

CORRECTING AWARD

Correcting Temporary Award Allowing Compensation dated October 23, 2014

Injury No. 12-103444

Employee: Glenda Buchanan

Employer: SRG Global

Insurer: ESIS, Inc.

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Correction

On page 6 of our temporary award in this matter issued October 23, 2014, we included the following sentence under the section entitled "Conclusion":

For necessary legal services rendered to employee, Kim Heckemeyer, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

The inclusion of the foregoing sentence was an inadvertent clerical error, as employee's attorney in this matter, Kim Heckemeyer, did not during the course of the hearing before the administrative law judge on January 21, 2014, make any request for approval of an attorney fee lien upon compensation awarded. (Both parties did make a request for an award of attorney's fees and costs under § 287.560 RSMo, but the administrative law judge denied those requests and neither party has appealed that determination.) We note that it is generally against our policy to award an attorney fee lien upon an award of compensation that consists solely of future medical expenses, and that it would be difficult to conceive of a circumstance in which we would do so.

Accordingly, we hereby issue this correcting award modifying the October 23, 2014, temporary award by omitting the above-quoted sentence. When this matter proceeds to a hearing for a final award or is resolved by compromise settlement, employee's attorney will, of course, be permitted to make a request for approval of an attorney fee lien at that time.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) whether on or about December 1, 2012, employee sustained an occupational disease arising out of and in the course of her employment; (2) whether employee's injury was medically causally related to her occupational disease; (3) whether employee is entitled to additional or future medical aid; (4) whether employee is entitled to additional temporary total disability benefits from December 5, 2012, through January 21, 2014; and (5) whether either party is entitled to fees and costs from the other.

The administrative law judge rendered the following findings and conclusions: (1) the opinions of Dr. Emanuel are more persuasive and representative of the evidence than those of Dr. Woiteshek; (2) the evidence does not support a finding that employee

Employee: Glenda Buchanan

- 2 -

suffered an occupational disease that was the prevailing factor in causing her bilateral upper extremity problems and resulting disability; (3) there is insufficient evidence to find that the proceedings were brought, prosecuted, or defended without reasonable grounds, and the request of each party for fees and costs is denied; and (4) the remaining issues are moot.

Employee filed an Application for Review alleging the administrative law judge erred in finding employee failed to prove she sustained an occupational disease and in finding employee failed to prove a medical causal connection between work and her bilateral upper extremities.

Findings of Fact

Employee was 60 years of age at the time of the hearing before the administrative law judge. Employee worked for employer for a total of 32 years. Employee worked variously as a “racker” and as a “lead person.” The “racker” job involved lifting plastic car parts, such as grilles, that weighed from several ounces up to 5 pounds, and attaching the parts to racks which moved through the workspace; this task required overhead work about 33% of the time. The “lead person” job, on the other hand, involved paperwork and administrative duties, such as counting the number of racks that were filled.

Employee is generally a poor historian with respect to when and for how long she performed the lead person versus the racking job, but her personnel file shows she was working as a racker as of May 2009. Employee also credibly testified (and we so find) that she performed exclusively racking duties from 2010 to 2012.

Employee’s normal work schedule was 40 hours per week/8 hours per day, but employee’s paystubs reflect that she worked numerous overtime hours in 2012, and sometimes worked as many as 60 hours per week. Employees were permitted two 15 minute breaks, but no lunch break. During the entire course of her employment with employer, employee did not have any hobbies or other non-work activities that involved repetitive use of the upper extremities.

On December 3, 2012, employee was 1 or 2 minutes late for work because she was caught by a train. Employer discharged employee on December 5, 2012, because she purportedly accumulated too many attendance points. Employer did not present any testimony to prove up the requirements of its policy or the specific circumstances of employee’s accumulation of attendance points.

Employee’s personnel file contains her termination slip and some written warnings for attendance, but it is unclear to us from these documents whether employer’s policy was a strict “no fault” attendance policy under which employees received points for attendance incidents which were beyond their control, or whether employer took the circumstances of each attendance incident into consideration when assessing points. Also, employee is alleging a gradual onset occupational disease sustained each day in the course of her employment through December 2012, so we cannot say that each of the attendance incidents leading up to her discharge from employment occurred “after” employee sustained the injuries she claims herein. In light of these considerations, we find that employer did not terminate employee from employment for post-injury misconduct.

Employee: Glenda Buchanan

- 3 -

Bilateral shoulder complaints

In 2009, employee started experiencing pain in her left shoulder when reaching overhead. The pain progressed and employee began experiencing similar symptoms in her right shoulder as well. The pain was so intense that it prevented employee from sleeping at night. Employee tried taking over the counter pain pills, but these were ineffective in treating her bilateral shoulder pain. Employee reported her bilateral shoulder pain to employer's safety officer, Connie Holt, but Ms. Holt told employee that her problems were the effect of aging and arthritis, and refused to authorize medical treatment. So employee sought medical treatment on her own.

On January 23, 2009, employee saw Dr. Michael Critchlow for her bilateral shoulder pain. Dr. Critchlow noted that employee's pain was associated with her racking duties, and that employee was taking 800 mg of over the counter ibuprofen 5 times per day, but that this was ineffective in controlling employee's pain complaints. Dr. Critchlow ordered diagnostic studies, recommended shoulder injections, and referred employee to a specialist, Dr. Patrick Knight. Employee saw Dr. Knight periodically from March 2009 to November 2012 for shoulder injections and to refill her prescriptions for pain medications. On March 16, 2009, Dr. Knight opined that an MRI of employee's left shoulder showed a severe partial cuff tear. A later MRI of March 1, 2010, revealed that employee had supraspinatus tendinosis with a large full-thickness rotator cuff tear in her left shoulder. On November 2, 2011, Dr. Knight diagnosed a rotator cuff tear in employee's right shoulder.

Dr. Knight addressed the issue of surgical intervention with employee, but employee declined because she could not afford the surgeries and could not afford to take time off work. Drs. Knight and Critchlow did not take employee off work at any time in connection with her bilateral rotator cuff tears, and employee continued working the racking job until employer terminated her employment on December 5, 2012. The shoulder injections provided employee with short-term relief, but her pain consistently returned.

Expert medical opinion evidence

Employer's expert, Dr. James Emanuel, initially found employee's work to be the prevailing factor causing her shoulder problems, but changed his mind after watching a video supplied by employer that he characterized as showing employees working at a "very leisurely pace." *Transcript*, page 372. We have carefully reviewed the video evidence, and we must disagree with Dr. Emanuel's characterization of the work. While employees are not depicted as rushing around in the video, they are in near-constant motion, and the work shown involves frequent reaching and twisting with the arms. More importantly, employee and a coworker, Sarah Yancy, credibly testified (and we so find) that employer could run the line at various speeds, so it's not clear that the video is representative of the typical pace of the work.

Notably, Dr. Emanuel opined that an employee would need to lift 25 pounds over shoulder height for 66% of the work day in order for him to deem a rotator cuff tear related to work. Dr. Emanuel did not refer to any medical literature or scientific study to support this hypothesis; it thus appears that it is of Dr. Emanuel's own creation. But Dr. Emanuel did not describe the origin of his hypothesis, or provide any testimony to specifically link it to his own clinical experience.

Employee: Glenda Buchanan

- 4 -

On the other hand, employee's expert Dr. Dwight Woiteshek (who also reviewed the video evidence) noted that there is a vast difference between lifting near the body and with the arms extended, as employee was required to do, and stressed the repetitiveness of the lifting tasks in rendering his opinion that employee's work was the prevailing factor causing her to suffer bilateral overuse syndrome with rotator cuff tears. Especially when we consider that employee was working exclusively as a racker for two full years during the time that her problems manifested and progressed, Dr. Woiteshek's opinions regarding occupational disease and medical causation ultimately strike us as more persuasive. Accordingly, we adopt the opinions and findings from Dr. Woiteshek as our own as to the issues of occupational disease and medical causation.

Dr. Woiteshek opined that employee is not at maximum medical improvement with regard to her bilateral shoulder injuries, and recommended that she undergo additional medical treatment including, but not limited to, surgical repair of her bilateral rotator cuff tears. We find persuasive this opinion from Dr. Woiteshek.

Dr. Woiteshek also opined, in his report, that employee has been unable to work as a result of her bilateral shoulder conditions from December 2012 into the foreseeable future. Employee testified she has been out of work since December 2012, and that she is requesting an award of temporary total disability benefits from that time period, but she did not specifically testify whether she felt she was unable to work after December 2012. Employee applied for, but did not receive, unemployment insurance benefits.

We have noted that employee was working full-time (with a lot of overtime) for employer up until December 2012, and that Drs. Knight and Critchlow did not, at any time, take employee off work. Nor did either of these treating doctors render an opinion that employee was unable to work owing to her bilateral shoulder conditions. In fact, Dr. Knight frequently indicated that employee had surprisingly good range of motion, and that she was highly functional even with her bilateral rotator cuff tears. It thus appears to us that employee could have continued working full-time for employer if employer had not discharged her in December 2012. In light of these considerations, we are not persuaded that employee's shoulder conditions rendered her unable to work, and we find Dr. Woiteshek's contrary opinion to be lacking persuasive force.

Conclusions of Law

Occupational disease

Section 287.067.1 RSMo provides, as follows:

In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Employee: Glenda Buchanan

- 5 -

We have credited Dr. Woiteshek's opinion that employee's repetitive work with employer caused her to suffer bilateral overuse syndrome with rotator cuff tears. We conclude that employee suffered an "occupational disease" as defined above.

Medical causation

Section 287.067.2 RSMo provides, as follows:

An injury or death by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

We have credited the medical causation opinion from Dr. Woiteshek. We conclude that employee's occupational exposure was the prevailing factor causing the resulting medical conditions of bilateral overuse syndrome with rotator cuff tears, and any disability associated therewith.

Additional medical treatment

Section 287.140 RSMo provides for an award of medical treatment where the employee can prove a reasonable probability that she has a need for treatment that flows from the work injury. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51-4 (Mo. App. 2008). We have credited the opinion from Dr. Woiteshek with regard to the issue of additional medical treatment. We conclude that employer is liable under § 287.140 to provide employee the medical care that may reasonably be required to cure and relieve the effects of her compensable injuries by occupational disease, which shall include, but shall not be limited to, surgeries to correct employee's bilateral rotator cuff tears.

Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ her during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). Accordingly, we look to the evidence of employee's physical condition following the work injury.

We have found lacking persuasive force Dr. Woiteshek's opinion that employee has been unable to work since December 2012. Accordingly, we must deny employee's claim for temporary total disability benefits from December 5, 2012, through January 21, 2014. We note, however, that because we have determined that employee's bilateral rotator cuff tears amount to compensable injuries by occupational disease, and have awarded medical treatment including surgery, that should employee be rendered unable to work during any time period as a result of such surgeries, employer will be liable for temporary total disability benefits at that time.

Employee: Glenda Buchanan

- 6 -

We further conclude that § 287.170.3 RSMo is not applicable in this matter, because we have found that employer did not terminate employee from employment for post-injury misconduct.

Costs under § 287.560 RSMo

Both parties request an award of costs under § 287.560 RSMo. The courts have cautioned the Commission to limit an award of costs to those cases where “the issue is clear and the offense egregious.” *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003). We are not persuaded that either party in this matter engaged in the type of egregious conduct for which the penalty under § 287.560 is reserved. We deny the parties’ requests for an award of costs.

Conclusion

We reverse the award of the administrative law judge. Employee sustained compensable bilateral shoulder injuries by occupational disease arising out of and in the course of her employment. Employer is ordered to furnish employee with that medical treatment that may reasonably be required to cure and relieve the effects of her bilateral shoulder injuries, which treatment shall include, but shall not be limited to, the surgeries recommended by Dr. Woiteshek.

The award and decision of Administrative Law Judge Carl Strange, issued April 23, 2014, is attached solely for reference.

Any past due compensation shall bear interest as provided by law.

This award is only temporary or partial. It is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

Given at Jefferson City, State of Missouri, this 21st day of November 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Glenda Buchanan

Injury No. 12-103444

Dependents: N/A

Employer: SRG Global

Additional Party: N/A

Insurer: ESIS Inc.

Hearing Date: January 21, 2014

Checked by: CS/rm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Denied (See Findings).
3. Was there an accident or incident of occupational disease under the Law? Denied (See Findings).
4. Date of accident or onset of occupational disease? December 1, 2012.
5. State location where accident occurred or occupational disease contracted: New Madrid 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? Denied (See Findings).
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: Employee alleged unusual strain and injury to bilateral upper extremities and body as a whole due to racking parts on the line.

12. Did accident or occupational disease cause death? N/A.
13. Parts of body injured by accident or occupational disease: (See Findings).
14. Nature and extent of any permanent disability: (See Findings).
15. Compensation paid to date for temporary total disability: \$0.00.
16. Value necessary medical aid paid to date by employer-insurer: \$0.00.
17. Value necessary medical aid not furnished by employer-insurer: (See Findings).
18. Employee's average weekly wage: Not Calculated.
19. Weekly compensation rate:

\$450.79 for temporary total disability and permanent total disability; and
\$433.58 for permanent partial disability.
20. Method wages computation: By Agreement.
21. Amount of compensation payable: Denied (See Findings).
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: Denied (See Findings).

FINDINGS OF FACT AND RULINGS OF LAW

On January 21, 2014, the employee, Glenda Buchanan, appeared in person and by her attorney, Kim Heckemeyer, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, Ben Shelledy. 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 December 1, 2012, SRG Global was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was insured by ESIS Inc.
2. On or about December 1, 2012, the employee was an employee of SRG Global and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. The employer had notice of employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's rate for temporary total disability and permanent total disability is \$450.79, and her rate for permanent partial disability is \$433.58.
6. The employer has furnished no medical aid to the employee.
7. The employer has paid no temporary total disability benefits.

ISSUES:

1. Occupational Disease.
2. Medical Causation.
3. Additional Medical Aid.
4. Additional Temporary Total Disability.
5. Fees and Costs.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Medical Records of
 1. Dr. Michael Critchlow;
 2. Orthopedic Associates;
- B. Medical Report of Dr. Dwight Woiteshek;
- C. Deposition of Dr. Dwight Woiteshek including Curriculum Vitae and Report;
- D. Deposition of Glenda Buchanan;
- E. Deposition of Claire Urhahn;
- F. Time and Expense Itemization;
- G. SRG Global Paystubs;

- H. Photograph 1;
- I. Photograph 2;
- J. Photograph 3; and
- K. Photograph 4.

Employer-Insurer's Exhibits:

1. Deposition of James Emanuel including Curriculum Vitae and Report;
2. Video Deposition of Claire Urhahn;
3. Transcript of Video Deposition of Claire Urhahn;
4. Plating Expected Chart;
5. Kortenhof McGlynn & Burns Summary of Invoices;
6. by Michael Fallwell dated April 10, 2013;
7. Physical demands analysis dvd; and
8. Employer records of Employee.

FINDINGS OF FACT & RULINGS OF LAW:

Issue 1. Occupational Disease & Issue 2. Medical Causation

Glenda Buchanan (hereinafter "Employee") has requested an award of compensation from SRG Global (hereinafter "Employer") for an occupational disease to her bilateral upper extremities. Employee has worked for Employer since 1980. As part of her duties, Employee has worked in racking and as a lead person. At the time of the hearing, Employee testified that during the 1980s and 1990s she was a lead person but also did racking. While Employee noted that she was occasionally lead person in the 2000s, she did paperwork and racking the rest of the time. Further, Employee noted that she first started having increased pain in her shoulders in 2009 at which time she reported it to Employer. At her doctor's appointment on January 23, 2009, Employee complained of bilateral shoulder pain which she had for about two to three weeks when she started a new job described as racking. On March 4, 2009, Employee informed Dr. Critchlow that the "pain is coming on while at work....but she is only doing paperwork now" (Employee's Exhibit A).

Dr. James Emanuel evaluated Employee on April 30, 2013, and opined that "based on the patient's work activities as she describes, the patient's work activities are the prevailing factor in the development of tears of the rotator cuff". Following a review of the physical demand analysis which has been entered into evidence, Dr. Emanuel changed his opinion and opined that "these job activities do not rise to the level in my opinion to be the prevailing factor in the development of a rotator cuff tear" (Employer-Insurer's Exhibit 1). On August 22, 2013, Dr. Dwight Woiteshek evaluated Employee and opined that Employee suffered an overuse syndrome of the left and right shoulder and that her work as a racker was the prevailing factor in that overuse syndrome (Employee's Exhibit B).

After a thorough review of the evidence, I find the opinions of Dr. Emanuel to be more persuasive and representative of the evidence than those of Dr. Woiteshek. Dr. Woiteshek's opinions fail to adequately consider several aspects of Employee's work with Employer which

includes, but is not limited to assistance with overhead work from a co-worker, limited weight of items racked, variation of job duties, speed of work, and number of items racked. Based on the evidence submitted, I find that Employee has failed to satisfy her burden of proof on the issue of occupational disease and medical causation relating to her bilateral upper extremity injuries. The evidence does not support a finding that Employee suffered an occupational disease that was the prevailing factor in causing her bilateral upper extremity problems and resulting disability. Employee's claim for compensation regarding her bilateral upper extremities must therefore be denied.

Issue 5. Fees and Costs

Each party has requested an award of fees and costs. Based on the evidence, I find that there is insufficient evidence to find that the proceedings were brought, prosecuted, or defended without reasonable grounds. Consequently, the request of each party for fees and costs is hereby denied.

As a result of the denial of Employee's claim, the remaining issues are moot and shall not be ruled upon.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation