

FINAL AWARD ALLOWING COMPENSATION  
(Pursuant to the Mandate of the Missouri Court of Appeals, Eastern District)

Injury No.: 97-433205

Employee: Cheryl Jennings  
Employer: Station Casino St. Charles  
Insurer: Continental Casualty Company (formerly known as CNA Plus)  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 16, 1997

On April 25, 2006, the Missouri Court of Appeals for the Eastern District issued an opinion reversing the August 4, 2005, Final Award of the Labor and Industrial Relations Commission (Commission) in the above-referenced case. By mandate issued September 8, 2006, the Court remanded this matter to the Commission with instructions that an award be entered which finds that the discogram, and its sequellae, are medically causally connected with the injury which occurred on September 16, 1997, to reconsider the issue of whether employee is entitled to reimbursement for past and future medical expenses related to the discogram, and to reconsider the nature and extent of employee's disability including whether employee is eligible to receive temporary total disability benefits and whether employee is permanently and totally disabled, all in accordance with the Court's opinion delivered April 25, 2006. *Jennings v. Station Casino St. Charles*, 196 S.W.3d 552 (Mo. App. E.D. 2006). Pursuant to the Court's opinion and mandate, we issue this award.

#### Discussion

The Court enunciated the following legal principles that direct our findings and conclusions in this matter:

It is well-settled in Missouri that findings and conclusions made by an ALJ in a temporary award are not binding on any subsequent proceeding. See *Dilallo v. City of Maryland Heights*, 996 S.W.2d 675, 676 (Mo. App. E.D. 1999)(holding that the temporary award of the ALJ, which found that injury to claimant's lower back was not compensable under the Workers' Compensation Act, was not res judicata on the issue of medical causation). Furthermore, the language of Section 287.510 recognizes that the final award may not be in accordance with the temporary or partial award. *Welch v. Eastwind Care Center*, 890 S.W.2d 395, 398 (Mo. App. W.D. 1995). The legislature clearly contemplated that the ALJ may render a decision in a final hearing which differed from that of the temporary or final award. *Id.* Even so, to modify a temporary award, the ALJ in the final award must find there was "additional significant evidence" not before the ALJ at the temporary award. *Dilallo*, 996 S.W.2d at 676.

*Jennings v. Station Casino St. Charles*, 196 S.W.3d 552, 558 (Mo. App. E.D. 2006).

Applying these principles to the facts of this case, the Court concluded that:

The overwhelming weight of the competent and substantial evidence shows that at the time the ALJ issued the temporary award, the discogram was medically necessary to cure and relieve the effects of the September 16, 1997 work-related injury. That the discogram ultimately resulted in an infection and disability is not new evidence on the question of whether Claimant was in need of such treatment or on the question of whether the need for such treatment was medically causally related to the original injury.

*Id.* at 561.

We find that the April 23, 2002, discogram and its sequellae are medically causally connected with the injury which occurred on September 16, 1997.

#### Past Medical Expenses / Future Medical Care

Exhibit K identifies claimed medical expenses for treatment before the temporary hearing in this matter. As regards Exhibit K, the administrative law judge denied reimbursement for medical expenses related to treatment by Dr. Prather and Dr. Levin, including expenses for diagnostic studies and prescriptions. We affirm the administrative law judge's award as to the expenses listed in Exhibit K.

Exhibit U contains medical bills related to the discogram and its sequellae. Employee has provided records, bills, and testimony to establish the compensability of the medical expenses set forth in Exhibit U. Employer/insurer argues the Supreme Court holding in *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. 2003) requires that we deny the bills in Exhibit U because employee has not established the amount she has or will be required to pay out of pocket. Employer/insurer misstates the assignment of burdens by the Court in *Farmer-Cummings*.

[Employee] had the burden and has produced documentation detailing her past medical expenses and has testified to the relationship of such expenses to her compensable workplace injury. See *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989); *Esquivel v. Day's Inn*, 959 S.W.2d 486, 489 (Mo. App. 1998). It is a defense of...employer, to establish that employee was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished, and that the reason that her liability was extinguished does not otherwise fall within the provisions of section 287.270. See *Martin*, 769 S.W.2d at 112; *Esquivel*, 959 S.W.2d at 489.

*Farmer-Cummings*, 110 S.W.3d at 822-823 (Emphasis added).

Employer/insurer has not met its burden as set forth *Farmer-Cummings* (bolded language). We award the medical expenses reflected in Exhibit U.

The administrative law judge correctly found that the testimony of Dr. Volarich establishes that employee will require additional medical care to cure and relieve her of the effects of the injury. The administrative law judge employed language limiting the type of treatment available to employee in the future. We do not so limit the award of treatment. We award future medical care necessary to cure and relieve employee of the effects of her injury, including the effects of the discogram and its sequellae.

#### Temporary Total Disability

The Court has directed that we consider anew the issue of temporary total disability. Because we find that the discogram and its sequellae are medically causally related to the work injury, employee is entitled to temporary total disability benefits for the healing period related to the discogram and its sequellae. The parties stipulated that employer/insurer paid temporary total disability benefits for the period beginning April 23, 2002 (date of discogram) through September 9, 2003. We accept the parties' stipulation as representing the appropriate healing period. No additional temporary total disability is awarded.

#### Nature and Extent of Permanent Disability

Employee asserts she is permanently and totally disabled. Dr. Volarich is the only medical expert who offered an opinion as to employee's permanent disability including the discogram and its sequellae. He believes that the work injury including the discogram and its sequellae caused a 75% permanent partial disability of the body as a whole referable to the lumbar spine. Dr. Volarich believes that employee "is unable to engage in any substantial gainful activity, nor could she be expected to perform in an ongoing working capacity in the future."

Employer argues, "Dr. Volarich's testimony cannot support an award of permanent total disability as a matter of

law," because Dr. Volarich gave a permanent partial disability rating for the 9/16/97 accident, placed work restrictions, and recommended employee undergo a vocational assessment (emphasis ours). We disagree.

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition."

"The 'extent and percentage of disability is a finding of fact within the special province of the Industrial Commission.'" "The Commission may consider all of the evidence, including the testimony of the claimant, and draw all reasonable inferences in arriving at the percentage of disability."

"The testimony of . . . lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence."

"The Commission is not bound by the expert's exact percentages and is free to find a disability rating higher or lower than that expressed in medical testimony." "The acceptance or rejection of medical evidence is for the Commission." "The decision to accept one of two conflicting medical opinions is a question of fact for the Commission."

*Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 233-234 (Mo. App. 2003) (citations omitted).

We will consider all of the evidence in reaching our permanent disability conclusion.

Employee testified that she experiences varying degrees of back pain and leg numbness on a nearly constant basis. The numbness is so severe at times that employee's legs collapse under her and she is forced to stay in bed. Employee's sleep is interrupted frequently due to discomfort. Employee can only drive for short periods and perform light housework. Employee can stand comfortably just one-half hour and sit comfortably only fifteen minutes.

Dr. Volarich recommended the following restrictions and guidelines for employee:

- limit repetitive bending, twisting, lifting, pushing pulling, carrying, climbing and other similar tasks to an as needed bases;
- limit lifting to no greater than 5 – 10 pounds on occasional basis;
- avoid handling weight overhead, away from body, over long distances, or over uneven terrain;
- avoid remaining in a fixed position greater that 15 – 20 minutes; and;
- change positions frequently and rest when needed, including resting in a supine position.

These restrictions track closely but expand upon Dr. Gornet's restrictions on lifting, bending, and remaining in a fixed position.

Dr. Volarich believes that employee is unable to engage in any substantial activity nor can she be expected to perform in an ongoing working capacity in the future. He does not believe she can reasonably be expected to perform for 8 hours a day, 5 days a week throughout the work year. Because employee is relatively young from a vocational standpoint, Dr. Volarich appropriately recommended a vocational assessment to explore the possibility that there might be some work employee could perform within the restrictions he imposed. However, Dr. Volarich testified unequivocally that if a vocational assessment was unable to identify a job for which employee was suited, he is of the opinion that employee is permanently and totally disabled. The vocational assessment performed by Mr. Timothy Lalk confirms Dr. Volarich's permanent total disability opinion.

Mr. Lalk evaluated employee's vocational rehabilitation potential. Mr. Lalk noted that employee's work history consisted mainly of cashiering and food/beverage service jobs. After administering tests to employee, including the Wide-Range Achievement Test and the Adult Basic Learning Examination, Mr. Lalk concluded that employee was not a candidate for post-secondary training. Mr. Lalk considered the restrictions imposed by Drs. Gornet and Volarich. He also considered employee's description of her level of functioning, particularly her testimony that on some days she must lie down for 10-24 hours of the 24-hour period and that three or four days each week she is

unable to function through most of the day. Mr. Lalk testified that he believes employee is unable to secure and maintain employment in the open labor market and would not be able to compete for any position. Her physical symptoms prevent her from performing work even in a sedentary level and her education and experience prevent her from finding work in a skilled position.

As mentioned above, none of employer's experts took into account the effect of the discogram and its sequellae when forming their opinions regarding the nature and extent of employee's permanent disability so their opinions are of little assistance on this issue.

Based upon the testimony of employee, Dr. Volarich, and Mr. Lalk, we do not believe any employer, in the ordinary course of business, could reasonably be expected to hire employee in her current physical condition. Accordingly, we conclude that employee is permanently and totally disabled.

The next issue we must consider is whether employee was rendered permanently and totally disabled by the work injury alone or whether the work injury combined with preexisting disabilities to result in permanent total disability. Dr. Volarich suggested that employee's preexisting lumbar problem – the disc bulge at L4-5 – combined with the primary injury to result in a greater disability than the simple sum of the conditions such that a loading factor should apply. On the other hand, Dr. Volarich testified that the work injury and its complications "far outweigh the preexisting lumbar disability." Dr. Wagner explained that the infection caused by the discogram deteriorated the discs at L4-5 and L5-S1, resulting first in a discectomy at L4-5 and, ultimately, in a lumbar fusion of both levels. Upon consideration of the medical evidence on the whole, we are persuaded that the complications from the discogram resulted in a lumbar condition that supplanted the prior lumbar condition, rather than combined with it.

Our conclusion is bolstered by our consideration of the physical restrictions that would prevent a reasonable employer from hiring employee in her present condition. All of the restrictions cited by Dr. Volarich and Mr. Lalk as rendering employee unemployable can be traced to the last injury, the discogram, and its sequellae. The physical limitations necessitating these restrictions are sufficient, standing alone, to render employee unemployable in the open labor market. Accordingly, employee is entitled to permanent total disability from employer/insurer. The Second Injury Fund has no liability for this injury.

#### Award

We award past medical expenses as described above.

We award future medical care to cure and relieve employee of the effects of her injury.

We award permanent total disability benefits to employee from employer/insurer in the weekly amount of \$ 253.34 beginning September 10, 2003, and continuing for her lifetime or until modified by law.

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

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

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of April 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary