

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

Injury No.: 03-148116

Employee: Amanda Brooke

Employer: Ramey's Supermarket

Insurer: Roswil, Inc., Alternative Risk Services, TPA

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 November 14, 2008. The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued November 14, 2008, 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 1st day of May 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Amanda Brooke

Injury No. 03-148116

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: Not Applicable

Employer: Ramey's Supermarket

Additional Party: Not Applicable

Insurer: Roswil, Inc., Alternative Risk Services, TPA

Hearing Date: October 6, 2008

Checked by: VRM/MB

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: March 2, 2003.
5. State location where accident occurred or occupational disease was contracted:
Seymour, 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 occurred or occupational disease contracted: Repetitive lifting as a meat assistant.
12. Did accident or occupational disease cause death? No. Date of death? Not applicable.

13. Part(s) of body injured by accident or occupational disease: Low back.

- Nature and extent of any permanent disability: Permanent Partial Disability.

15. Compensation paid to-date for temporary disability: \$15,372.96.

16. Value necessary medical aid paid to date by employer/insurer? \$107,879.83.

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

18. Employee's average weekly wages: \$280.83.

19. Weekly compensation rate: \$187.22.

- Method wages computation: Agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: 35 percent Permanent Partial Disability to the body as a whole attributable to the neck/back equaling \$26,210.80.

22. Second Injury Fund liability: No.

Total: \$26,210.80.

23. Future requirements awarded: Future medical care as set forth in award.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: William E. Lawrence.

FINDINGS OF FACT AND RULINGS OF LAW:

Employee: Amanda Brooke

Injury No. 03-148116

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: Not Applicable

Employer: Ramey's Supermarket

Additional Party: Not Applicable.

Insurer: Roswil, Inc., Alternative Risk Services, TPA

Hearing Date: October 6, 2008; Record closed: October 30, 2008. Checked by: VRM/MB

INTRODUCTION

The undersigned Chief Administrative Law Judge convened the final hearing in this case on October 6, 2008. Upon motion, and without objection from opposing counsel, the record remained open for the submission of the original deposition of Phil Eldred, which previously had been taken, along with the attached material from his file. The record closed October 30, 2008. Claimant appeared at the hearing in person and by her attorney, William E. Lawrence. Brandon Potter and Aaron Jones appeared on behalf of Ramey's Supermarket and its insurer Roswil, Inc., and its third party administrator Alternative Risk Services (referenced hereafter collectively as Employer). The parties stipulated to the following facts.

STIPULATIONS

1. On or about March 2, 2003, Claimant sustained an occupational disease that arose out of and in the course of employment with Ramey's Supermarket.
2. Claimant was an employee of Ramey's Supermarket, working under the protections of the Missouri Workers' Compensation Act.
3. Employer was fully insured and subject to the Missouri Workers' Compensation Act.
 - Venue is proper in Greene County, Missouri.
 - Employer received proper notice.
5. The claim was filed within the time prescribed by law and the parties do not dispute jurisdiction.
6. At all relevant times, Claimant earned an average weekly wage of \$280.83, resulting in applicable rates of compensation of \$187.22 for Temporary Total Disability, Permanent Partial Disability, and Permanent Total Disability benefits.
7. Employer paid \$15,372.96 in Temporary Total Disability benefits.
8. Employer paid medical benefits in the amount of \$107,879.83.

ISSUES

1. What is the nature and extent of Claimant's permanent disability?
2. Are future medical benefits necessary and directly related to Claimant's work-related injuries of on or about March 2, 2003?

3. Is Employer liable for outstanding medical benefits?

EXHIBITS

The following exhibits were offered and admitted. All objections contained in the depositions are ruled in a manner consistent with this Award.

- Deposition of Dr. Paul Olive with attached exhibits.
- Deposition of Dr. Shane Bennoch with attached exhibits.
- Deposition of Phillip Eldred with attached exhibits.
- Claimant's medical records.

1. Deposition of Dr. Norbert Belz with exhibits.
2. Surveillance tapes.
3. Surveillance computer disc.

FINDINGS OF FACT

Claimant is 33 years old and currently resides with her mother, Sue Sampson, in Seymour, Missouri. Claimant has 2 children, ages 10 and 15, but only one of the children live with her. Claimant dropped out of high school just prior to her 11th grade, although she later received her GED. She has not completed any post high school education. Despite dropping out of school, the Claimant was a good student. Throughout her testimony she appeared to be average or above average intellectually. Her vocational evaluation placed her in greater than high school ability in reading, high school ability in spelling, and eighth grade ability in arithmetic.

Prior Physical Condition

Claimant believed she was in excellent physical health prior to going to work for Employer. Although she had suffered bouts of depression in the past, she recovered with the help of anti-depressants. There is no evidence that Claimant suffers from long-term depression.

Work History

She described her paid work history as follows:

- 1) Six months as a bartender for Frank's Place;
- 2) Six months for Shamrock bar and pub;
- 3) Short-time position which Claimant describes as a scam;
- 4) Four or five months sewing inseams for Hagle's;
- 5) Three or four months for Ramey's supermarket;
- 6) One to two months as a telemarketer for Fairfield;
- 7) One year for Ramey's supermarket.

Claimant subsequently worked at least six months for a former boyfriend who owned an auto repair shop. Her job duties included running errands for parts, answering phones, and performing accounting tasks on the computer. Claimant was not paid for this work which was part-time and allowed her to vary her positions and rest as needed.

Job Injury

During her last stint with Employer, Claimant initially began working in the deli department in March 2002. She later obtained the position as an assistant in the meat department. In that position her job duties included, but were not limited to, unloading delivery trucks, lifting boxes of meat products, lifting meat

products in and around the cold storage area and meat cases, grinding meats, throwing away trash into a dumpster. The lifting was repetitive and occasionally up to 80 pounds. The pain in her back began about two months after starting her job in the meat department. She advised her supervisor that she believed her low back pain was related to her work in the meat department. She continued working until September 2002 at which time she was taken off work for her low back. Claimant remained off work until January 2003, at which time she returned to work for Employer as a checker. She testified that this position made her back complaints worse until ultimately she was forced to quit her job in late February or early March 2003. She notified her employer that she could not continue working due to her low back problems. Claimant has not worked in a paid position since late February or early March 2003.

Medical Treatment

Claimant initially received medical treatment for her back from the Fordland Family Clinic on June 20, 2002. She continued to return to the same clinic until October 1, 2002, when an orthopedic consultation was recommended.

In December 2002 Claimant first saw Dr. Olive, an orthopedic surgeon with Orthopedic Specialists of Springfield. He reviewed MRI scans which revealed a right side disc protrusion at L3-4 and a posterior annular tear at L4-5 with mild bulging of that disc. He prescribed Ultram, a painkiller, and one month of therapy. Although Claimant was supposed to follow up with Dr. Olive in a month after therapy, she failed to do so.

Claimant returned to Dr. Olive about 10 months later in October 2003, at which time she reported increased pain approximately two weeks prior, along with pain down her left leg. Claimant denied any new injury. Dr. Olive recommended that Claimant continue with Ultram for her pain. He also prescribed Vioxx. In December 2003 Claimant complained to Dr. Olive that she again had increased pain, swelling in her left knee, and uncontrollable shaking in her left knee. On December 16, 2003, Dr. Olive reviewed a second MRI of Claimant's back, which revealed a large disc protrusion at L-4. Dr. Olive prescribed an epidural steroid injection, which improved some of her pain but not the pain in her back and both buttocks. One month later in January 2004, based on Claimant's complaints and the MRI, Dr. Olive recommended a two-level fusion.

That surgery was performed on February 3, 2004. The fusion involved caging and instrumentation. Dr. Olive said the herniated disc, resulting in the need for fusion surgery, was caused by her repetitive lifting at Ramey's. Employer paid Claimant \$15,372.96 in Temporary Total Disability while she was off work.

Dr. Olive initially indicated that Claimant sustained a 13 percent Permanent Partial Disability to the body as a whole. He indicated that many people who have had fusions become pain free, did not need medication, and could sit, stand, lift, and do many activities without restrictions.

In Claimant's case, however, Dr. Olive understood that, while Claimant had some initial pain relief after surgery, her legs and back still were sore. Claimant complained to Dr. Olive that she could not sit and do any type of work that he suggested, such as that of a telemarketer. Dr. Olive acknowledged that Claimant's pain complaints were subjective and could not be objectively tested; however, based on those subjective complaints, he opined that Claimant could not work. He prescribed Vicodin and Skelaxin, the need for which he believed was directly related to the work-related repetitive trauma at Employer's supermarket.

After treating with Dr. Olive, Claimant saw Dr. Ted Lennard on August 23, 2005, and September 10, 2005. Claimant told Dr. Lennard that she had no symptoms below the knees and 98 percent of her residual pain was located in her back. In reaching his determination of Claimant's disability, Dr. Lennard made the following statement:

Ms. Brooke has been through a long course of treatment and unfortunately continues to have subjective complaints of pain in her back. It is felt that she has reached maximum medical improvement. She will be maintained in permanent work restrictions of 25 pounds of lifting, avoiding more than occasional bending, sitting, and walking.

Dr. Lennard referred Claimant to Physical Care Therapy for a functional capacity evaluation (FCE), which was performed on September 1, 2005. In a letter dated September 9, 2005, Lalaine N. Capapang reported to Dr. Lennard the following:

Ergo Science Functional Capacity Evaluation (FCE) completed for your patient, Ms. Amanda Brooke, on

9/01/05. The results of the FCE reveals the following:

1. Your patient can return to work; He/She can return to work at a MEDIUM level based on the criteria of the Department of Labor; 3. He/She can tolerate an 8 hour work at the MEDIUM level; There is or no job match. / A job description is not available and a job match was not performed.

Surveillance of Employee

Employer introduced surveillance tapes and a computer disc depicting Claimant on various dates in 2007: January 9 and 10; February 10, 11, 16, and 21; March 16, 21, 22, and 23; and May 14 and 15. Claimant is depicted in the surveillance performing routine tasks such as grocery shopping, driving to a fast-food restaurant, obtaining gasoline, and smoking cigarettes while sitting on a front porch. On February 21, 2007, Claimant is observed moving loaded boxes and trash bags, loaded laundry baskets, a television set with the aid of another woman, a bicycle, and other miscellaneous items. Contrary to Claimant's contention, Claimant appears to move fluidly and without any difficulty. She easily climbed into the bed of a pickup truck and bends over into the back of a van.

In the surveillance C.D., Claimant is observed pushing a grocery cart, walking past an individual in a seated handicapped shopping cart. She lifted what appeared to be several 12-packs of soft drinks, leaned into a frozen food compartment, and sacked and lifted bags of groceries. She performed all of these tasks with no apparent distress.

Even though there were consecutive dates filmed, Claimant does not appear to be in distress on any date. The surveillance videos demonstrate that Claimant is able to drive, get in and out of a vehicle, walk up and down stairs, sit for periods of time on a hard surface, twist, bend, walk, and stand without difficulty. While sitting on a porch to smoke a cigarette, she crossed her legs and turned around, demonstrating no discomfort or numbness in either her legs or back. Contrary to Claimant's contentions, this Administrative Law Judge did not observe Claimant limping.

Expert Testimony

Of those experts who were not treating physicians, Dr. Bennoch and Phil Eldred were retained on behalf of the employee. Dr. Belz was retained on behalf of the employer.

Dr. Shane Bennoch

Dr. Bennoch evaluated Claimant in 2006 and later testified that the repetitive nature of Claimant's work was the prevailing factor in causing her work-related injury and subsequent need for surgery on February 3, 2004. During his physical exam of Claimant, Dr. Bennoch noted that Claimant's heel-to-shin (a balance test) and heel-to-toe (to determine muscle function based on nerve function coming from the back) were all intact and Claimant could heel/toe walk in normal fashion. He observed no limp. Dr. Bennoch's opinions in relation to the disability and restrictions were made primarily due to Claimant's subjective complaints of pain. He admitted that there was no way to test for pain.

Dr. Bennoch agreed that Claimant was at maximum medical improvement. He said Claimant sustained a 35 percent permanent partial impairment due to the low back injury. He imposed the following restrictions: lifting or carrying 20 pounds occasionally, with no frequent lifting of any weight; standing and/or walking no more than two hours in an eight-hour day; alternating sitting and standing to relieve the pain or discomfort; no pushing and/or pulling more than 20 pounds with lower extremities; no climbing of ramps, poles, ladders, ropes, scaffolds, or stairs; She should never balance or crawl. She can kneel or stoop occasionally. Occasionally was defined as occurring from very little up to one-third of an 8-hour workday. Dr. Bennoch felt these limitations were appropriate since Claimant had a two-level fusion with persistent back pain. Dr. Bennoch said, "I don't think she can be reemployed with this injury, certainly not in a physical job." She further indicated that persons who have had "this kind of surgery and who continue to complain of back pain are likely to require ongoing care, not necessarily that she requires further surgery or anything like that."

Phil Eldred

Phillip Eldred, a vocational rehabilitation expert, concluded that Claimant was permanently and totally disabled given the restrictions imposed by Dr. Lennard, Dr. Olive and Dr. Bennoch. In his opinion, these restrictions (which were based on Claimant's subjective complaints) placed her outside of the open labor market. Mr. Eldred did not review Dr. Belz's report in his determination of Claimant's employability. He did,

however, review the surveillance tapes, although he said nothing in the surveillance changed his opinion regarding Claimant's inability to obtain employment on the open labor market. Employer provided no vocational opinions.

Dr. Belz

Dr. Belz examined Claimant on July 20, 2007. He said Claimant sustained an occupationally-induced back injury requiring the fusion that was performed. He testified that Claimant presented in a fashion that was inconsistent with having any back pain or radiculopathy. For example, during her examination she pulled a chair next to her and stretched her legs over the arm of the chair, which placed her lower extremities above chest level, which would be counter indicative of someone having any leg pain or radiculopathy. He also determined that her range of motion in her back was the same as someone that had a good result from back surgery.

Dr. Belz believed Claimant had reached maximum medical improvement on August 13, 2004. Based on his examination of Claimant, he believed Claimant would be best served with a 25-pound lifting restriction and to use proper biomechanics and body mechanics. She had no other restrictions. He imposed no restrictions on sitting, standing, or walking. He opined within a reasonable degree of medical certainty that Claimant could work and that she possessed transferable skills. Dr. Belz said, "She's not permanently and totally disabled. She's a young lady who would – who would be best served by reentering the work force." Dr. Belz gave Claimant a 35-percent Permanent Partial Disability rating because Claimant had a two-level fusion. With respect to future medical, Dr. Belz believed that the only medications Claimant should be taking is Celebrex. He strongly advised against long-term use of narcotic medications such as Hydrocodone. Even though he recommended against Claimant taking Hydrocodone, he said that the effect of the medication was dose and individual dependent. From his observations, it did not affect the Claimant's ability to concentrate or listen to directions.

Current Complaints and Activities

Claimant testified at the hearing that over the last 18 months (some of which time was the subject of extensive videotaped surveillance) the problems with her back are getting worse. She testified that she was unable to sit for longer than a few minutes. Claimant's mother also testified that Claimant is unable to perform a number of household chores due to her pain. She contends she has difficulty riding in cars, and can only ride for 30 minutes before having to stop. She states that she has had difficulty sleeping. Claimant limits her activities with her children. She no longer can jump on the trampoline and has noticed some problems with balance. She reads, but contends that she sometimes has difficulty concentrating due to the pain and the negative effects of the medications.

Despite these alleged limitations, Claimant admitted that she canoed more than once since her back injury. She rides horses for 30 minutes at a time. She has ridden as a passenger on a motorcycle with her new boyfriend. And, as she admitted at the hearing, she prefers driving to riding in a vehicle.

Claimant testified that since her surgery she has had constant pain in her lower back, radiating into both legs. While she stated that her toes go numb, especially when she is sitting, Dr. Bennoch found no atrophy indicating radiating pain into the legs. Claimant was observed both in the surveillance tapes and at the hearing with her legs crossed with no apparent discomfort. She estimated that her average pain was six to seven, and increased to nine on a ten-point scale with increased activity. She said she is limited to walking for an hour at a time. Claimant indicated that she must change positions frequently, and did so during the hearing. She did not, however, appear to be uncomfortable while other witnesses were testifying. She testified that walking down stairs is not much of a problem, but going up a series of steps is difficult and she often has to stop and rest. She currently lives with her mother and the laundry room is in the basement. There are approximately nine steps going down into the basement and she often has to stop halfway up to rest. Claimant is seen climbing a few steps in the videos.

Claimant currently takes pain medications and muscle relaxers for her low-back pain. She said they cause significant drowsiness, difficulty concentrating, and difficulty staying focused. Dr. Belz found no adverse affects in concentration as a result of Claimant's medications. I also noticed no difficulty in Claimant's concentration during the hearing.

CONCLUSIONS OF LAW

Nature and Extent of Disability

Permanent Total Disability is defined as the inability to return to any employment, and not merely to the employment in which Claimant was engaged at the time that the claim arose. *Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo. App. W.D. 1996). The test is whether the individual can compete for employment in the open labor market. *Grgic v. P & G Construction*, 904 S.W.2d 464 (Mo. App. E.D. 1995). It is not necessary that an injured employee be rendered wholly or completely inactive, inert or helpless in order to be entitled to receive compensation for permanent total disability. *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274 (Mo. App. S.D. 1994). Claims for Permanent Total Disability are to be determined according to the facts and circumstances surrounding each claim. Because this claim arose prior to the statutory amendments effective on August 28, 2005, the law is to be liberally construed in accordance with the public welfare. *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936). But Claimant has the burden of establishing all of the statutory elements of a compensable workers' compensation claim. *Fitzwater v. Dept. of Public Safety and Missouri Veterans Home*, 198 S.W.3d, 623 (Mo. App. W.D. 2006).

Claimant contends that the restrictions placed on her by various doctors create a disability sufficient to make her unemployable on the open labor market. While Claimant certainly has a disability to her back, many of the restrictions were imposed based on Claimant's *subjective* complaints. If Claimant's history, performance, and testimony relating to her subjective complaints is not credible, then the restrictions imposed do not accurately reflect Claimant's true degree of disability. I do not find Claimant credible in relation to her subjective complaints.

As noted above, Employer provided surveillance of Claimant which was admitted without objection. These videos, which Dr. Belz observed, clearly demonstrate that Claimant is functioning quite well. I further observed Claimant during her testimony. Although she altered her position frequently, there were times in which she appeared to have no distress at all.

In my opinion, Claimant's physical activity in the videotapes is completely inconsistent with statements that she made to doctors and her testimony at the final hearing. Of the physicians who rated Claimant, only Dr. Belz reviewed the videotapes presented at the hearing. Additionally, Dr. Belz performed an extensive independent medical examination, during which he was able to take a complete history and perform an extensive medical record review and physical exam. At the physical exam, Dr. Belz was able to determine inconsistencies in Claimant's presentation and her actual physical abilities, supporting my opinion of the surveillance of the employee. Dr. Belz's opinion is substantiated by the FCE. I find Dr. Belz's opinion of 35 percent to the body as a whole with a 25-pound lifting restriction to be supported by the evidence in this case. Other postural restrictions, imposed due to Claimant's subjective complaints to various physicians, are clearly suspect in light of Claimant's obvious abilities demonstrated on the surveillance videos.

Vocational expert Phil Eldred also opined that Claimant was unable to obtain work in the open labor market. Mr. Eldred stated that he found nothing in the surveillance video tapes to alter his opinion. Such opinion is simply not credible. This is not an instance in which Employer presented surveillance on just one or two days. There were repeated instances of Claimant performing tasks in such a way that completely contradict Claimant's contention that she is in constant pain. While Claimant may need a 25-pound lifting restriction as opined by Dr. Belz, I specifically find that she is capable of obtaining work on the open labor market.

Future Medical

Future medical benefits may be awarded if Claimant proves to a reasonable degree of probability that such benefits are necessary and directly result from a work-related injury; the testimony and evidence in this regard need not be conclusive in nature. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo. App. E.D. 2007). While Claimant must prove that the need for future medical aid flows from a work-related accident, Claimant is not required to demonstrate the specific medical treatment or procedures that will be necessary in the future. *Crowell v. Hawkins*, 68 S.W.3d 432 (Mo. App. E.D. 2001; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001).

Dr. Norbert Belz performed an independent medical examination at the request of the employer. He testified that Claimant would require medications in the future. In particular, Dr. Belz recommended Celebrex and

related the need for this medication to the claimant's work-related injury. Dr. Shane Bennoch concurred that Claimant needed Celebrex, although he also found that Claimant needed Skelaxin and Hydrocodone. Dr. Paul Olive also recommended future medical treatment in the form of medications. There were no medical opinions to the contrary regarding Claimant's need for medication, even if they did disagree as to the kind of medication. Based on the competent and substantial evidence referenced above, including medical treatment records and the expert opinions from the doctors, Claimant met her burden of proving that she will require future medical treatment as a direct result of her work-related injury. Employer shall provide medications and follow-up visits to obtain prescriptions for medications as prescribed by the treating physician of Employer's choice.

Past Medical

There is insufficient evidence that Claimant is due any past medical.

SUMMARY

Claimant is entitled to 35-percent Permanent Partial Disability to the body as a whole attributable to the low back as a result of a work related injury. At her stipulated rate of \$187.22, Claimant is to be paid \$26,210.80 in Permanent Partial Disability (140 weeks x \$187.22).

Compensation awarded is subject to a 25 percent fee in favor of attorney William E. Lawrence for necessary legal services.

Dated: November 14, 2008

By: /s/ Victorine R. Mahon
Victorine R. Mahon
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: attest:

/s/ Jeffrey W. Buker
Jeffrey W. Buker
Director
Division of Workers' Compensation