

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

Injury No.: 03-088949

Employee: Vivian Houston
Employer: Normandy Nursing Center
Insurer: Health Care Facilities Management Trust
c/o Sedgwick James
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: August 29, 2003
Place and County of Accident: St. Louis, 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 administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 16, 2007. The award and decision of Administrative Law Judge Margaret D. Landolt, issued February 16, 2007, 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 26th day of July 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri

Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to award employee past medical expenses.

I agree with the administrative law judge's finding that employee is entitled to compensation in this claim. However, I disagree with the administrative law judge's finding that employee is not entitled to an award of past medical expenses.

The administrative law judge erred in finding that employee was not entitled to past medical expenses due to the fact that her treatment was not authorized. Employee sought treatment from, Dr. Andrew Wayne, a workers' compensation doctor approved by employer on August 30, 2004. At that time Dr. Wayne opined that employee was at maximum medical improvement with regard to her injury; but more importantly he concluded that her injury was not work-related and required no further treatment. According to employee's testimony, Dr. Wayne, told her not to come back. Dr. Wayne's records confirm that he did not believe there was a need for a follow up visit.

Therefore, it is unreasonable to penalize employee for seeking treatment on her own, especially when the doctor she was referred to by employer not only believed that employee did not suffer a work-related injury, but was not interested in treating her. Once Dr. Wayne had formulated his opinion with regard to employee's injury and treatment, it is illogical to think that he would have a change of mind. Dr. Wayne maintained that employee did not suffer a work-related injury even after she underwent shoulder surgery. Employee was given no choice other than to seek the advice and care of her own doctor as employer did not offer any other alternative.

Furthermore, a sufficient factual basis to award past medical expenses exists when employee identifies all of the medical bills as being related to and the product of the work-related injury and the medical bills are shown to relate to the professional services rendered by medical records in evidence. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Employee satisfied her burden of proof as she properly offered into evidence all medical bills pertaining to treatment for her work-related injury and testified that such medical bills and treatment were related to and the product of that injury. Additionally, Dr. Berkin testified that these medical bills were reasonable, necessary and related to the employee's accident on August 29, 2003.

Based upon my review of all the evidence, I find employee met her burden of proof showing the past medical expenses were related to and the product of her work-related injury. Accordingly, I would modify the decision of the administrative law judge and award past medical expenses.

For the foregoing reasons, I respectfully dissent from the portion of the majority's decision denying an award of past medical expenses.

John J. Hickey, Member
AWARD

Employee:	Vivian Houston	Injury No.:	03-088949
Dependents:	N/A	Before the	
Employer:	Normandy Nursing Center	Division of Workers'	
Additional Party:	Second Injury Fund (Open)	Compensation	
Insurer:	Health Care Facilities Management Trust c/o Sedgwick James	Department of Labor and Industrial	
Hearing Date:	December 5, 2006	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	MDL:tr

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 29, 2003
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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 occurred or occupational disease contracted:
Employee was working in the laundry room doing laundry when she slipped and fell.
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: Right wrist, body as a whole referable to the cervical spine and right shoulder
14. Nature and extent of any permanent disability: 2 ½% PPD to right wrist; 5% PPD body as a whole (cervical spine) and 20% PPD of the right shoulder
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Vivian Houston Injury No.: 03-088949

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate: \$80.50 for TTD benefits and \$115.00 for PPD benefits
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

70.775 weeks of permanent partial disability from Employer	\$8,139.13
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 22. Second Injury Fund liability: Open
- TOTAL:** \$8,139.13
23. Future requirements awarded: None

Said payments to begin immediately 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:

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Vivian Houston	Injury No.: 03-088949
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Normandy Nursing Center	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund (Open)	Jefferson City, Missouri
Insurer:	Health Care Facilities Management Trust c/o Sedgwick James	Checked by: MDL:tr

PRELIMINARIES

A hearing was held on December 5, 2006, at the Division of Workers' Compensation in the city of St. Louis. Ms. Vivian Houston (Claimant) was represented by Mr. Jeff Swaney. Normandy Nursing Center and its Insurer, Health Care Facilities Management Trust c/o Sedgwick James, were represented by Mr. Christopher Archer. Although the Second Injury Fund is a party to this case, pursuant to the agreement of the parties, the claim against the Second Injury Fund shall remain open, and the Fund did not participate in the hearing of this matter. Mr. Swaney requested a fee of 25% of Claimant's award.

The parties stipulated that on or about August 29, 2003, Claimant was an employee of Employer; venue is proper in the city of St. Louis; and the claim was timely filed. The parties further stipulated that Claimant's rates are \$80.50 for total disability benefits and \$115.00 for permanent partial disability benefits. Employer has paid no benefits. The issues for resolution by hearing are: whether Claimant sustained an accident arising out of and in the course of her employment on or about August 29, 2003; medical causation; liability of Employer for past medical benefits; liability of Employer for past TTD benefits; nature and extent of permanent partial disability sustained by Claimant; whether Claimant is permanently and totally disabled; and notice of injury with respect to Claimant's right shoulder injury.

SUMMARY OF EVIDENCE

Live Witnesses

Claimant worked for Employer from August 5, 2003, until September 7, 2003. Claimant worked in the laundry department, washing, drying, folding, and passing out laundry. Claimant testified that between 4:15 and 4:30 p.m. on August 29, 2003, she was pushing a laundry basket on a wet floor when she slipped and fell.

Claimant testified that her left hand was on the basket and she used her right arm to break her fall. Claimant testified that following her fall she had a sore throat, and her right hand and thumb hurt. After her accident, Claimant asked her supervisor, Ms. Farmer, if she could go home because she had a sore throat. Ms. Farmer would not let her leave and she didn't want to tell Ms. Farmer about her fall because she didn't want to tell her about a back and leg problem she has dating back to 1992.

Claimant testified that she finished her shift that day and remained off work until September 2. When she returned to work on September 2, her back, neck, hand, and thumb hurt, and her arm was burning. The pain went up to her elbow. Performing her work aggravated her condition. Claimant testified that September 7, 2003, is the last day she has worked in any capacity.

Claimant testified that she went to the emergency room on September 3, 2003, where she was given a shot in her back and was allowed to rest. Claimant testified that she returned to the emergency room on the 27th where they gave her medications, a brace, and instructions on how to treat her arm. Eventually Claimant came under the care of Concentra and was subsequently referred to Dr. Wayne. Claimant had an MRI of her shoulder on March 2, 2004.

Claimant went to the Meacham Park Clinic where they gave her medications, injections, therapy, and surgery. Dr. Odegard did surgery on June 29, 2005, on her right arm. Following her surgery, she underwent physical therapy.

Currently, Claimant has discomfort when raising her right arm, her hand swells, and she has occasional pain and discomfort. She still gets shooting pains. She has a burning sensation in her right hand and forearm, and in her thumb up to her forearm. She also has a tingling in the back of her hand. She has constant pain in her neck. Claimant testified she never had trouble with her right shoulder before the work injury. She now has difficulty taking care of her hair, getting dressed, and driving. Claimant's back symptoms have not increased since the fall. She can no longer throw a ball, fish, fix her son's hair, or collect antiques. She currently takes Tegretol and Celebrex, which are prescribed by St. John's. She has a seventh grade education. Claimant isn't able to do much during a typical day and is somewhat depressed.

Bruce Franks testified on behalf of Employer. Mr. Franks knows Claimant, and works for Employer in Maintenance and Housekeeping Systems. Mr. Franks testified that on August 29, 2003, Claimant told him there was a leak in the laundry room and someone could slip and fall, and she wanted something to mop it up. Mr. Franks gave Claimant a mop and a bucket. Claimant also told Mr. Franks she thought she had strep throat and wanted to leave work early. Later the same day Mr. Franks saw Claimant again, and she reported she had slipped and fallen, and injured her hand and thumb. Mr. Franks found it odd that Claimant's clothes were dry. He has had no further contact with Claimant since that time. Mr. Franks testified that Claimant could report a work injury to him, although he was not her direct supervisor.

Ms. Orlene Farmer testified on behalf of Employer. She has worked for Employer since 1986 as the laundry and dietary supervisor. On August 29, 2003, Claimant came in to see Ms. Farmer around 5:00 and said she wanted to go home early because she felt like she was getting strep throat. Claimant only had an hour left in her shift, and Ms. Farmer did not give her permission to go home.

Ms. Farmer later learned Claimant reported to the Director of Nursing that she had fallen and hurt her thumb. According to the Director of Nursing, Claimant refused to go to Employer's workers' compensation doctor. Ms. Farmer later had a conversation with Claimant where Claimant informed Ms. Farmer she wanted to go to her own doctor. Ms. Farmer informed Claimant that's not the way it works. Claimant never reported to Ms. Farmer that she sustained an injury to her right shoulder.

Medical Evidence

On September 3, 2003, Claimant reported to the emergency room at St. John's Mercy Medical Center complaining of right arm and hand pain as well as neck and lower back pain after a fall at work on August 29. She stated she had a burning sensation to her right wrist. Claimant did not specifically complain of right or left

shoulder pain. Claimant was administered a Toradol injection, and was advised to follow up with Dr. Godar and continue taking Celebrex.

On September 27, 2003, Claimant again reported to the emergency room at St. John's Mercy Medical Center. Claimant reported slipping on a wet floor pushing a cart and falling on her buttocks, and catching herself with her right hand. She complained of constant pain in her right arm and reported a history of persistent back pain. She denied injury to her right shoulder, but she reported the location of her pain was in the right upper extremity. X-rays of Claimant's right forearm were normal and an x-ray of her right shoulder revealed mild degenerative changes. The diagnosis was right upper extremity sprain. Claimant was instructed to use heat on her shoulder and forearm, and do range of motion exercises.

On September 29, 2003, Claimant reported to Concentra. Claimant gave a history of a fall consistent with her trial testimony. The initial diagnosis was right arm pain and low back pain. Claimant returned to Concentra on October 15, 2003, a CT of the cervical spine was performed and Claimant was diagnosed with a cervical, trapezius and right shoulder strain.

Claimant was treated at the Meacham Park Clinic beginning on September 29, 2003. Claimant gave a consistent history of accident. Claimant reported right arm and shoulder pain. After a course of conservative treatment, Claimant was referred to Dr. Odegard, an orthopedist, who recommended an MRI of Claimant's right shoulder which was performed on March 2, 2004. The impressions were mild degenerative changes, with cartilaginous thinning of humeral head articular surface, and minimal volume of fluid within the subacromial/subdeltoid bursa, suggesting mild bursitis. When Claimant failed to respond to conservative measures, Dr. Odegard performed right shoulder surgery on June 29, 2005. The surgery consisted of a rotator cuff repair with subacromial decompression. The operative report indicated that Claimant had a right shoulder impingement syndrome with a rotator cuff tear. Following surgery, Claimant underwent physical therapy. The post surgical physical therapy records are not in evidence, and there are no records in evidence to indicate when Claimant was found to be at maximum medical improvement.

Claimant was seen by Dr. Andrew Wayne, a physiatrist. He examined Claimant on August 30, 2004, and stated she had reached maximum medical improvement. He advised Claimant to avoid repeated overhead use of the arm and suggested no lifting over 20 pounds. Dr. Wayne reexamined Claimant on December 21, 2005, and did not believe she had any work related disability.

Claimant was examined by Dr. Shawn Berkin at the request of her attorney on February 6, 2006. Dr. Berkin diagnosed Claimant as having a cervical strain, a rotator cuff tear of the right shoulder with impingement syndrome, Os Acromiale, a right hand sprain involving the right thumb and index finger, as well as a recurrent lumbar strain as a result of her work injury. Upon physical examination, Claimant had reduced range of motion in the cervical spine. In the right shoulder there was tenderness over the glenohumeral joint, and the impingement test was mildly positive. On muscle strength testing, Claimant reported pain to her right shoulder on resisted abduction and external rotation of her right arm. Examination of the right hand was normal with the exception of some tenderness of the right thumb and index fingers upon palpation. As a result of Claimant's work injury, he rated Claimant's disability at 15% of the neck, 35% of the right shoulder, 5% of the right wrist, and 15% of the lumbosacral spine. Dr. Berkin testified that the treatment bill of St. Louis Orthopedic Institute in the amount of \$27,586.00 was reasonable and necessary in order to cure and alleviate Claimant's complaints.

Dr. Andrew Wayne testified on behalf of Employer. Dr. Wayne testified Claimant's need for right shoulder surgery was not causally related to her fall at work. Dr. Wayne testified that the fact that Claimant did not complain of right shoulder pain until a few days after the injury occurred is not consistent with a rotator cuff injury which would be symptomatic from the time immediately after the injury. Furthermore, he testified that Claimant's MRI did not specifically describe any rotator cuff damage. He testified that her surgery took place approximately 16 months after the MRI scan was performed and a chronic degenerative tear or a separate injury to the shoulder could have taken place in that time span. He testified that Claimant's initial examination on August 30, 2004, failed to show any weakness in any of the rotator cuff muscles and there were very non-specific findings in terms of testing the rotator cuff itself. Dr. Wayne testified that he did not see any medical records which indicated Claimant had ever complained of any shoulder problems before her August 29, 2003, accident. Dr. Wayne testified that Claimant was a poor historian and did not appear to have a high level of education.

Dr. Wayne testified that Claimant has permanent disability of 10% of the right shoulder, but he did not believe the disability was caused by her work accident.

FINDINGS OF FACT AND RULINGS OF LAW

Based upon my observations of the witnesses at hearing, a comprehensive review of the evidence, and the application of Missouri law, I find:

Claimant sustained an accident in the course and scope of her employment for which notice was provided in a timely manner. Claimant appeared to be truthful. Although Claimant was noted to be a poor historian throughout the records, it is clear that she injured her right arm and shoulder when she fell on August 29, 2003. She gave a consistent history of the injury to the various medical providers. Although initially she did not specifically describe right shoulder pain, she did complain of right upper extremity pain, and her right shoulder was x-rayed at her second emergency room visit. Additionally, the Concentra diagnosis on October 15, 2003, approximately six weeks after the accident, was cervical, trapezius and right shoulder strain.

I find Dr. Berkin's opinion on causation to be more persuasive than Dr. Wayne's. Dr. Wayne's opinion that Claimant could have sustained a separate accident or chronic degenerative tear in the sixteen months between her accident and surgery is speculative. There is no evidence Claimant injured her shoulder before or after the work accident occurred. From the outset, Claimant complained of shoulder pain, and I am not persuaded by Dr. Wayne's opinion that Claimant's rotator cuff injury would have been symptomatic immediately after the injury.

According to Claimant, her low back symptoms were similar to those she was experiencing prior to August 29, 2003, and I do not find any PPD related to her low back. I find Claimant sustained permanent partial disability of 2 ½% to the right wrist as a result of a minor strain. I further find that Claimant sustained permanent partial disability of 5% of the body as a whole referable to the cervical spine, and 20% permanent partial disability of the right shoulder.

There is no evidence on which to base an award for permanent total disability and accordingly the request for permanent total disability benefits is denied.

Although Claimant has met her burden of proving that the St. Louis Orthopedic Institute medical bill was reasonable and necessary, there is no evidence that Claimant ever demanded treatment from Employer. Claimant elected to treat on her own, which is her right, but it is also at her own cost. §287.140.1 RSMo (2000). Claimant's request for an award of past medical expenses is denied.

Claimant has failed to meet her burden of proving entitlement to TTD benefits. No evidence was presented to indicate when Claimant was found to be at MMI following her surgery. Neither Dr. Odegard's records nor physical therapy records were offered into evidence. There was no expert testimony presented to indicate what period of time Claimant was temporarily and totally disabled following her accident. The Court is unable to guess whether Claimant was capable of working in some capacity either after her accident leading up to her surgery, or post surgery until she was found to be at MMI.

I further find Employer had actual notice of a work accident. Claimant informed Mr. Franks, Employer's supervisor, and the Director of Nursing of her accident. Employer's contention that it did not have notice with respect to a right shoulder injury is without merit. The medical records indicate Claimant was complaining of right upper extremity pain, and Employer's own medical provider, Concentra, had notice that Claimant was complaining of right arm pain 31 days after the accident. Employer was not prejudiced by any failure to receive notice within 30 days pursuant to §287.420 RSMo (2000).

CONCLUSION

In conclusion, I find Claimant sustained an accident in the course and scope of her employment and notice

was provided. I further find Claimant sustained permanent partial disability of 5% of the body as a whole referable to the neck, 2 ½% of the right wrist, and 20% of the right shoulder to be compensated at the stipulated rate of \$115.00 per week.

This award is subject to a lien of 25% in favor of Claimant's attorney, Mr. Jeff Swaney.

Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation