

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

Injury No.: 99-040243

Employee: Kelley Courtney
Employer: McDonald's Restaurant
Insurer: McDonald's Operators Risk Management
c/o Cannon Cochran Management Services

The above-entitled 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 briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the June 24, 2010, award and decision of the administrative law judge. 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, decisions and modifications set forth below.

Preliminaries

The issues stipulated in dispute at the hearing were: (1) medical causation; (2) whether employee is entitled to her unpaid medical expenses; (3) whether employee is entitled to temporary total disability benefits from March 11, 2003 through April 25, 2004; and (4) the nature and extent of permanent disability resulting from the work injury, if any.

The administrative law judge made the following findings: (1) employer is not liable for any permanent partial disability to employee's knees; (2) employee is permanently and totally disabled as a result of the work injury of March 15, 1999; (3) employer is not liable for the bills from Dr. Kock; (4) employer is liable for treatment employee received at St. Joseph's Health Center and St. Joseph's Physicians; and (5) employer is liable for temporary total disability benefits from March 11, 2003 through April 25, 2004.

Employer submitted a timely Application for Review with the Commission alleging the administrative law judge erred in the following ways: (1) in allowing temporary total disability benefits from March 11, 2003 through April 25, 2004; and (2) in finding employee permanently and totally disabled as a result of the work injury of March 15, 1999.

For the reasons set forth in this award and decision, the Commission modifies the award of the administrative law judge.

Findings of Fact

The work injury

Employee worked as an assistant manager at employer's fast-food restaurant. On March 15, 1999, employee slipped on a wet floor and caught herself on a counter, resulting in injury to her low back. Employer eventually sent employee to Dr. Kennedy, who diagnosed chronic lumbar strain, and opined that she could return to work with temporary restrictions as of June 16, 2000. Dr. Kennedy's restrictions required

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employee to work no more than 4 hours per day, 4 days per week, with a 20 pound lifting restriction.

Employee worked for employer under Dr. Kennedy's restrictions until March 10, 2003. On that date, employee sought treatment for sudden and severe low back pain at the emergency room at St. Joseph's Health Center. The next day, employee saw her evaluating physician, Dr. Cohen. Dr. Cohen examined employee, recommended additional treatment, and provided permanent partial disability ratings related to the work injury, but he did not render an opinion that employee was unable to work. Dr. Kennedy saw employee on May 8, 2003, diagnosed a significant aggravation of her lumbar condition, and recommended a course of epidural steroid injections, but Dr. Kennedy's records do not indicate he took employee off work or issued additional restrictions. The contemporary records of Dr. Graham, the treating pain management specialist, indicate that employee's previous work restrictions would remain in effect. Employee couldn't remember whether Dr. Kennedy told her she couldn't work, but testified that, in any case, she didn't feel she could work because she couldn't walk, stand, or drive. Employee never returned to work for employer after March 10, 2003.

In his report of February 19, 2004, Dr. Cohen first provided his opinion that employee was unable to work from March 10, 2003. We find Dr. Cohen's retroactive opinion unpersuasive. Employee worked without incident for employer for almost three years under Dr. Kennedy's restrictions. While it's clear employee experienced an exacerbating event on March 10, 2003, we are concerned by the lack of any contemporary medical opinion that employee was unable to work as of March 10, 2003, especially where employee was seen not only by employer's treating physicians, but by an evaluating physician of her own choosing. We are also concerned by employee's admission that one of the reasons she didn't work for employer after March 10, 2003, was because the restaurant changed ownership and she didn't know the new owners. In the absence of contemporary medical records indicating a need to be off work, and in light of employee's admission that she had other reasons for not returning to work after March 10, 2003, we find employee's testimony lacking in credibility on the question whether she was unable to continue working after the exacerbating event of March 10, 2003.

Employee ultimately underwent surgery on April 26, 2004. When Dr. Kennedy released employee on October 4, 2005, he issued the same restrictions as before, with the addition that she was not to lift more than 10 pounds. Dr. Kennedy was of the opinion employee sustained a 25% permanent partial disability of the body as a whole referable to the lumbar spine. Employee currently uses over-the-counter pain medications and Vicodin to relieve her ongoing low back pain.

Conflicting expert testimony

Dr. Cohen evaluated employee and believes she is permanently and totally disabled due to the difficulty she has sitting for short periods of time. Dr. Cohen admitted, though, that if an employer accommodated employee and she was able to move around and get up when she wanted, it was possible for her to return to work.

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Dr. Chabot evaluated employee and opined that she sustained a 25% permanent partial disability of the body as a whole referable to the lumbar spine as a result of the work injury. Dr. Chabot believes there is no reason employee can't work 8 hours per day if she is able to alternate sitting and standing every 30 to 40 minutes.

Mr. Dolan evaluated employee and opined that she is permanently and totally disabled under either Dr. Cohen's or Dr. Kennedy's restrictions. Mr. Dolan admitted, though, that employee has supervisory skills and that she would be a good candidate for career counseling if her pain problem were under control.

Mr. England evaluated employee and opined that, although she likely cannot return to her past work for employer, she is employable in part-time work under Dr. Kennedy's restrictions. Mr. England pointed out that employee is young (42 years old at the time of hearing) and that there are a number of part-time service-type positions available in the area where employee lives that would be a good match for someone with employee's background and skills.

We resolve the conflicting expert testimony as follows. We find Mr. England and Dr. Chabot more credible than Mr. Dolan and Dr. Cohen. Employee worked under restrictions that were almost identical to her permanent restrictions for three years. Employee is an experienced and skilled worker with transferrable skills in an industry with a high demand for part-time work. The treating surgeon, Dr. Kennedy, rated employee's permanent partial disability at 25% of the body as a whole and Dr. Chabot agreed with this rating. We find Dr. Kennedy's opinion credible.

We find that employee is not permanently and totally disabled as a result of the work injury. Rather, we find that employee sustained a 30% permanent partial disability of the body as a whole referable to the lumbar spine as a result of the work injury.

Conclusions of Law

Temporary Total Disability from March 11, 2003, through April 25, 2004

Employer argues employee failed to prove she is entitled to temporary total disability benefits from March 11, 2003 through April 25, 2004. We agree.

Under § 287.170, an injured employee is entitled to compensation during the continuance of temporary total disability. However, payments are unwarranted beyond the point at which the employee is capable of returning to work.

Jones v. Washington Univ., 239 S.W.3d 659, 666 (Mo. App. 2007).

It was employee's burden to prove her entitlement to temporary total disability benefits. *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo. App. 2000). The purpose of temporary total disability awards is to cover the employee's healing period, so the award should cover only the time before the employee can return to work. *Id.*

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We have found employee's testimony and Dr. Cohen's retroactive opinion lacking in credibility with regard to employee's inability to work after March 11, 2003. We are not convinced employee was temporarily and totally disabled from work as of that date. Employee worked without incident for almost three years under significant restrictions from Dr. Kennedy. None of the contemporary treating and evaluating physicians found that employee was unable to return to work after the exacerbating event on March 11, 2003.

We find that employee is not entitled to temporary total disability benefits from March 11, 2003 through April 25, 2004.

Nature and extent of disability resulting from the work injury

Employer argues employee failed to prove she is entitled to permanent total disability benefits. We agree.

The term "total disability" means the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. The pivotal question is whether an employer can reasonably be expected to hire this employee, given his present physical condition, and reasonably expect him to successfully perform the work.

Sutton v. Vee Jay Cement Contr. Co., 37 S.W.3d 803, 811 (Mo. App. 2000) (citations omitted).

We have found that employee is not permanently and totally disabled as a result of the work injury, but rather that she sustained a 30% permanent partial disability of the body as a whole referable to the lumbar spine.

Accordingly, employee is not entitled to permanent total disability benefits from employer, but rather permanent partial disability benefits.

Award

We modify the award of the administrative law judge. Employee is not entitled to temporary total disability benefits from March 11, 2003 through April 25, 2004. Employee is entitled to 120 weeks of permanent partial disability benefits from employer at the rate of \$294.73 per week.

Christopher Tucker, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

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The award and decision of Administrative Law Judge Joseph E. Denigan, issued June 24, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 22nd day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

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DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

In modifying the administrative law judge's award of temporary total disability benefits, the majority focuses on the absence of any contemporary medical opinion that employee was unable to work as of March 10, 2003. I believe the majority reads the medical records too narrowly. The majority references Dr. Kennedy's note from May 8, 2003, but fails to mention that this note indicates employee was in so much pain during the examination that she was "reluctant to walk." Likewise, Dr. Cohen's contemporary report includes his observation that employee was "quite distressed due to the severity of the pain." It's true Dr. Cohen did not specifically speak to employee's ability to work in that report, but his findings and recommendations make clear, at least to me, that work was not even a consideration due to the severity of employee's symptoms related to what was revealed to be a significant disc herniation. Dr. Kennedy's note from August 18, 2003, sets forth his findings related to the MRI of May 23, 2003. Dr. Kennedy found a disc herniation at L5-S1 with bilateral root impingement which was "more prominent than studies previously obtained." Dr. Kennedy noted that employee had been continuously symptomatic to varying degrees since the work events of March 15, 1999, but that she had a "significant aggravation" as of March 10, 2003. All of these findings and notations provide compelling support for employee's testimony that she was unable to work after her work injuries were aggravated on March 10, 2003.

A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability. An award is further supported where the claimant's testimony is corroborated by medical evidence and the employer has presented no evidence to refute the temporary total disability claim.

Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 249 (Mo. 2003) (citations omitted).

Here, employer has presented no evidence or expert medical opinion that would indicate employee was able to work, but has merely pointed to perceived deficiencies in the contemporary medical records. Employee was only working 4 hours a day for 4 hours a week when she reported to the emergency room on March 10, 2003, with debilitating low back pain. I am convinced that the medical records do not include an explicit order that employee not work because her pain level was so high that work was out of the question after the "significant aggravation" of her low back condition she experienced on that date. I would affirm the administrative law judge's award of temporary total disability benefits from March 11, 2003 through April 25, 2004.

I also disagree with the majority's decision to modify the administrative law judge's findings on the issue of the nature and extent of employee's permanent disability. As a

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result of the work injury, employee underwent an L4-5 laminectomy, discectomy, and fusion surgery on April 26, 2004. Employee provided credible testimony that she continues to experience disabling levels of extreme pain that keep her from sleeping at night. Employee's daily activities are significantly curtailed by the effects of the work injury. Employee can't sit or stand for very long before she must change positions. It is difficult for employee to sit in a vehicle or drive. Some days it can take her up to five hours before she is stable enough in the morning to get into the shower. Prescription muscle relaxers and pain killers do not significantly alleviate her symptoms and make her feel tired and fuzzy headed.

I disagree with the majority's rationale for discounting the opinions of Dr. Cohen and Mr. Dolan. The majority emphasizes the fact that employee worked for almost three years under restrictions from Dr. Kennedy that are almost identical to her permanent restrictions. But Dr. Kennedy's restrictions, both before and after employee reached maximum medical improvement, are extreme and limit her to part-time work at best. Dr. Kennedy specifically opined on March 22, 2007, that he did not believe working more than 4 hours per day would be feasible for employee. Employee should not be penalized for attempting to remain a productive member of society by working through her pain for three years. I am convinced the majority's award has this effect. Both Dr. Cohen and Mr. Dolan agreed that employee is permanently and totally disabled due to the work injury and I find their opinions persuasive. I find employee is permanently and totally disabled due to the work injury.

In sum, I believe employee met her burden on both the issues of temporary total disability from March 11, 2003 through April 25, 2004, and her permanent total disability following maximum medical improvement. I would affirm the award of the administrative law judge.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member