

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

Injury No.: 06-135802

Employee: Tabitha Hasten
Employer: Sonic Drive In of High Ridge
Insurer: Mid-Century Insurance Company

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 briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the 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, decision, and modifications set forth below.

Introduction

The administrative law judge heard this matter to resolve the following disputed issues: (1) accident; (2) statute of limitations; (3) average weekly wage and compensation rates; (4) medical causation; (5) previously incurred medical expenses; (6) future medical expenses; (7) temporary total disability; (8) permanent total disability; (9) permanent partial disability; and (10) whether employee's claim should be deemed admitted as a result of employer's failure to file a timely answer.

The administrative law judge made the following findings: (1) employee sustained an accident arising out of and in the course of her employment on November 15, 2006; (2) employee's claim is timely; (3) employee's statement of eligibility for maximum compensation is an admitted fact because employer filed an untimely answer, and employee is therefore entitled to the maximum rate of compensation for temporary total and permanent partial disability benefits; (4) Dr. Packman is more credible than Dr. Harbit on the issue of medical causation, and the sexual assault that occurred on November 15, 2006, was the prevailing factor in causing employee's post traumatic stress disorder and major depression; (5) that additional medical treatment is necessary to cure and relieve the employee from the effects of her injury; (6) that employer is liable in the amount of \$2,896.50 for employee's past medical expenses; (7) employee failed to meet her burden of proof on the issue of temporary total disability; and (8) employee sustained a permanent partial disability of 45% of the body as a whole referable to post-traumatic stress disorder and depressive disorder caused by the rape that occurred at work on November 15, 2006.

Employer filed a timely Application for Review with this Commission, alleging a number of errors.

We agree with the administrative law judge that employee is credible as to the accident and that Dr. Packman is more credible than Dr. Harbit, and that employee met her burden of proving she sustained a compensable work injury. However, for the reasons set forth herein, we believe we must modify the award of the administrative law judge on the issue of the rate of compensation for permanent partial disability benefits.

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Discussion

Employer filed a late answer. Under 8 CSR 50-2.010(8) (B), employer is deemed to have admitted, for any further proceedings, the statements of fact in employee's claim for compensation. *Lumbard-Bock v. Winchell's Donut Shop*, 939 S.W.2d 456, 457-58 (Mo. App. 1996), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

The administrative law judge found employee is entitled to a compensation rate of \$376.55 per week for permanent partial disability benefits. We surmise that the administrative law judge derived this figure by calculating, pursuant to § 287.190.5(5) RSMo, 55% of the state average weekly wage as of the date of the accident on November 15, 2006, in order to give effect to employee's allegation, in her claim for compensation, that her average weekly wage was "max rate."

Employer argues that it cannot be deemed to have admitted employee's entitlement to the maximum rate of compensation, because employee's allegation that her average weekly wage was "max rate" amounts to a legal conclusion, rather than a statement of fact, citing *Anderson v. Veracity Research Co.*, 299 S.W.3d 720, 728 (Mo. App. 2009). The *Anderson* court held that legal conclusions, such as the statement that an employee's injuries "arose out of and in the course of employment," are not admitted by an employer's failure to file a timely answer. *Id.* In response, employee cites *Aldridge v. S. Mo. Gas Co.*, 131 S.W.3d 876, 882 (Mo. App. 2004), which held that "[w]age rate is a question of fact, to be determined by the Commission according to the computations provided by statute."

After careful review, we are convinced that employer is correct. We find *Aldridge* distinguishable from the present circumstances. The employee in *Aldridge* alleged in his claim for compensation that his average weekly wage was \$550.00; the court found that this was a statement of fact. 131 S.W.3d at 882. But here, employee's allegation that her average weekly wage was "max rate" does not suggest or even imply any specific dollar amount, nor does it state any cognizable fact about employee's average weekly wage while working for employer. To our knowledge, there is no legal maximum rate in Missouri as to the wage employers may pay to employees. And employee did not put on evidence that employer had a maximum wage rate.

Employee alleges that the words "max rate" were intended as an assertion that employee's average weekly wage at the time of the accident was sufficient to yield, after application of the terms and provisions of § 287.170.1(4) RSMo, § 287.180.1(4) RSMo, § 287.190.5(5) RSMo, and § 287.200.1(4) RSMo, compensation at the maximum rate allowed under each of those sections. But we believe the very process of going through such an explanation, and the fact such an explanation is necessary, illustrates why "max rate" is not a statement of fact. Instead, if it is anything, we believe it is a legal conclusion. See *Gordon v. Puritan Chemical Co.*, 406 S.W.2d 822, 826 (Mo. App. 1966) (noting that conclusions of law, in contrast to findings of fact, generally will require interpretation or application of Chapter 287). As the *Anderson* court stated, "[t]here is a difference between the physical location of an accident and the legal conclusion that an accident met the statutory criteria for compensability." 299 S.W.3d at 728. Here, there is a difference between the dollar amount of an employee's average weekly wage and the

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legal conclusion that the amount met the statutory criteria such that the employee is entitled to the maximum compensation rate provided by law.

For these reasons, we conclude that employer did not admit, by filing a late answer, that employee is entitled to a compensation rate of \$376.55 per week for permanent partial disability benefits. Having so concluded, we would normally turn now to the evidence on record to determine employee's average weekly wage. But there is no such evidence.

Employee does not remember her hourly wage in the weeks preceding the accident, did not present any documentary evidence such as W2s, time sheets, or check stubs, and ultimately agreed, on cross-examination, that she had no evidence at all as to what she earned while she was working for employer. As a result, we must conclude that employee has failed to meet her burden of proving her average weekly wage. The cases suggest the minimum \$40 compensation rate under § 287.190.5(2) RSMo is appropriate where an employee sustains a compensable injury but fails to establish her average weekly wage. See *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 887 (Mo. App. 2001), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

We are sensitive to the fact that this employee suffered a horrible trauma at work, and we wish to make clear that her genuine inability to recall details from that time period, such as her average weekly wage in the thirteen weeks before the accident, does not strike us as unexpected or blameworthy in the least. But the task of proving an average weekly wage was by no means rendered impossible simply because employee was unable to remember what she earned while working for employer. To the contrary, it would seem there were many other possible sources of evidence to establish employee's wage. In fact, we note the objection by employee's counsel to Employer's Exhibit 2. That exhibit was a Wage Statement and constituted the only actual evidence of employee's average weekly wage offered at the hearing. As a result of counsel's objection, the exhibit did not come into the record, and we cannot consider it now.

We are bound to apply the law. We must conclude that the applicable rate of compensation is \$40 for permanent partial disability benefits.

Award

We modify the award of the administrative law judge as to the issue of average weekly wage and the rate of compensation for permanent partial disability benefits. We conclude employee failed to meet her burden of proving her average weekly wage. We conclude the rate of compensation for permanent partial disability benefits is \$40.00 per week, not \$376.55.

As a result, employee is entitled to, and employer is obligated to pay, \$7,200.00 in permanent partial disability benefits.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

The award and decision of Administrative Law Judge Maureen Tilley, issued August 24, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 2nd day of May 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Tabitha Hasten Injury No. 06-135802
Dependents: N/A
Employer: Sonic Drive In of High Ridge
Additional Party: N/A
Insurer: Mark Cantor
Hearing Date: June 1, 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? November 15, 2006.
5. State location where accident occurred or occupational disease contracted: Jefferson 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 raped at work.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Body as a whole, psychiatric.
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: See findings.
18. Employee's average weekly wage: Max rate.
19. Weekly compensation rate: \$376.55/\$718.87
20. Method wages computation: See findings.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: See findings.

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: Mark Cantor.

FINDINGS OF FACT AND RULINGS OF LAW

On June 1, 2011, the employee, Tabitha Hasten, appeared in person and with her attorney, Mark Cantor, for a hearing for a final award. The employer was represented at the hearing by its attorney, Stephen McManus. 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. Covered Employer: Employer was operating under and subject to the provisions of the Missouri Workers Compensation Act, and liability was fully insured by Mid Century Insurance Company.
2. Covered Employee: On or about November 15, 2006 Claimant, Tabatha Hasten was an employee of Sonic Drive-In of High Ridge and was working under the Workers' Compensation Act.
3. Notice: Employer had notice of Claimant's accident.
4. Medical Aid furnished by Employer/Insurer: Amount paid: \$0.00
5. Temporary Disability paid by Employer/Insurer: Amount paid: \$0.00

ISSUES

1. Accident;
2. Statute of Limitations;
3. Average weekly wage;
4. Medical causation;
5. Prior medical care in the amount of \$2,896.50 with disputes as to authorization and causal relationship;
6. Future medical aid;
7. Temporary total disability benefits from 12/01/2006 to 07/30/2007;
Temporary total disability benefits from 01/01/2009 to 02/01/2011 (total of 90.57 weeks);
8. Permanent total disability or in the alternative;
9. Permanent partial disability; and
10. Whether the claim is admitted by Employer for failing to file a timely answer pursuant to the Code of State Regulations 8 CSR § 50-2.010 (8) (B).

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Dr. Paul Packman deposition and exhibits.
- C. Certified medical records from St. John's Mercy Medical Center including 19 pages.

- D. Certified billing records from St. John's Mercy Medical Center including 12 pages in the amount of \$2,698.50.
- E. Certified medical and billing records from Joes Counseling. The billing amount is \$75.00.
- F. Certified medical records from St. Anthony's Hospital.
- G. Certified medical and billing records from Creve Coeur Primary including Dr. Pilaipun Williams and billing amount of \$123.00.
- H. Certified Jefferson County Police Report #2642397-0.
- I. Mailed cover letter for claim filing dated November 14, 2008 and received and date stamped by the Division of Workers' Compensation 3 days later on November 17, 2008.
- J. Affidavit of Gary K. Burger and Settlement Release of September 10, 2008.

Claimant's Exhibit B was offered into evidence, objected to by the Employer/Insurer, and taken under advisement. Claimant's Exhibit B is the deposition of the assailant, Jeremy Schrum, taken February 22, 2011. The Court sustains the objection and the deposition is not admitted. Claimant requested that the deposition exhibits be independently offered into evidence as follows: Claimant's Exhibit B, subpart A is the certified criminal record of Jeremy Schrum and is admitted. Claimant's Exhibit B, subpart B is the photograph of Jeremy Schrum and is not admitted. Attachment C, the subpoena for the deposition of Jeremy Schrum, is not admitted.

Employer-Insurer's Exhibit

- 1. Deposition of Dr. Melissa Harbit with exhibits.

This Court agreed to take judicial notice of its file and notes that no report of injury was filed.

FINDINGS OF FACT:

Employee's background

- At the time of this hearing, Employee, Tabatha Hasten was 27 years old.
- At the time of Employee's injury, November 15, 2006, she lived with her mother, father, brother and daughter. She worked as a carhop at Sonic in High Ridge, Missouri.

Employment

- Employee was hired in August 2006 as a carhop at the Sonic in High Ridge, Missouri.
- She worked with a supervisor named Kevin as well as co-workers Jessica, Christopher Nelson, Annie, Melinda and Jeremy Schrum.

Work Accident – November 15, 2006

- On November 15, 2006, Employee received a call from Christopher Nelson, a shift manager, and Jeremy Schrum to come in early to work at 9:00 a.m.

- As a result of that call Employee reported to work and Mr. Nelson asked her to watch the front of the store.
- Watching the front of the store is a work duty at Sonic where an employee simply watches for customers or visitors.
- Mr. Nelson asked Employee to watch the front of the store so he could go buy a pack of cigarettes. After Mr. Nelson returned Employee was approached by Jeremy Schrum who wanted to speak with her.
- Employee agreed to speak to Mr. Schrum at the back of the store and they proceeded to walk through the Sonic. When the two of them were in front of the men's bathroom, Jeremy Schrum pushed Employee into the men's bathroom and locked the door behind them.
- Jeremy Schrum then forcibly raped Employee by pulling her clothes off and penetrating her from behind.
- Following the rape, Employee was in shock. She worked until 1:00 p.m. by which time she was too upset to continue. She called her mother and father for a ride and left. Though she was sad and crying, she did not tell anyone about her rape that day. Employee was also afraid to go anywhere or to tell anyone. Not only had the incident affected her terribly; Jeremy Schrum had also threatened her and stated that she would "regret it" if she told anyone.
- The day after the rape, on November 16, 2006, Employee told her mother about the rape and her mother said that Employee should report it to the police and go to the hospital.
- Employee's mother had to repeatedly tell her to report the incident to the police.
- Employee went to the police a couple of weeks later. Employee reported the rape to her supervisor, Kevin, who came to Employee's home and took her statement.
- Employee testified that she was unable to work from December 1, 2006 through July 1, 2007. She then worked from July 2007 to February 2008 at McDonalds, but had to quit because of her psychological difficulties in working with men. She worked from May 2008 to July 2008 at Del Taco. She then worked from December 2008 to January 2009 at the Cookie Factory. The Cookie Factory hired more men and Employee resigned. She did not work again until February 2011. Employee is seeking temporary total disability for the time period for November 2006 through July 2007 and then again from January 2009 to February 2011.
- When asked about her last job on cross-examination, Employee testified that she worked from February 2011 through April 2011 at the Holiday Inn. When the defense counsel asked her why she quit that job, Employee stated that she was required to clean rooms at night, even if the room was occupied. She stated that she did not feel safe, especially if the guest was a man. Employee is seeking past temporary total disability benefits for these time periods as well as permanent total disability or in the alternative, permanent partial disability.
- Employee testified that she did not remember how much money she made when she worked at Sonic. She stated that her tips varied each day.

Treatment

- Employee requested medical care from her supervisor Kevin, who told her that there was no doctor or insurance available through workers' compensation. Employee then sought medical care on her own at St. John's Mercy Medical Care on November 29, 2006. She reported her rape of 11/15/06 by a co-worker at Sonic. She reported a sensation of burning during urination. She also reported fear of losing her job.
- On 12/09/06 she was seen by Nancy Jones at Jones Counseling Service and her chief complaint was "November 15 at 10:15 a.m. she was at Sonic, Jeremy and Chris who was the manager on duty called her phone to ask if she would come in early while Chris went to the gas station to get cigarettes. She said yes. The records go on to state "he took her apron off and took her pants down, pushed her over and raped her." When he was done, he opened the door and let her out and walked outside. She went outside and cried.
- She then went to Dr. Pilaipun Williams. She provided the same history of rape to that medical care provider.

Current Complaints due to November 15, 2006 Work Occurrence

- Employee testified that she now suffers from anxiety, stress, panic attacks and depression. She frequently cries three or four times a day and has consistent headaches three or four times a week. Her anxiety occurs three or four times a week, her stress is constant and during panic attacks she experiences chest pain and tightness.
- Employee is afraid to be around men. She was not like this before the rape. Although she did have chronic migraines previously they are now more frequent and severe.
- Employee stated that she cannot work around men due to her constant, oppressive fear of being raped again.
- Since the rape, Employee has been unable to be intimate with a man. She has had a boyfriend for two years, but has not been intimate with him.
- Employee's mother testified that Employee has seemed emotionally distant, sad and depressed, and that she is "different" since the rape.

Pre-existing Disabilities

- Employee testified that she had headaches in the past, but that she was not sad or depressed like she is now.
- Employee's headaches occurred approximately twice per month but now occur three to four times per week with increased severity.

Assailant Jeremy Schrum

- Employee accused Jeremy Schrum of forcible rape. This Court has ruled that Schrum's prior sexual misconduct is relevant to the issues in this case. A certified copy of Jeremy Schrum's criminal record is offered as a deposition exhibit, which is certified by Howard Wagner as the circuit clerk for Jefferson County.

- On January 28, 2010, Jeremy Schrum pled guilty to numerous felonies he committed in January 2006 which is 10 months before this rape. A judgment for felony statutory sodomy was entered after a guilty plea. For Count II a felony of statutory sodomy in the first degree was entered upon a plea of guilty. For Count III a felony class B of molestation in the first degree on a child was entered by a plea of guilty. On January 22, 2008 for Count V, a charge of child molestation in the first degree, a felony class B was entered upon a plea of guilty. (See Claimant's Deposition Exhibit B which was not admitted, but attached to Claimant's Deposition Exhibit B is attachment Exhibit A of the criminal records of Jeremy Schrum which were admitted into evidence.)
- Also, on January 22, 2008, a felony unclassified statutory rape was entered upon Schrum's plea of guilty and the assailant in this case was sentenced.

Dr. Packman

- Dr. Packman's opined that the November 15, 2006 work event caused post-traumatic stress disorder with panic attacks and major depressive disorder. He opined that these were both chronic conditions.
- Dr. Packman testified that the patient has attempted to return to work, but has been unable to do so.
- Dr. Packman testified that patient is now and was unable to sustain employment because of and beginning with the incident. Packman Dep. At p. 39; Ln. 3.
- The patient has never been adequately treated for the work related post-traumatic stress disorder and major depression and the exacerbation of her migraine disorder.
- Dr. Packman defines a treatment plan, but believes because of the duration of her illness the treatment would extend for several years and the prognosis is still "guarded."
- Dr. Packman stated that Employee has a permanent psychiatric partial disability of 65% of the person as a whole and that the permanent partial disability rating is based on the severity of the symptoms, the chronicity or length of time of her symptoms, her failed attempts to re-enter the open labor market, and the significantly negative impact on her social interactions with individuals other than direct family members. Dr. Packman also stated that the employee would not be able to work with that high a permanent partial disability.
- Dr. Packman's opinions followed a thorough review of all of the medical records and documents contained in the file including the police report, early medical records and a lengthy exam.
- Dr. Packman stated that the employee has obsessive compulsive personality disorder. He stated that this is a pre-existing condition.
- Dr. Packman testified that delay in treatment of symptoms like Employee's can result in a lower probability of recovery as well as increased difficulty with the recovery process. *Id.* at p. 36; Ln. 1.
- Dr. Packman believes that additional care is required. He stated that the ideal care for Employee's therapy would be therapy consisting of medications and cognitive therapy or cognitive behavioral therapy and, in the behavioral therapy component, what we call eye movement desensitization reprocessing.

- Dr. Packman opined that treatment may not return Employee to a functioning level given the duration of these complaints and given the lack of prior care. However, Dr. Packman would be willing to treat Ms. Hasten if the Court directs him to do so.
- Dr. Packman found that patient's psychiatric presentation provided credible evidence of her sexual assault. *Id.* at p. 21; Ln. 25.
- Although Dr. Packman testified that she left her subsequent jobs because she was couldn't work around men, she gave Dr. Packman a different history of why she stopped working.
- Dr. Packman stated that the employee continued working at Sonic for two to three weeks following the accident. He stated that she informed the managers the next day after the rape. He stated that the employee started missing work a great deal. She started having excuses for not showing up and worked relatively little.
- Dr. Packman stated that following the employee's work at Sonic, she worked at McDonald's for a year. The employee was fired because she left to be with her father when he had a heart attack.
- Dr. Packman stated that the employee then worked at a different McDonald's for two months until she moved.
- Dr. Packman stated that the employee then worked at Del Taco for four months until it closed.
- Dr. Packman stated that the employee then worked at Daddy Ray's Cookie Factory for three months before she was laid off.
- Dr. Packman agreed that there was no indication that she stopped working for any of those employers because of the rape.
- Dr. Packman stated that the employee's failed attempts to re-enter the labor market were that the employee just stopped working. He stated that she couldn't re-enter the labor market because of her symptomology of her psychiatric illness.
- Dr. Packman was asked "She didn't try to work anywhere and say I can't do this?" He answered "I don't know the answer directly to that."

Dr. Harbit

- Dr. Harbit attributes Ms. Hasten's current psychiatric condition to borderline personality disorder. Harbit Dep. at p. 13; L. 15.
- Dr. Harbit, after being asked several times, refused to state whether she honestly believed that Ms. Hasten was a victim of rape. Dr. Harbit responded to the question of whether she believes Ms. Hasten was raped by stating that "I don't have an opinion about whether or not her – again, I wasn't there so I can't speak for what happened that day. I can only speak for her perception of it and her description of it." *Id.* at p. 24; L. 6. Later, when asked whether she, at any point, formed an opinion as to whether Ms. Hasten was raped, Dr. Harbit, a forensic psychiatrist, replied "I don't know how I can." *Id.* at p. 26; L. 6.
- Dr. Harbit testified that victims of sexual assaults in general can show diagnostic criteria of post traumatic stress disorder, *Id.* at p. 29; L. 14. But according to Dr. Harbit, Ms. Hasten did not meet the criteria for the disorder, which include experiencing an event that was life-threatening.

- This doctor believes that Ms. Hasten had major depressive disorder prior to the November 15, 2006 “alleged incident,” *Id.* at p. 22, L. 22, and that Ms. Hasten’s suffering can entirely be explained by a diagnosis of “borderline personality disorder” comprises 100% of her current condition. *Id.* at p. 13; L. 15.
- Dr. Harbit does not believe that Claimant requires psychiatric care at this time.

RULINGS OF LAW:

Issue 1. Accident

Employee alleged that she was raped on November 15, 2006. At trial, employer-insurer denied that employee was raped. Based on all of the evidence presented, I find that the employee was a credible witness on the issue of accident. I further find that the employee was raped at work. Therefore, I find that on November 15, 2006, the employee sustained an accident that was arising out of and in the course of her employment.

Issue 2. Statute of Limitations

The applicable Statute of Limitations provides that when an employer does not file a report of injury an employee may file a claim for compensation within three years of the date of injury. Mo. Rev. Stat. § 287.430.

The Court was asked to take judicial notice of the file. The Court’s file does not contain a report of injury.

The employee’s accident was on November 15, 2006. The Division of Workers’ Compensation received the Claim for Compensation on November 17, 2008. The statute of limitations requires this claim be filed three years from the date of injury if no report of injury is filed. Since Employer did not file a report of injury this claim is timely.

Issue 3. Average Weekly Wage and Issue 10. Whether the claim is admitted by Employer for failing to file a timely answer pursuant to the Code of State Regulations 8 CSR § 50-2.010 (8) (B)

The claim was mailed on November 14, 2008 and was received on November 17, 2008. The claim was acknowledged by the Division on November 24, 2008 and timely answered by the Second Injury Fund (who is no longer a party to this action) on December 4, 2008. Employer/Insurer did not file an answer until March 31, 2009 which was received and date stamped on April 2, 2009. 8 CSR § 50-2.010 (8) (B) provides that when an employer files an untimely answer to a claim for compensation “the statements of fact and the claim for compensation shall be deemed admitted for any further proceedings.”

I find that Employer’s response was not filed before the 30 day limit imposed by 8 CSR § 50-2.010 (8) (B). Therefore, I deem all factual allegations in Employee’s complaint admitted.

Though Employer knew that this claim asserted eligibility for the maximum statutory rate of compensation, as well as the fact that Employee was paid in tips, it failed to present any evidence disputing the factual basis for Employee's statements of past earnings.

The employee's weekly income is a statement of fact for which Employer presents no rebuttal evidence. I therefore find that the Employee's statement of eligibility for maximum compensation an admitted fact because of Employer's untimely response. I find, therefore, that employee is eligible for the maximum rate of compensation for temporary total disability at \$718.87 per week. I further find that Employee is eligible for the maximum rate of compensation for permanent partial disability at \$376.55 per week.

Issue 4. Medical Causation and Issue 6. Additional medical aid

Dr. Harbit opined that Employee did not meet the criteria for the disorder.

Dr. Harbit opined that employee's condition can entirely be explained by a diagnosis of "borderline personality disorder". She opined that this comprises 100% of her current condition. Dr. Harbit does not believe that Employee requires psychiatric care at this time.

The evidence is consistent with and supports the finding of medical causation that the rape of November 15, 2006 is the prevailing factor in causing Employee's post-traumatic stress disorder and other psychiatric findings.

Dr. Packman opined that the November 15, 2006 work event caused post-traumatic stress disorder with panic attacks and major depressive disorder. He opined that these were both chronic conditions.

Dr. Packman opined that Employee has never been adequately treated for the work related post-traumatic stress disorder and major depression and the exacerbation of her migraine disorder.

Dr. Packman believes that additional care is required. He stated that the ideal care for Employee's therapy would be therapy consisting of medications and cognitive therapy or cognitive behavioral therapy and, in the behavioral therapy component, what we call eye movement desensitization reprocessing.

Based on all of the evidence presented, I find Dr. Packman's opinions on the issues of medical causation and future medical aid are more credible than Dr. Harbit's opinions on these issues. I further find that the sexual assault that occurred on November 15, 2006 was the prevailing factor in causing Employee's post traumatic stress disorder and major depression.

I find that additional medical treatment is necessary to cure and relieve the employee from the effects of her injury. This includes but is not limited to the treatment recommendations by Dr. Packman. This includes medications and cognitive therapy or cognitive behavioral

therapy and, in the behavioral therapy component, what we call eye movement desensitization reprocessing.

Issue 5. Prior Medical Care in the Amount of \$2,896.50

Awarding past medical expenses is appropriate when an employer improperly fails to authorize or provide treatment for an injured employee. *See Wilson*, 07-104113 (Mo. Labor & Indus. Relations Comm. 2009) (order of Hart, J., affirming decision).

I find that the employer failed to provide medical treatment for Employee after she was injured and is therefore liable for the expenses Claimant incurred during initial treatment. I further find that the employer is liable in the amount of \$2,896.50 for Employee's medical costs to date.

Issue 7. Temporary total disability; Issue 8. Permanent total disability; and Issue 9. Permanent partial disability

Mo. Rev. Stat. § 287.020 (6) (2010) provides as follows:

The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

Courts have interpreted the phrase "the inability to return to any employment" as an employee's inability to perform the usual duties of a position as would the average person engaged in such employment. *Kowalski v. M-G Metals & Sales, Inc.*, 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of Missouri*, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo. App. 1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner*, 837 S.W.2d at 365. *See also Thornton v. Haas Bakery*, 858 S.W.2d 837, 834 (Mo. App. 1993).

Employee testified that she was unable to work from December 1, 2006 through July 1, 2007. She then worked from July 2007 to February 2008 at McDonalds, but had to quit because of her psychological difficulties in working with men. She worked from May 2008 to July 2008 at Del Taco. She then worked from December 2008 to January 2009 at the Cookie Factory. The Cookie Factory hired more men and Employee resigned. She did not work again until February 2011. Employee is seeking temporary total disability for the time period for November 2006 through July 2007 and then again from January 2009 to February 2011.

When asked about her last job on cross-examination, Employee testified that she worked from February 2011 through April 2011 at the Holiday Inn. When the defense counsel asked her why she quit that job, Employee stated that she was required to clean rooms at night, even if the room was occupied. She stated that she did not feel safe, especially if the guest was a man. Employee is seeking past temporary total disability benefits for these time periods as well as permanent total disability or in the alternative, permanent partial disability.

Although the employee stated that she left her subsequent jobs because of the fact that she had to work with men, she gave Dr. Packman a job history that stated otherwise.

Dr. Packman stated that the employee worked at Mc Donald's for a year until she was fired because she left to be with her sick father. She then worked at a different McDonald's for two months until she moved. Dr. Packman stated that the employee then worked at Del Taco for four months until it closed. Dr. Packman stated that the employee then worked at Daddy Ray's Cookie Factory for three months before she was laid off.

Dr. Packman agreed that there was no indication that she stopped working for any of those employers because of the rape. Dr. Packman stated that the employee's failed attempts to re-enter the labor market were that the employee just stopped working. He stated that she couldn't re-enter the labor market because of her symptomology of her psychiatric illness. Dr. Packman was asked "She didn't try to work anywhere and say I can't do this?" He answered "I don't know the answer directly to that."

It is clear from the evidence that the employee went back to work for a substantial period of time, after she was raped at work. Furthermore, it is clear that the employee left her jobs for various reasons that were unrelated to her rape. Based on all of the evidence presented, I find that the employee did not meet her burden of proof on the issue of permanent total disability. The employee did not prove that she was unemployable in the open labor market. Therefore, the employee's claim for permanent total disability is denied.

The employee is also claiming temporary total disability for the time periods of 12-1-2006 through 7-30-2007 and 1-1-2009 through 2-1-2011. Based on all of the evidence, including the employee's work history, I find that the employee did not meet her burden of proof on this issue. Therefore, the employee's claim for temporary total disability is denied.

Based on all of the evidence presented, I find that the employee sustained a permanent partial disability of 45% of the body as a whole (180 weeks) for her post-traumatic stress disorder and depressive disorder caused by the rape that occurred at work on November 15, 2006. The employee's rate is \$376.55. Therefore, the employer-insurer is directed to pay the employee \$67,779.

ATTORNEY'S FEE

Mark Cantor, 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.

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation