

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 07-073113

Employee: Barbara A. Boone

Employer: Missouri Department of Corrections

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and considered the whole record and we find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the January 6, 2011, award and decision of the administrative law judge, as modified herein. We adopt the findings, conclusions, decision and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

We specifically do not affirm or adopt the following statement by the administrative law judge that appears at the bottom of page 7 of the award:

Based on the award of permanent total disability benefits and my above findings, the Division of Workers' Compensation shall retain jurisdiction to resolve disputes related to this award of future medical aid.

“[A]n administrative tribunal is a creature of statute and exercises only that authority invested by legislative enactment.’ *Farmer v. Barlow Truck Lines, Inc.*, 979 S.W.2d 169, 170 (Mo. banc. 1998).” *Thomas v. Treasurer*, 326 S.W.3d 876, 879 (Mo. App. 2010). Neither we nor the Division of Workers' Compensation may “retain jurisdiction” over a claim or dispute. The statutes either grant us the authority to act or they do not. It is the duty of each administrative tribunal to consider whether it has statutory authority to act upon being requested to act. We express no opinion about whether we or the Division of Workers' Compensation will have authority to consider any particular dispute related to future medical aid that may be presented to us in the future.

In all other respects, we affirm and adopt the award and decision of the administrative law judge.

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.

¹ Statutory references are to the Revised Statutes of Missouri 2006, unless otherwise indicated.

Employee: Barbara A. Boone

- 2 -

The award and decision of Administrative Law Judge Carl Strange, issued January 6, 2011, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 1st day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Barbara A. Boone

Injury No. 07-073113

Dependents: N/A

Employer: Missouri Department of Corrections

Additional Party: Second Injury Fund

Insurer: Self

Hearing Date: September 13, 2010

Checked by: CS/rf

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 7, 2007
5. State location where accident occurred or occupational disease contracted: St. Francois 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.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was participating in self-defense class when she performed a front kick and was flipped backward landing on her neck, shoulders, and back.

12. Did accident or occupational disease cause death? N/A
13. Parts of body injured by accident or occupational disease: Body as a Whole referable to her neck, shoulder, and low back.
14. Nature and extent of any permanent disability: 30% of the Body as a Whole referable to her neck and shoulder and 2.5% of the Body as a Whole referable to her low back. (See Findings)
15. Compensation paid to date for temporary total disability: \$19,559.84
16. Value necessary medical aid paid to date by employer-insurer: \$37,342.11
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$516.45
19. Weekly compensation rate:
 - \$344.30 for temporary total disability
 - \$344.30 for permanent partial disability
20. Method wages computation: By Agreement
21. Amount of compensation payable:
 - a. Employee awarded permanent partial disability benefits from the employer-insurer in the amount of \$44,759.00.
 - b. Employee awarded permanent total disability benefits from Second Injury Fund beginning February 14, 2012 (See Findings).
22. Second Injury Fund liability: Yes (See Findings).
23. Future requirements awarded: Yes (See Findings).

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: Douglas Van Camp

FINDINGS OF FACT AND RULINGS OF LAW

On September 13, 2010, the employee, Barbara A. Boone, appeared in person and by her attorney, Douglas Van Camp, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Assistant Attorney General Gregg Johnson. The Second Injury Fund was represented at the hearing by its attorney, Assistant Attorney General Eileen Krispin. 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 7, 2007, Missouri Department of Corrections was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about August 7, 2007, the employee was an employee of Missouri Department of Corrections and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about August 7, 2007, the employee sustained an accident or occupational disease during the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$516.45, her rate for temporary total disability, permanent total disability, and permanent partial disability is \$344.30.
7. The employee's injury to her neck and shoulder is medically causally related to the work injury on or about August 7, 2007.
8. The employer has furnished \$37,342.11 in medical aid to employee.
9. The employer has paid temporary total disability benefits for 56 $\frac{5}{7}$ weeks at a rate of \$344.30 per week for a total of \$19,559.84.
10. The employee reached maximum medical improvement on August 17, 2009, and employer liability for permanency will begin on August 17, 2009.
11. The employer will provide future medical aid and other medical expenses including but not limited to mileage under 287.140 for employee's neck and shoulder.

ISSUES:

1. Medical Causation
2. Future Medical Aid
3. Nature and Extent
4. Liability of the Fund

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical Records of Dr. Suthar;
- B. Medical Records of Parkland Health Center;
- C. Medical Records of Dr. Dennis Sumski;
- D. Medical Records of Medical Arts Clinic, Inc.;
- E. Medical Records of Barnes-Jewish Hospital;
- F. Medical Records of Dr. Suthar;
- G. Medical Records of Barnes-Jewish Hospital;
- H. Medical Records of Pro Rehab;
- I. Medical Records of Midwest Imaging Center;
- J. Medical Records of Brain & Spine Center;
- K. Medical Records of Dr. Suthar;
- L. Deposition of James England;
- M. Deposition of Dr. David Volarich; and
- N. Correspondence Regarding Back Treatment.

Employer-Insurer's Exhibits

- 1. Deposition of Sherry Browning.

APPLICABLE LAW:

- The employee has the burden to prove all material elements of his claim. Melvies v Morris, 422 S.W.2d 335 (Mo.App.1968). The employee has the burden of proving not only that he sustained an accident that arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. Griggs v A B Chance Company, 503 S.W.2d 697 (Mo.App.1973).
- Under Section 287.140.1 RSMo., “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury”. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. Emert v Ford Motor Company, 863 S.W. 2d 629 (Mo.App. 1993); Shores v General Motors Corporation, 842 S.W. 2d 929 (Mo.App.1992) and Hendricks v Motor Freight, 520 S.W. 2d 702, 710 (Mo.App.1978).
- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:
 - “All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks

compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, 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 shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.
- Section 287.020.7 RSMo. provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

FINDINGS OF FACT & RULINGS OF LAW:***Issue 1. Medical Causation***

The employer-insurer has disputed that Barbara Boone's ("employee") injury to her low back was medically and causally related to her work injury of August 7, 2007. In support of their position, the employer-insurer has pointed to employee's past medical records concerning her pre-existing low back treatment. Further, Dr. Manish Suthar opined that "there are medical records that suggest that Ms. Boone has had prior existing lower back problems and therefore the 'the prevailing factor' cannot be attributed to the injury of August 7, 2007" (Employee Exhibits A & K). Additionally, Dr. Michael Boland noted that "medical records support a chronic mid thoracic and lumbar spine problem for which she had been undergoing treatment" (Employee Exhibit J). Conversely, employee offered the opinion of Dr. Volarich. Dr. Volarich opined that employee aggravated her lumbar syndrome as a result of the injury (Employee Exhibit M). All of the doctors and the medical records agree that employee had pre-existing problems in her back. However, it is important to note that on August 7, 2007, employee went to Parkland Health Center for treatment on her low back and neck as a result of being thrown on her back in self-defense class. The emergency room doctor diagnosed employee with an acute cervical strain and acute low back strain even though employee had reported chronic back pain under past medical history (Employee Exhibit B). At the time of the hearing, employee testified that she had an increase in low back pain as a result of the August 7, 2007 work injury.

Based on the evidence and observing employee at the hearing, I find employee credible. Further, I find the opinions of Dr. Volarich regarding employee's work related injuries to be credible based on the evidence. I find the opinions of Dr. Boland and Dr. Suthar regarding employee's low back to not be credible based on the evidence and the diagnosis of an acute injury to her low back by the emergency room physician on the day of the accident. Thus, I specifically find that employee's aggravation of her lumbar syndrome is medically and causally related to her August 7, 2007 work related injury.

Issue 2. Additional Medical Aid

Employee has requested an award of future medical aid for her low back as a result of her August 7, 2007 work related injury. Dr. Volarich opined that employee would require future medical care including but not limited to medications, injections, physical therapy, pain management, nerve blocks, and a TENS unit. (Employee Exhibit M). Based on the evidence and my above findings, the medical evidence supports a finding that the additional treatment being suggested by Dr. Volarich is both reasonable and necessary to cure and relieve employee from the effects of her injury to her low back.

Based on these findings, the employer-insurer is directed to furnish additional medical aid in accordance with Section 287.140 RSMo and Dr. Volarich's recommendations for employee's low back as it relates to her August 7, 2007 work related injury.

Issue 3. Nature and Extent of Disability & Issue 4. Liability of the Fund

With regard to permanent partial disability related to her primary injury, I find that based on the evidence admitted that employee, as a direct result of her August 7, 2007 accident, has suffered a 2.5% permanent partial disability of her body as a whole referable to her low back at the 400 week level and a 30% permanent partial disability of her body as a whole referable to her neck and shoulder at the 400 week level. The employer-insurer is therefore directed to pay to the employee the sum of \$344.30 per

week for 130 weeks for a total award of permanent partial disability equal to \$44,759.00. Since part of the employer-insurer's liability has accrued prior to the date of the award, the employer-insurer shall make a lump sum payment for the appropriate amount that is past due.

Employee has also requested an award of permanent total disability benefits against the Second Injury Fund. In support of his position, the employee has offered the opinions of Dr. David Volarich and Vocational Rehabilitation Expert, James England. The Second Injury Fund has relied on the opinion of Vocational Rehabilitation Expert, Sherry Browning, that the employee is not permanently and totally disabled. If the employee is permanently and totally disabled, the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing disabilities and employee's last injury occurring on August 7, 2007. The Second Injury Fund is not liable if the last injury alone caused employee to be permanently and totally disabled.

After examining employee and the medical records, Mr. England opined that employee would likely not be able to obtain employment competing with younger people and would not be able to sustain work in the long run based on a combination of her problems assuming Dr. Volarich's restrictions and her typical day to day functioning. At his deposition, Mr. England testified that he based his opinion Dr. Boland's restrictions, Dr. Volarich's restrictions, and employee's presentation (Employee Exhibit L). Further, Dr. Volarich also opined that employee was "permanently and totally disabled as a direct result of the work related injury of 8/7/07, in combination with her preexisting medical conditions (Employee Exhibit M). Conversely, Ms. Browning opined that with the post August 2007 physicians restrictions employee could continue to work as a mobile home salesperson and as an apartment manager or leasing agent or in sales positions such as recreational vehicles or automotive, as a cashier or counter and rental clerk attendant and in some customer service representative or order clerk jobs in the occupational group Office and Administrative Support. At her deposition, Ms. Browning admitted that the appearance, demeanor and interaction with people is important in deciding whether a person can work and admitted that she did not know what employee's current complaints were (Employer-Insurer Exhibit 1). Further, Ms. Browning was very evasive on her answers at her deposition and would not even answer questions about clear thinking and medication side effects.

It is important to note that the employer-insurer has failed to offer sufficient credible evidence that employee's complaints, limitations, and presentations regarding her injuries are not credible. As a result, I find employee is credible based on the evidence. Further, Ms. Browning's opinions ignore and fail to fully account for employee's current symptoms, presentation, and limitations from her August 7, 2007 work injury. Consequently, I find that the opinions of Mr. England and Dr. Volarich to be credible and the most consistent with the evidence and the opinions of Ms. Browning to be not credible.

Based on the evidence, I find that employee is unemployable in the open labor market and is permanently and totally disabled as a result of a combination of her August 7, 2007 work injury and her preexisting injuries. The employer-insurer's liability for permanent partial disability shall last until February 13, 2012. The Second Injury Fund is therefore directed to pay to employee the sum of \$344.30 per week commencing on February 14, 2012, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which employee is restored to her regular work or its equivalent as provided in Section 287.200.2.

Based on the award of permanent total disability benefits and my above findings, the Division of Workers' Compensation shall retain jurisdiction to resolve disputes related to this award of future medical aid.

ATTORNEY'S FEE:

Douglas Van Camp, 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.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Ms. Naomi Pearson