pay of \$6.50 per hour. She continued work at Unity until November 13, 1997, the day before her second arthroscopic operation.

Judge Allen found her to be a believable witness.

The Second Injury Fund claims “there was no verification of her pay records”.

On July 19, 1999, a letter was sent to Stacy R. Page, Assistant Attorney General, handling this case, enclosing letter of Specialized Support Services regarding pay records of Claimant Elrod.

On September 16, 1999, a letter was sent to Stacy R. Page, Assistant Attorney General, handling this case, enclosing a copy of Claimant Elrod’s pay records for 36th Street Food & Drink. Elrod worked there for 1-1/2 years.

On August 25, 2000, a letter was sent to Bruce Levine, Assistant Attorney General, handling this case, enclosing Authorization For The Release Of Medical Records, Authorization To Permit Copying Of Employment Records and also Consent For Release Of Confidential Information (Social Security).

Previously pointed out was reference to the Legal File, page 1, Report of Injury, which detailed Elrod's weekly wage at the 36th Street Food & Drink at a gross of \$155.00 for three work days per week, which calculated on an 8-hour day at \$6.41 per day.

Claimant Elrod submits that in addition to records actually provided to Second Injury Fund by Elrod, authorization to obtain all pay, medical and confidential records was provided to Second Injury Fund.

At the hearing, Claimant Elrod attempted to introduce a copy of her Social Security record of earnings for years of 1995-1997, which was not admitted (Exhibit F, page 328 of Transcript). The record was dated September 17, 1999 and showed her name, Social Security number, date of birth and earnings for the years involved.

Since authorization for medical records, pay records and confidential (Social Security) records had been provided the Second Injury Fund, it should not be allowed to object to the consideration of the Social Security record.

ANSWER TO POINT IV

Claimant Elrod is entitled to permanent total disability benefits.

Claimant Elrod had a work-related injury to her left knee.

Claimant, at the time of her work-related injury, had pre-existing disabilities of diabetes, morbid obesity and 50% disability to her right ankle from an automobile accident.

Claimant was unable to exercise because of her left knee injury and her pre-existing 50% disability to her right ankle. Claimant's loss of ability to exercise adversely affected her diabetes and it progressed to diabetes with neuropathy, seriously affecting her ability to use her hands, arms and legs.

Dr. Gondring found her unemployable because of her left knee injury, right ankle injury, morbid obesity and diabetes with neuropathy. He also found that the drugs she was taking (60 pills per day) would absolutely negatively affect employment (pps. 207, 339 of Transcript).

The Missouri Law For Permanent Total Disability is stated in Brown v. Treasurer of Mo., 795 S.W.2d 479, at page 483.

"The test for permanent total disability is whether, given claimant's situation and condition, he is competent to compete in the open labor market. Laturno v. Carnahan, 640 S.W.2d 472 (Mo.App. 1982)."

In Patchin v. National Supermarkets, Inc., 738 S.W. 2d 166 (Mo.App. 1987), the court stated at l.c. 167:

*** “The test for permanent total disability in Missouri is the worker’s ability to compete in the open market in that it measures the worker’s prospects for returning to employment.”

Lana Elrod, Respondent/Appellant submits that there is no way she could compete in the open job market and return to any employment.

CONCLUSION

Lana Elrod, Respondent/Appellant, is entitled to an award of Permanent Total Disability.

Respectfully submitted,

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