

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

Injury No.: 01-007805

Employee: Glenda Fitzwater
Employer: The Missouri Department of Public Safety and
the Missouri Veteran's Home
Insurer: Central Accident Reporting Office
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: February 9, 2001
Place and County of Accident: Clinton County, Missouri

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 associate administrative law judge must be modified with respect to the employee's request for costs pursuant to section 287.203 RSMo; with regard to the deposition fee of Dr. Koprivica; and, with regard to the denial of future medical care. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the associate administrative law judge dated October 27, 2004. In all other respects the award and decision of the associate administrative law judge is supported by substantial and competent evidence and is affirmed.

REQUEST FOR COSTS PURSUANT TO SECTION 287.203 RSMo
Section 287.203 RSMo, provides:

Whenever the employer has provided compensation under section 287.170, 287.180 or 287.200, and terminates such compensation, the employer shall notify the employee of such termination and shall advise the employee of the reason for such termination. If the employee disputes the termination of such benefits, the employee may request a hearing before the division and the division shall set the matter for hearing within sixty days of such request and the division shall hear the matter on the date of the hearing and no continuances or delays may be granted except upon a showing of good cause or by consent of the parties. The division shall render a decision within thirty days of the date of hearing. Reasonable cost of recovery shall be awarded to the prevailing party.

Employee alleges that the administrative law judge erred in failing to award her request for costs pursuant to section 287.203 RSMo, due to the fact that she prevailed subsequent to the hearing. Employer/insurer responds that neither party was the prevailing party because employee did not get all of the relief that she requested in that not all of the temporary total disability payments she requested were awarded. It argues that neither party prevailed, so no costs should be awarded pursuant to section 287.203 RSMo.

We agree with employee that she was the prevailing party after the section 287.203 RSMo hearing and she is entitled to her costs of recovery. We reject employer/insurer's argument that neither party was the prevailing party because employee did not obtain all relief requested.

Although section 287.203 RSMo, does not define the phrase "the prevailing party," "[w]hen a statute fails to define a word, a dictionary may be consulted to verify the word's plain and ordinary meaning. Missouri courts have adopted *Black's Law Dictionary* definition of prevailing party. A 'prevailing party' is defined in *Black's Law*

Dictionary as ‘the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention’.” *Corley v. Corley*, 128 S.W.3d 521, 526 (Mo. App. 2003) (citations omitted.) In the *Corley* case, the court was interpreting the meaning of the prevailing party as used in section 452.402.7 RSMo, which states: “The court may award reasonable attorneys fees and expenses to the prevailing party.” The phrase “the prevailing party” as used in section 452.402.7 RSMo is the same phrase used in section 287.203 RSMo. We therefore define the prevailing party as used in section 287.203 RSMo, as was defined in *Corley*.

Employee prevailed on the main issues of causation, further medical care, and some of the temporary total disability benefits she requested. That her request for ongoing temporary total disability payments was not awarded does not make her a non-prevailing party. As the prevailing party of the section 287.203 RSMo, hearing she is entitled to her costs. Employee submitted expenses totaling \$1,191.98, plus attorney’s fees totaling \$6,121.97. Employer/insurer did not object to those amounts. Employer/insurer is ordered to reimburse employee her total costs of recovery of \$7,313.95.

DR. KOPRIVICA’S DEPOSITION COSTS

Employer/insurer concedes it owes employee \$600.00 for the costs of Dr. Koprivica’s deposition. Employer/insurer is ordered to reimburse employee \$600.00, if it has not already done so.

FUTURE MEDICAL CARE

In order to receive future medical benefits under the Workers’ Compensation Laws of Missouri, employee has the burden of proving there exists a “reasonable probability” future medical treatment is needed. *Dean v. St. Luke’s Hospital*, 936 S.W.2d 601, 603 (Mo. App. 1997).

The claimant does not have to absolutely establish the elements of her case. It is sufficient if she shows them by a reasonable probability. ‘Probable’ means founded on reason and experience which inclines the mind to believe but leaves room for doubt. In determining whether this standard has been met, the court should resolve all doubt in favor of employee.

Id., at 604. (citations omitted).

The administrative law judge denied future medical care on a finding that he found no evidence that employee’s back and foot will need further treatment. We disagree.

Dr. Robert Haas, one of the treating doctors, stated on January 15, 2004, that intermittent use of the CAM walker is “certainly warranted” to help the swelling in her left foot, which is the result of the Charcot joint. Employee testified that the CAM walker is particularly helpful when she is not at home and is in a location where she cannot elevate her foot. We order employer/insurer to continue provide employee replacement CAM walkers or repairs as needed.

Employee also testified that she continues to have back pain and was prescribed Talwin by her primary care physician for pain relief for her back. Dr. Brent Koprivica also testified that employee would need pain therapy or medications for pain relief due to ongoing low back problems. We order employer/insurer to provide ongoing pain relief medications as may be prescribed for pain relief of her low back.

Dr. Brent Koprivica also stated that employee would require attendant or nursing care; home modifications to make the home wheelchair accessible; and, an electric mobility cart. We are not persuaded that her work accident was a substantial factor in creating any need for these modalities as recommended by Dr. Koprivica. We find the need for any attendant or nursing care; home modifications; or, an electric cart is the result of the progression of her diabetes and resulting complications and not due to the work accident. We therefore deny the same.

CONCLUSION

Employer/insurer is responsible to employee for \$7,313.95 as the costs of recovery in the section 287.203 RSMo hearing.

Employer/insurer shall reimburse employee \$600.00 for the costs of Dr. Koprivica’s deposition.

Employer/insurer are responsible for future medical care in the form of replacing employee's CAM walker as needed and for pain medication as prescribed by a physician for pain relief of her low back symptoms.

The Commission further approves and affirms said 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.

The award and decision of Associate Administrative Law Judge R. Michael Mason, issued October 27, 2004, are attached and incorporated by this reference, except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 22nd day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: John J. Hickey, Member

Secretary

AWARD

Employee: Glenda K. Fitzwater Injury No. 01-007805

Employer: The Missouri Department of Public Safety and the Missouri Veteran's Home

Add'l Party: Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Insurer: CARO

Hearing Date: August 30, 2004 Checked by: RMM
Submitted: September 15, 2004

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: February 9, 2001.
5. State location where accident occurred or occupational disease contracted: Clinton 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: Claimant was preparing some desserts and tripped and fell over an electrical cord.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Parts of body injured by accident or occupational disease: Left Ankle, foot and back.
14. Compensation paid to date for temporary disability and temporary partial disability: \$16,430.60
15. Value necessary medical aid paid to date by employer/insurer? \$26,522.75
16. Value necessary medical aid not furnished by employer/insurer? None.
17. Employee's average weekly wages:
18. Weekly compensation: \$248.76 / \$248.76
19. Method wages computation: By Stipulation.

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: \$ 211.05

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from employer beginning March 6, 2003 for claimant's lifetime.

21. Second Injury Fund liability:
None.

weeks of permanent partial disability from Second Injury Fund

uninsured medical / death benefits

Permanent total disability benefits from Second Injury Fund:
 weekly differential payable by Second Injury Fund for weeks
 beginning and, thereafter, for claimant's lifetime.

TOTAL:

22. Future requirements awarded: None.

Said payments to begin February 9, 2001 and to be payable and 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: Mark E. Kelly.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Glenda K. Fitzwater

Injury No. 01-007805

Employer: The Missouri Department of Public Safety and the Missouri Veteran's Home

Add'l Party: Treasurer of the State of Missouri as Custodian of the Second Injury Fund

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Prior to presenting evidence, the parties stipulated that the Court was to rule on the following issues:

1. Nature and extent of disability;
2. Liability for temporary total disability;
3. Liability for future medical aid;
4. Liability for mileage;
5. Liability of the Second Injury Fund;
6. Liability for the deposition fee of Dr. Koprivica.

FACTS

A Temporary Award was issued by Judge Nelson G. Allen found the employee's back injury and Charcot foot injury to have been compensable. The issue of medical causation was not retried at the final hearing.

Ms. Fitzwater had diabetes prior to the accident of February 9, 2001. She did not adequately control it. The employee stated she had problems with her diabetes but was always able to work. She had intermittent problems with gripping heavy items, driving at night, fatigue, headaches, and joint swelling. Ms. Fitzwater took two insulin shots a day prior to the accident and tested her sugar level on her breaks. In effect, she worked around these problems. She never left work due to sugar levels.

Dr. Koprivica, in Exhibit 1, lists numerous problems and restrictions the employee should have had from diabetes prior to the accident. Dr. Koprivica's assertions basically describe a permanent total disability situation, however, I note that the employee did successfully compete in the open labor market by obtaining a job with the State one year prior to the accident.

The employee has numerous current complaints as to her foot and back. The foot swells, especially with activity. She has pain in the foot. She must elevate the foot every two to three hours to lessen the swelling. Ms. Fitzwater cannot elevate the foot sitting down because this aggravates her back pain. She needs to lie down. She has constant low back pain, which runs down her left hip and leg. She cannot sit for long periods of time. This keeps her from driving. She needs to lie down on occasion due to the back pain.

The employee has an IQ of 102. Per Mr. Cordray, the employee is untrainable due to her back pain. She also has no transferable skills.

CONCLUSIONS

The employee is permanently and totally disabled from this accident alone. Dr. Koprivica and Mr. Cordray state that the necessity of elevating her foot, coupled with her back pain, make her permanently and totally disabled.

A quote from the report of Mr. Cordray accurately assesses the situation:

"It is also my vocational rehabilitation opinion that an individual cannot perform any sedentary occupation of an unskilled nature and elevate the foot. There may be some people that have significant work skills who can perform professional occupations at a desk and as necessary elevate their foot. However, employers are not going to hire unskilled workers and allow them the convenience of sitting down and elevating the foot as necessary."

It is obvious, the employee has problems with her diabetes, especially since the accident, however, I hold that the conditions arising from the accident create a permanently totally disabling situation in and of themselves.

The Second Injury Fund is held to have no liability in this case.

Judge Allen found the employee to have reached maximum medical improvement on March 5, 2003. He ordered temporary total disability paid to that date.

Whether further temporary total disability is owed is a moot question. With a holding that the employers owe permanent total disability benefits, the employee will receive permanent total disability benefits from March 6, 2003 negating the need of temporary total disability.

As to future medical treatment, I find no medical evidence that the employee's back and foot will need treatment. Obviously, the unrelated diabetes will demand constant medical treatment. No future medical treatment is awarded.

The employee is owed mileage in the amount of \$211.05 for 630 miles.

Since 287.210.7 does not apply to the Second Injury Fund, the deposition of Dr. Koprivica was taken on behalf of the employers, who wanted the evidence to be submissable against the Second

Injury Fund. The Fund has no responsibility to pay for a deposition taken by another party. The Fund does not owe any costs as to Dr. Koprivica's deposition.

Dated: October 26, 2004

Made by: /s/ R. Michael Mason
R. Michael Mason
Associate Administrative Law Judge
Div. of Workers' Compensation

A true copy: Attest:

/s/ Gary Estenson
Gary Estenson
Acting Director,
Division of Workers' Compensation