

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

Injury No.: 09-073246

Employee: Linda Dorris
Employer: Stoddard County
Insurer: Missouri Association of Counties

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 read the briefs, heard the parties' arguments, reviewed the evidence, and considered the whole record.² We find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge by this supplemental opinion.

We offer this supplemental opinion to address arguments raised by the parties on appeal and to analyze the matter in light of recent appellate decisions controlling the determination of the issues at hand.

Arising Out of and In the Course of Employment³

Employee's supervisor invited employee and a co-worker to walk across the street from their current office to view workstations installed in a new workspace they would soon occupy. Employee testified that while she and her co-worker were returning to their current office, she tripped and fell in the street resulting in an injury to her shoulder. The evidence overwhelmingly supports the administrative law judge's conclusion that employee's accident was the prevailing factor in causing employee's shoulder injury.⁴

In dispute in this matter is whether employee's shoulder injury came from "a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life."⁵

Employer also argues that employee's fall was *unexplained* like the fall Ms. Bivins suffered in *Bivins v. St. John's Reg'l Health*.⁶ Therefore, employer argues, employee has not established that her injury arose out of and in the course of her employment. *Bivins* is distinguishable.

¹ Statutory references are to the Revised Statutes of Missouri 2009, unless otherwise indicated.

² Chairman Larsen was not a member of the Commission at the time the Commission heard oral argument.

³ Section 287.020.3(2) RSMo provides this statutory test: "An injury shall be deemed to arise out of and in the course of the employment only if: (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life."

⁴ § 287.020.3(2)(a) RSMo.

⁵ § 287.020.3(2)(b) RSMo.

⁶ 272 S.W.3d 446 (Mo. App. 2008).

Employee: Linda Dorris

- 2 -

Employee suffered the trip and fall while employee was walking to the office where she was then performing services for employer from an office across the street where employee would soon be performing those services for employer. Two administrative law judges considered the evidence now before us and each drew from that evidence the inference that the hazard that caused employee's injury was the poor condition of the pavement upon which employee was walking when she tripped. We find that inference reasonable.⁷

Employee need not prove that the nature of the risk to which she was exposed was unique to her employment. Compensability is established herein based upon our finding that, in the course and scope of her employment, employee had a direct and greater exposure to the specific risk of tripping inherent in the poor condition of the roadway in a direct path from one office to another and that she sustained injury as a result therefrom.

We agree with the administrative law judge's conclusion that employee's shoulder injury arose out of and in the course of her employment.

Order

We affirm the award of the administrative law judge as supplemented herein.

We approve and affirm the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

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

The July 13, 2011, award and decision of Administrative Law Judge Maureen Tilley is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

⁷ In determining questions of fact the administrative law judge and commission have the right and the duty to draw such reasonable inferences as are warranted by the evidence taken as a whole and the circumstances disclosed by it. See *Davies v. Carter Carburetor*, 429 S.W.2d 738 (Mo. 1968); *Taylor v. Labor Pros L.L.C.*, 392 S.W.3d 39, 45 (Mo. App. 2013).

Employee: Linda Dorris

- 3 -

Secretary

Employee: Linda Dorris

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 reversed.

I do not believe employee's injury arose out of and in the course of her employment.⁸ Employee is unable to identify what caused her to trip. Before we can conclude that an injury arose out of and in the course of employment, it is incumbent upon us to identify the hazard giving rise to employee's injury. It is only by weighing employee's work exposure to the hazard against her non-work exposure to that hazard that we can determine if there is the necessary causal connection between her fall and her work. Here, employee has not proven what hazard caused her fall so I cannot perform the quantitative comparison required by the Workers' Compensation Law. Employee bears the burden of proving all elements of her claim for compensation. Employee has failed to prove her injury arose out of and in the course of employment.

For the foregoing reasons, I would deny the claim for compensation. I respectfully dissent from the decision of the majority of the Commission to award compensation for this claim.

James G. Avery, Jr., Member

⁸ § 287.020.3(2) RSMo.

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Linda Dorris

Injury No. 09-073246

Dependents: N/A

Employer: Stoddard County

Additional Party: N/A

Insurer: Missouri Assoc of Counties c/o Gallagher Bassett Services

Hearing Date: April 13, 2011

Checked by: MT/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? September 15, 2009.
5. State location where accident occurred or occupational disease contracted: Stoddard 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 crossing the street and she tripped and fell.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right shoulder.
14. Nature and extent of any permanent disability: See findings.
15. Compensation paid to date for temporary total disability: None.
16. Value necessary medical aid paid to date by employer-insurer: None.
17. Value necessary medical aid not furnished by employer-insurer: \$32,804.06
18. Employee's average weekly wage: \$401.63
19. Weekly compensation rate: \$267.75
20. Method wages computation: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: None.

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: Michael Moroni.

FINDINGS OF FACT AND RULINGS OF LAW

On April 13, 2011 the employee, Linda Dorris appeared in person and with her attorney, Michael Moroni for a hearing for a final award. The employer was represented at the hearing by its attorney, Jared Vessell. 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. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and liability was fully insured by the Missouri Association of Counties.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Stoddard County Missouri and was working under the Workers' Compensation Act.
3. The employer had notice of the employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The parties stipulate that Employee's average weekly wage is \$401.63, creating a compensation rate of \$267.75 for all benefits.
6. The parties stipulate that the employer/insurer paid \$0 in medical aid.
7. The parties stipulate that the employer/insurer paid \$0 in temporary total disability benefits.

ISSUES

1. Whether on or about September 15, 2009, Employee sustained an accident or occupational disease arising out of and in the course of her employment?
2. Whether Employee's back condition is related to the fall on September 15, 2009?
3. Whether Employer and Insurer are liable for past medical?
4. Whether Employer and Insurer are liable for mileage?
5. Whether the employer and insurer are liable for past temporary total disability benefits?
6. Whether Employer and Insurer are liable for any permanent partial disability regarding Employee's shoulder, and if so, what is the nature and extent?

EXHIBITS

Joint Exhibits

Employee and Employer-Insurer stipulate the following into evidence:

1. Photograph of street where Plaintiff's alleged accident occurred.
2. Medical records pertaining to Plaintiff from Dr. Sonjay Joseph Fonn.
3. Medical records pertaining to Plaintiff from Bloomfield Medical Clinic.

4. Medical records pertaining to Plaintiff from Orthopaedic Associates, Dr. R. August Ritter.
5. Deposition of Linda Dorris, taken December 29, 2009.
6. Deposition of Linda Patrick, taken December 29, 2009.

Employee's Exhibits

- A. Temporary Award.
- B. Records from Dr. Fonn.
- C. Medical bill from Dr. Fonn.
- D. Certified records Bloomfield Clinic.
- E. Certified records Orthopaedic Associates.
- F. Notice of Constitutional Objections.
- G. Rating Report of Dr. Guidos.
- H. Summary of medical expenses and mileage and monthly wages.
- I. Statement of hours missed from work.

Defendant's Exhibits

1. Report of Dr. Nogalski.
2. Curriculum Vitae of Dr. Nogalski.

FINDINGS OF FACT:

Linda Dorris (Employee) testified she is currently employed with Stoddard County as a clerk in the Collector's office. She has held this position for approximately six years and has been an employee of Stoddard County for approximately thirteen years. She is currently sixty-two years old.

On September 15, 2009, the employee and a co-worker, Linda Patrick, traveled across the street to look at countertops that were being installed in their new office building after they finished eating lunch. According to the employee's testimony, her supervisor, Carla Moore asked if she and Ms. Patrick would like to see the new work stations and they agreed they did, and began to travel across the street.

The employee testified that she could not remember specifically where she fell. She also stated that there were not any pot holes in the road. However, she did state that there were cracks in the road. She also stated that she "tripped and fell". She further stated that she "can't state specifically what she tripped on." Employee's Exhibit J is a picture of the street where the employee fell. The employee placed an 'X' on the exhibit that represented the approximate location where she fell. The cracks in the road are visible on the picture.

Employee testified she scraped her right knee and right hand and rolled onto her right shoulder, then continued rolling onto her stomach. She testified her right shoulder took the blunt of the fall. Ms. Patrick was the only witness, although she did not see the actual fall, but did see

the employee hit the ground (Joint Exhibit 5, Page 8-9). The employee was hesitant to get up immediately because she had undergone back surgery one month prior to the fall to repair three compression fractures. An unknown male driver stopped and assisted the employee to her feet and helped her exit the road toward her current office building (Joint Exhibit 5, Page 20; Joint Exhibit 6, Page 9). Regarding her right knee, the employee testified the scrapes healed and she never had any problems after that.

When the employee went back into the office, she stated that she could not use her shoulder or raise it without assistance (Joint Exhibit 5, Page 20-21). Although she was asked if she wanted to go to the hospital, the employee declined and decided to go to the Bloomfield Medical Clinic with her husband (Joint Exhibit 5, Page 20).

Employee testified that the Bloomfield Medical Clinic took x-rays of her shoulder which showed no evidence of a fracture or dislocation (Joint Exhibit 3). The employee reported that she was told to wear a sling and was given pain medication (Joint Exhibit 5, Page 22). Employee then testified she underwent an MRI and was referred to an orthopedic surgeon. The employee stated she underwent surgery with Dr. Ritter, which the records reflect followed a diagnosis of a right rotator cuff tear.

On October 14, 2009, Dr. Ritter operated on the employee's shoulder (Joint Exhibit 5, Page 25; Joint Exhibit 4). Subsequently, the employee underwent physical therapy for her shoulder (Joint Exhibit 5, Page 25). Dr. Ritter recommended that the employee not return to work for six weeks, but the employee stated that she only missed eight or nine days following her shoulder surgery because she was put on light duty at work so that she would not have to move her shoulder.

The employee testified her current problems with her right shoulder include weakness with lifting up or out. She testified she can reach behind her back without any problems. The employee stated that she did not have pain in her right shoulder. She also stated that she was not taking pain medicine.

The employee also testified that she made seven round trips to Cape Girardeau from her house in Bernie Missouri for her medical treatment. Each round trip was 140 miles.

Employee's Exhibit I is a list of the dates and the number of hours the employee missed work. The employee testified that some of these days referenced in this exhibit she would work part of the day, while other days she would not work at all. She further stated that some of these missed days she went to the doctor's office.

The employee testified that in Employee's Exhibit H, Column A contained the provider's names that treated her for this injury, column B was the date the care was provided, column C was the total bill, column D was the amount the insurance company paid, column E was the employee's co-pay, and column F was the amount the employee paid for some bills related to this injury.

Regarding her back, Employee testified she went to Dr. Fonn to ensure she had not reinjured her back. The employee testified that Dr. Fonn indicated her back looked fine and ran some tests to make sure. Employee indicated she is not currently having any problems with her back.

The employee saw Dr. Guidos on October 25, 2010 for an independent medical evaluation.

Dr. Guidos opined that the employee's back pain is due to pre-existing, non-work related thoracic compression fractures. Dr. Guidos assessed a 15% permanent partial impairment of the whole person in relation to this pre-existing injury. Regarding the right shoulder, Dr. Guidos opined that the prevailing factor for the right shoulder injury, need for treatment and surgery for repair of the right rotator cuff and resultant weakness is related to the work injury. Furthermore, Dr. Guidos assessed a 35% permanent partial impairment of the shoulder.

Dr. Nogalski, a practicing orthopedic surgeon, evaluated the employee on behalf of the employer and insurer. Dr. Nogalski performed a verbal history as well as a physical examination. Dr. Nogalski reviewed x-rays of the lumbar spine performed in office that displayed the compressed vertebrae and subsequent repair. Dr. Nogalski diagnosed a history of kyphoplasties of the spine and opined that no clear findings suggest any abnormalities with respect to her spine. In conclusion, Dr. Nogalski opined that Ms. Dorris did not sustain any specific injury as related to a claimed work event regarding her lumbar spine.

Regarding the right shoulder, Dr. Nogalski performed a verbal and physical examination. An MRI performed on September 28, 2009 was also reviewed which showed a retracted rotator cuff tear specifically on the superior rotator cuff with secondary congruency of the acromion relative to the humeral head, which was noted to be high riding. Dr. Nogalski concluded this was a chronic tear. Dr. Nogalski opined that the employee was status post right shoulder rotator cuff repair, probably recurrent rotator cuff tear. Dr. Nogalski notes that Employee may have sustained a shoulder strain which precipitated her evaluation and treatment. Dr. Nogalski concluded that given the mechanism of the injuries, he could not identify that as the prevailing factor in her chronic rotator cuff tear. Furthermore, Dr. Nogalski opined that Employee may have responded well to conservative treatment as she had been living with a chronic tear. Finally, Dr. Nogalski opined that Employee has not sustained any permanent partial disability as a result of a claimed work event and there is no further medical treatment that will be required to cure or relieve the employee from the effects of any such work injury.

RULINGS OF LAW:

Issue 1. Accident.

Was there an accident? The employee tripped and fell and hurt her shoulder. That is sudden and violent and within a single work shift.

Was the accident in the course of employment? The employee was working for the employer performing beneficial services in a place that she was expected to be at the time of the accident.

Did the accident arise out of employment? Was there an idiopathic fall? An injury resulting either directly or indirectly from idiopathic causes is not compensable. Idiopathic was defined in *Ahern v. P&H. LLC*, 254 S.W.3d 129 (Mo.App. E.D. 2008) as being peculiar to the individual or unexplained. In this case, there was not any evidence presented that the fall was peculiar to the employee.

Did the accident arise out of employment? Whether the fall came from a hazard or risk unrelated to employment: Section 287.020.3(2)(b) mandates that an injury does not arise “out of and in the course of employment” if:

“It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal unemployment life.”

In this case, the hazard was related to the employment. She was specifically walking across a street that had cracks in it. In order to get to and from the old office and the new office she had to cross the street. The street was therefore a hazard related to the employment. Furthermore, the Court of Appeals has ruled that that this section of the statute is applicable when there is a nexus between the work and the injury. *Pile v. Lake Regional Medical Center*, 321 S.W.3d 463 (Mo. App. S.D. 2010). In this case, there is a clear nexus between the employee’s work and her injury. She was walking across the street because of work, and she tripped and fell on a cracked street.

Based on all of the evidence presented, I find that the employee sustained an accident arising out of and in the course of her employment.

***Issue 2. Medical causation; and
Issue 3. Previously Incurred Medical Aid.***

The employee credibly testified that on the date of the accident her right shoulder took the blunt of her fall.

Dr. Guidos opined that the prevailing factor for the right shoulder injury, need for treatment and surgery for repair of the right rotator cuff and resultant weakness is related to the work injury. Furthermore, Dr. Guidos assessed a 35% permanent partial impairment of the shoulder.

Dr. Nogalski concluded this was a chronic tear. Dr. Nogalski opined that the employee was status post right shoulder rotator cuff repair, probably recurrent rotator cuff tear. Dr. Nogalski notes that Employee may have sustained a shoulder strain which precipitated her evaluation and treatment. Dr. Nogalski concluded that given the mechanism of the injuries, he

could not identify that as the prevailing factor in her chronic rotator cuff tear. Furthermore, Dr. Nogalski opined that Employee may have responded well to conservative treatment as she had been living with a chronic tear. Finally, Dr. Nogalski opined that Employee has not sustained any permanent partial disability as a result of a claimed work event and there is no further medical treatment that will be required to cure or relieve the employee from the effects of any such work injury.

Based on all of the evidence presented, I find that the opinion of Dr. Guidos is more credible than the opinion of Dr. Nogalski on the issues of medical causation and previously incurred medical aid. Based on all of the evidence presented, I find that the employee's injury to her right shoulder was medically causally related to her accident. Furthermore, I find that the employee's work accident on September 15, 2009 was the prevailing factor in causing the employee's right shoulder injury.

The employee is claiming \$32,804.05 in previously incurred medical expenses. The employer-insurer is disputing this claim based on authorization, reasonableness, necessity, and casual relationship.

The employee did not present any evidence that the employee's need for evaluation on her back was causally related to the employee's injury. The employee is requesting \$984.27 in reimbursement of medical expenses for visits to Dr. Fonn. Based on the evidence presented, the employee's request for reimbursement of medical expenses for Dr. Fonn, are denied.

Dr. Guidos opined that the need for treatment and surgical repair of the right rotator cuff is related to the injury. The employer-insurer denied medical treatment therefore they lost their right to control the medical care. Therefore, the employee's request for reimbursement of medical expenses can't be denied based on authorization. Furthermore, based on Dr. Guidos' opinion, I find that the medical expenses listed in Employee's Exhibit H are reasonable, necessary, and causally related (except those relating to Dr. Fonn). The dates of service in Employee's Exhibit H correspond to the employee's medical records. The Employer-Insurer is therefore directed to pay the employee \$31,819.79 (\$32,804.05 minus \$984.27) in previously incurred medical expenses.

Issue 4. Mileage.

In this case the employee has sought mileage of 140 miles per round trip for seven trips from Bernie to Cape Girardeau, Missouri. The employee testified that she made seven round trips to the doctor for her medical treatment. However, the employee failed to prove that the 9-30-09 trip to Dr. Fonn was medically causally related to the accident. Therefore, the mileage for the trip to see Dr. Fonn is denied. However, I find that the other six trips were necessary for the treatment of the employee's right shoulder.

The mileage rate is \$.50 cents per mile for the time claimed.

The employer-insurer is directed to pay the employee \$420.00 for mileage (140 x 6) x \$.50 = \$420.00.

Issue 5. Temporary Total Disability.

Employee's Exhibit I is a list of the dates and the number of hours the employee missed work. The employee testified that some of these days referenced in this exhibit she would work part of the day, while other days she would not work at all. She further stated that some of these missed days she went to the doctor's office. This was the only evidence presented on the issue of temporary total disability. Based on all of the evidence presented, I find that the employee did not meet her burden of proof on the issue of temporary total disability. Therefore, the employee's claim for temporary total disability is denied.

Issue 6. Permanent Partial Disability.

Based on all of the evidence presented, I find that the employee sustained 20% permanent partial disability of her right injury from the September 15, 2009 work injury at the 232 week level (46.4 weeks). The employee's rate is \$267.75. Therefore, the employer-insurer is directed to pay the employee \$12,423.60 for permanent partial disability of the employee's right shoulder from this injury.

ATTORNEY'S FEE

Michael Moroni, 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.

Employee: Linda Dorris

Injury No. 09-073246

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation