

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

Injury No.: 08-076787

Employee: Rosario Grado
Employer: Securitas Security Services (Settled)
Insurer: Indemnity Insurance Company of North America
c/o Broadspire (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 2, 2012. The award and decision of Administrative Law Judge Emily Fowler, issued February 2, 2012, 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 31st day of October 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Rosario Grado Injury No: 08-076787
Dependents: N/A
Employer: Securitas Security Services
Additional Party: Second Injury Fund
Insurer: Indemnity Insurance Co. of North America c/o Broadspire
Hearing Date: October 24, 2011 Checked by: ESF/lh

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: August 1, 2008
5. State location where accident occurred or occupational disease was contracted:
Kansas City, Wyandotte County, Kansas
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: Employee lifted a gate causing permanent injury to her low back and body as a whole.
12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Back and Body as a whole
14. Nature and extent of any permanent disability: 12.5% permanent partial disability as previously settled with the Employer; Permanent and total disability as to the Second Injury Fund
15. Compensation paid to-date for temporary disability: \$21,045.96
16. Value necessary medical aid paid to date by employer/insurer? \$33,188.18
17. Value necessary medical aid not furnished by employer/insurer? \$0
18. Employee's average weekly wages: \$740.28
19. Weekly compensation rate: \$493.52/404.66
20. Method wages computation: Comparable employee - MO. REV. STAT. §287.250.1(5)
21. Amount of compensation payable:

The Employee and employer previously settled the primary claim for 12.5% permanent partial disability.
22. Second Injury Fund liability:

Permanent total disability benefits from Second Injury Fund: weekly differential of \$88.86 payable by SIF for 50 weeks beginning 07/20/2010 totaling \$4,443.00 and \$493.52 thereafter, for Claimant's lifetime.
23. Future requirements awarded: None

Said payments subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a twenty-five percent (25%) lien in favor of Keith V. Yarwood, Attorney, as attorney's fees pursuant to MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rosario Grado Injury No: 08-076787
Dependents: N/A
Employer: Securitas Security Services
Additional Party: Second Injury Fund
Insurer: Indemnity Insurance Co. of North America c/o Broadspire
Hearing Date: October 24, 2011 Checked by: ESF/lh

On October 24, 2011, the Employee and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to § 287.110. The Employee, Rosario Grado, appeared through her attorney, Keith Yarwood. Ms. Grado had previously settled her claim with the employer under Kansas law. The Second Injury Fund appeared through Assistant Attorney General Eric Lowe.

The parties stipulated to the following:

- 1) that the Employer, Securitas Security Services, was an employer operating under and subject to the provisions of Missouri Workers' Compensation Law on August 8, 2008, and was fully insured through Indemnity Insurance Company of America;
- 2) that Rosario Grado was its employee and working in Kansas City, Wyandotte County, Kansas;
- 3) that Employee notified the Employer of his injuries as required by law and his claim was filed within the time allowed by law;
- 4) that the Employer has paid temporary total disability compensation in the amount of \$21,045.96 and medical care costing \$33,188.18;
- 5) that the Employer and Employee settled the primary claim for 12.5 percent permanent partial disability to the body as a whole;

ISSUES

The issues to be resolved by this hearing are as follows:

- 1) Whether this Court has Missouri jurisdiction;
- 2) Whether the Employee sustained an accident or occupational disease while in the course and scope of her employment and whether it resulted in injury;
- 3) What was employee's average weekly wage and thereby her compensation rate;

- 4) Whether the employee suffered any disabilities prior to her alleged injury on August 1, 2008, and, if so, the nature and extent of such disabilities;
- 5) Whether the Second Injury Fund is liable to the Employee for any disability compensation.

FINDINGS

Ms. Grado testified on her own behalf and presented the following exhibits, all of which were admitted into evidence without objection with the exception of Exhibit H:

- Exhibit A - Deposition of Dr. Stanley Butts, Ph.D.;
- Exhibit B - Deposition of Dr. John Ciccarelli, M.D.;
- Exhibit C - Deposition of Dr. William Hopkins, M.D.;
- Exhibit D - Deposition of Vocational Specialist Michael Dreiling;
- Exhibit E - Wage Statement;
- Exhibit F - Settlement in the Injury No. 87-012884;
- Exhibit G - Post-Injury W-2 Forms;
- Exhibit H - Kansas Statutes 44-510d, e and f.

Although the Second Injury Fund did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence without objection with the exception of Exhibit 1:

- Exhibit 1 - Kansas Settlement;
- Exhibit 2 - Deposition of Vocational Specialist Michelle Sprecker;
- Exhibit 3 - Deposition of Rosario Grado;
- Exhibit 4 - Deposition of Dr. Patrick Hughes, M.D.;
- Exhibit 5 - Report of Dr. Allen Parmet, M.D.

Based on the above exhibits and the testimony of Ms. Grado, I make the following findings: Ms. Grado is a 53-year old female who lives alone in Kansas City, Missouri. Securitas hired her as a security guard at its offices located at 3101 Broadway, Kansas City, Missouri in January of 2007, and on August 1, 2008, she met with an accident that resulted in permanent injury while working at the gate at the General Motors plant located in Kansas City, Wyandotte County, Kansas. At the time, she was earning an average weekly wage of \$720.84 which entitles her to a permanent partial disability rate of \$404.66 and a permanent total disability rate of \$480.56 (Exhibit E).

I further find that she had significant pre-existing disabilities which included a work-related back injury while working as a Kansas City Police Officer in 1987 that resulted in a permanent partial disability of 25% to the body as a whole (Exhibit F), and she suffered from pre-existing psychiatric disabilities that included Major Depressive Disorder, Post-Traumatic Stress Disorder, Attention Deficit Disorder and a Dissociative Disorder (Exhibit A and Exhibit 4).

Prior to working for Securitas, Ms. Grado had also worked as a patient liaison at

Truman Medical Center, a grocery store cashier, several positions at Stations Casino, which included working in the wardrobe department, buffet attendant, steward and dishwasher. She also worked for Barton Security as a security officer; as a tanning salon supervisor; and a roofing repair estimator and as a fabric store clerk.

On August 1, 2008, Ms. Grado worked as a security guard at the General Motors Plant gate. The gate was originally motorized, but the motor no longer worked. She was required to physically open and close a gate large enough to span two lanes designed for truck traffic. On August 1, 2008, she was in the process of lifting the gate when she felt a severe pain in her low back. She was referred to Concentra where she underwent physical therapy for seven months without relief. She was then referred to Dr. David Ebelke, M.D., an orthopaedic surgeon, who administered two epidural injections and performed an EMG of her right leg which showed radiculopathy. He also ordered a myelogram, a CT scan and a bone scan. She was finally referred to Dr. John Ciccarelli who identified two disc herniations: one at the L3-L4 level and another at the L4-L5 level. Dr. Ciccarelli performed back surgery on Ms. Grado, which consisted of partial hemilaminectomies with recessed decompression at the L3 and L4 and discectomies at the L3-4 and the L4-5. He then referred her to physical therapy for twelve visits and released her from treatment on July 20, 2010.

Ms. Grado did return to Securitas for a brief period after her release and eventually was terminated due to an altercation with a co-employee. Ms. Grado found work as a deli worker, but was fired after a couple of weeks when she suffered a dissociative event on the job. She last worked in June of 2010.

Ms. Grado settled her claim in Kansas against the employer based on 12.5% General Work Disability. (Exhibit 1). General work disability is not based on a claimant's permanent partial disability or impairment, but the average between the "wage loss" and "task loss" after the injury.

"Wage loss" is the percentage the claimant's wage decreases after the injury as compared to her average weekly wage before the injury. "Task loss" is the percentage of tasks the claimant is no longer able to perform after the injury as compared to tasks she performed while working in the 15 years prior to the injury. General work disability is not a benefit granted under Missouri law and is granted under Kansas law when it results in a higher award than would result when considering the claimant's impairment rating. (See, Exhibit H, K.S.A. 44-510e).

Rulings

The first issue the parties have asked this court to address is whether it has jurisdiction. Section 287.110.2 states in part, "[t]his chapter shall apply to ... all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide...."

Under Missouri law, a contract is deemed to have been made where the parties perform the last act necessary to complete the contract. Gash v. Black & Veatch, 976 S.W.2d 31,32 (Mo.App. 1998). The uncontroverted evidence is that Ms. Grado accepted her position at Securitas while standing in the Securitas offices located at 3101 Broadway in Kansas City, Jackson County, Missouri. This Court has jurisdiction to decide this case.

The next issue is whether Ms. Grado suffered a work-related accident while working for Securitas on August 1, 2008, and whether it resulted in injury. For an award of benefits, the Court must conclude that the workplace "accident" was the "prevailing factor" or primary factor in causing the injury and the disability. §287.020.3(1). In other words, Ms. Grado's back injury must not have "come from a hazard or risk unrelated to the employment to which [Grado] would have been equally exposed outside of and unrelated to the employment in normal non-employment life." §287.020.3(2)(b).

Dr. William Hopkins and Dr. John Ciccarelli were the only doctors to testify regarding Ms. Grado's physical injury. Dr. Ciccarelli concluded that Ms. Grado had suffered a work related injury based on Ms. Grado's description of what she was doing at the time she first felt symptoms and his review of the post incident MRI. (Exhibit B, 7:16-8:9; 9:2-9:21). The Administrative Law Judge in the Kansas portion of this claim ordered an independent medical exam with Dr. Allan Parmet, M.D., who stated on page eight of his report to that Court that Ms. Grado's low back injuries were "causally related to her on-the-job injury of August 1, 2008, while employed at Securitas in Kansas City, Kansas." (Exhibit 5, pg. 8). Dr. Hopkins concluded that the August 1, 2008 work incident was the prevailing factor in causing both Ms. Grado's disability and her need for treatment. (Exhibit C, 11:2-11:10).

Psychologist, Dr. Stanley Butts, Ph.D., evaluated Ms. Grado for the claimant. Psychiatrist, Dr. Patrick Hughes, M.D. evaluated Ms. Grado for the employer/insurer. Doctors Butts and Hughes independently made the identical diagnosis. Both concluded that after the August, 2008 injury, Ms. Grado, for the first time, suffered from a pain disorder with both physical and psychological components. (Exhibit 4, 17:14-19:21; Exhibit A, 26:17-27:21). Therefore, I conclude that Ms. Grado did suffer an accident while in the course and scope of her employment and that this accident caused the injury to her back as alleged.

The next issue to be determined is Ms. Grado's average weekly wage and compensation rate on the date of injury. The calculation for determining Ms. Grado's average weekly wage is the same regardless of whether she has a permanent partial or a permanent total disability claim against the Fund. The Court must average her total earnings while working for Securitas during the thirteen weeks prior to the injury. (See, Sec. 250.1(4)).

Ms. Grado testified that she worked 40 or more hours per week in the 13 weeks prior to her injury at a rate of \$12.92 per hour for regular hours. She submitted her wage statement which shows an average weekly wage during that period of \$740.28. (Exhibit

E). This Court therefore finds she has a permanent total disability rate of \$493.52 and a permanent partial disability rate of \$404.66.

The next issue is whether Ms. Grado suffered from any disabilities prior to August 1, 2008. I conclude that she did. This Division approved a Stipulation for Compromise Settlement for a 1987 work-related injury to Ms. Grado's back based on a 25% permanent partial disability to the body as a whole. (Exhibit F). When Ms. Grado first saw Dr. Ciccarelli in January of 2009, she reported on-going pain from her 1987 injury of chronic numbness and other symptoms in her left leg. (Exhibit B, 9:10-9:21). Ms. Grado testified that those ongoing symptoms forced her to leave her job as a Kansas City, Missouri police officer.

Furthermore, Dr. Parmet, who was appointed by the Kansas ALJ, stated in his report, "Ms. Grado appears to have had significant impairment prior to the August 1, 2008 injury. This assessment is based upon well documented mental health conditions that exist as well as a report of previous spine injury dating to her occupational injury while working as a Kansas City, Missouri Police Officer." (Exhibit 5, pg. 9). With regard to the significant pre-existing psychological disabilities, Dr. Butts concluded that prior to the August 1, 2008 work-injury, Ms. Grado suffered from a recurrent Major Depressive Disorder, Post-Traumatic Stress Disorder, Attention Deficit Disorder and a Dissociative condition. (Exhibit A, 113).

Dr. Hughes also concluded that prior to August 1, 2008, Ms. Grado suffered from a recurrent Major Depressive Disorder, Post-Traumatic Stress Disorder, Attention Deficit Disorder, and a Dissociative condition. (Exhibit 4, 21:9-22:10). It is well documented in the records the doctors reviewed that Ms. Grado had been hospitalized in various mental hospitals several times in the years prior to her injury. She testified that her depression would make it difficult to go to work on many days. Her dissociative condition would cause her to "black-out" for long periods of time and her post-traumatic stress disorder would cause flash-backs that disrupted her ability to work. Clearly, Ms. Grado had both physical and psychological disabilities prior to her work injury in August, 2008.

The final issue the parties have asked this Court to determine is whether the Second Injury Fund is liable to the employee for any disability compensation. In this issue the employee is alleging the Second Injury Fund is liable for permanent total disability benefits. Total disability is the "inability to return to any employment and not merely [an] 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 whether the worker is able to compete in the open labor market. ABB Power T&D Co. v. Kempker, 236 S.W.3d 43, 48 (Mo.App.2007). "Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert." Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App.1990). " 'Any employment' means any reasonable or normal employment or occupation." Mell v. Biebel Bros., 247 S.W.3d 26,29 (Mo.App.2008). "The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the

injured worker, given his present physical condition.” ABB Power T&D Co. v. Kempker, 236 S.W.3d at 48.

Dr. Ciccarelli placed no restrictions on Ms. Grado as a result of her August 1, 2008 work accident. (Exhibit B, 17:5-17:8). Dr. Hopkins restricted her to sedentary or possibly semi-sedentary work based on the physical injury. (Exhibit C, pg. 85). And, Dr. Parmet, the doctor chosen by the Kansas ALJ to render an opinion, stated Ms. Grado could physically perform a sedentary or light level of work, but he recommended a functional capacity evaluation to make a better determination. (Exhibit 5, pg. 9).

The employer/insurer hired Michelle Sprecker to give her opinion. Ms. Sprecker testified that based on Ms. Grado's *physical restrictions*, Ms. Grado could return to work as a surveillance system monitor, front desk clerk, dispatcher, receptionist, or customer service representative. (Exhibit 2, 19:13-20:1). However, Ms. Sprecker acknowledged that her opinion did not take into account Ms. Grado's psychological condition and that she would defer to mental health professionals on Ms. Grado's psychological ability to compete in the open labor market. (Exhibit 2, 24:17-32:5).

However, all of Ms. Grado's psychological complaints add to the difficulty in obtaining and maintaining employment. Dr. Hughes testified that while the psychogenic pain complaints from Ms. Grado's pain disorder are "self-generated" and "self-serving", she is not malingering. In other words, according to Dr. Hughes, she is not consciously "fabricating" her pain complaints; they are unconsciously generated. (Exhibit 4, 29:14-31:24). Dr. Butts agreed, testifying that Ms. Grado honestly believes she experiences the amount of pain she reports. (Exhibit A, 18:20-19:14).

Dr. Butts testified that the type of dissociative disorder afflicting Ms. Grado, called dissociative amnesia, causes the individual to "black-out" during significant periods of time - sometimes days at a time. However, that would not necessarily be apparent to those around her. The disorder causes her to be passive, dependant, guilty and depressed. It also manifests itself in aggressive behavior. Stress triggers dissociative episodes. The disorder even caused Ms. Grado to lose jobs. He opined that the added stress of the pain disorder would only make things worse. (Exhibit A, 11:3-12:2;12:14-12:22; 14:6-14:13; 14:19-14:25;15:11-15:22; 28:18-29:7; See also, pp. 115-122).

Furthermore, Ms. Grado suffers from night terrors as a result of her post traumatic stress disorder. Dr. Butts says people who suffer from night terrors often wake up in the middle of the night with their hearts pounding and then have difficulty returning to sleep. The end result is the night terror victim has difficulty functioning the next day at work. (Exhibit A, 30:8-21:14).

Dr. Butts testified that from a psychological standpoint, Ms. Grado could not perform any of the jobs Ms. Sprecker listed. (Exhibit A, 31:15-35:3). Dr. Hughes testified that Ms. Grado's psychological conditions would make it difficult for her to maintain employment. (Exhibit 4, 31:6-31:24).

Michael Dreiling testified on behalf of Ms. Grado. He agreed with Ms. Sprecker that Ms. Grado could perform the jobs Ms. Sprecker identified based on the physical restrictions alone. However, he stated that the memory lapses and aggressive behavior brought on by her dissociative condition would prevent her from maintaining employment in those positions. When he factored in the stress those positions would cause and her pain disorder, he concluded that it would be very difficult to find her a job she could keep. (Exhibit A, 15:2-19:13). He concluded that Ms. Grado would have difficulty in accessing the open labor market and that she was "realistically unemployable." (Exhibit D, 12:24-13:12; pp. 63-64).

None of the medical or psychological experts concluded that Ms. Grado was permanently and totally disabled as a result of the last accident alone. With regard to the physical disability from the last accident alone, Dr. Ciccarelli assigned a 13% permanent partial disability to the body as a whole. (Exhibit B, 18:10 – 18:20; pg. 50). Dr. Hopkins assigned a 35% permanent partial disability to the body as a whole. (Exhibit C, pg. 85). Dr. Parmet, the court appointed doctor in Kansas, assigned an 11% impairment to the body as a whole. (Exhibit 5, pg. 8). In addition, Dr. Butts assigned a 5% permanent partial disability for Ms. Grado's psychological injury as a result of the August 1, 2008 work injury. Dr. Hughes did not assign any psychological disability for the August 1, 2008 work injury.

Ms. Grado settled her Kansas claim based on 12.5% General Work Disability. I, therefore, conclude that Ms. Grado suffered a 12.5% permanent partial physical disability to the body as a whole under Missouri law as a result of the last accident. The maximum permanent partial disability rate at that date was \$404.66 per week. The employer's liability to Ms. Grado under Missouri law is \$20,233.00.

Based on the above information, I find that Ms. Grado is permanently and totally disabled as a result of her last accident in combination with her pre-existing conditions.

The final issue is the extent of the Second Injury Fund's liability.

Section 287.220.1 reads in part,

If the previous disability or disabilities ... and the last injury together result in total and permanent disability,... the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself ... then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund"

Dr. Ciccarelli released Ms. Grado at maximum medical improvement on July 20, 2009. (Exhibit B, 16:20 – 17:4). Ms. Grado returned to work at Securitas at a lower rate of pay. Securitas terminated her after an altercation with a co-worker on March 30, 2010.

(Exhibit D, pg. 32). She then went to work at a grocery store for fifteen hours per week. The grocery store terminated her within 90-days. She has given varying accounts of the reason she was terminated. She told Ms. Sprecker it was because she did not work fast enough. (Exhibit 2, 31:1-31:24). She testified at the hearing that it was because she suffered a dissociative episode and failed to clock-out on time. She has not worked anywhere since June 30, 2010.

Although it appears that Ms. Grado was able to return to work after she was released from medical treatment this Court finds that the employment she did was both short term in each case and not necessarily gainful employment as it was performed. Although she did return to her position with Securitas it was changed from her previous work. She was no longer required to lift the gate which was the cause of her injury. She testified that she avoided doing anything that would cause her physical injury so she avoided many of her physical duties. She did find work at Festival foods which was a deli type of establishment however she only worked 15 hours a week and was eventually fired after a few months because she did not maintain her work product up to the employers standards. She testified that she did want to return to work and has actively sought work but has not been able to find work since she was fired from her last job. This was quite some time ago. A person's desire to work does not translate to their ability. In this case this Court finds that the employee is unable to obtain or sustain gainful employment.

One vocational expert, Michelle Sprecker did not take the employee's psychological impairments into account when determining her ability to return to work, only her physical ones, which at best put her in a sedentary range of employment. Mr. Dreiling may have initially felt employee was capable of returning to some type of gainful employment; however when Mr. Dreiling was given all the information regarding employee's physical disabilities as well as psychological disabilities he found she was unable to return to the open labor market at any level. This Court finds this opinion to be the most credible as it includes all effects of all disabilities from which employee suffers.

Because this Court finds employee is permanently and totally disabled due to the combination of all her disabilities from her last accident combined with those disabilities she suffered prior to her last accident I find the Second Injury Fund is liable to employee for permanent total disability. I therefore find that Ms. Grado became permanently and totally disabled on July 20, 2009. I order the Second Injury Fund to pay 50 weeks compensation beginning July 20, 2009 at a rate of \$88.86 ($\$493.52 - \$404.66 = \88.86) and then \$493.52 per week for the rest of Ms. Grado's life. The amount due and owing on November 22, 2011 is \$39,976.44.

Made by: _____

Emily Fowler
Administrative Law Judge
Division of Workers' Compensation