

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

Injury No.: 08-048368

Employee: Robin Johnson
Employer: Jared Enterprises, Inc.
Insurer: Guarantee Insurance Company

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 7, 2011. The award and decision of Administrative Law Judge Victorine R. Mahon, issued February 7, 2011, 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 10th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Robin Johnson

Injury No. 08-048368

Dependents: Not Applicable

Employer: Jared Enterprises, Inc.

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Not Applicable.

Insurer: Guarantee Insurance Company

Medical Fee Dispute: Dismissed.

Hearing Date: December 3, 2010

Checked by: VRM/db

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: May 23, 2008.
5. State location where accident occurred or occupational disease was contracted: Taney County, Missouri, venue transferred to Greene County upon agreement.
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 the 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 involved in a motor vehicle accident while driving from one work location to another upon Employer's request.
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 hip and leg, and body as a whole.
14. Nature and extent of any permanent disability: Permanent Total Disability as a result of the last accident, alone.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not paid by employer/insurer? \$154,480.27.
18. Employee's average weekly wages? \$330.00.
19. Weekly compensation rate: \$220.00.
20. Method of computation: Stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

For temporary total disability, the sum of \$220.00 per week for 28 weeks from May 23, 2008 through December 4, 2008,:	\$ 6,160.00
For accrued permanent total disability, the sum of \$220.00 per week for 104 weeks from December 5, 2008 to December 3, 2010 – the date of hearing:	\$ 22,880.00
For past medical care, the sum of \$154,480.27:	\$154,480.27
For costs awarded pursuant to § 287.560 RSMo	<u>\$ 45,852.85</u>
TOTAL:	\$229,373.12

22. Second Injury Fund liability: None.

23. Future requirements awarded:

Permanent total disability of \$220.00 per week for the remainder of Claimant's life.

Future medical to cure or relieve the effects of Claimant's injuries, as set for the in the Award.

This Award is subject to review and modification as provided by law. Interest shall be paid as prescribed by law.

The compensation awarded to Employee/Claimant shall be subject to a lien of 25 percent of all payments in favor of the following attorney for necessary legal services rendered to Employee/Claimant: Jeffrey Goodnight.

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Robin Johnson

Injury No. 08-048368

Dependents: Not Applicable

Employer: Jared Enterprises, Inc.

Additional Party: Not Applicable.

Insurer: Guarantee Insurance Company

Medical Fee Dispute: Dismissed.

Hearing Date: December 3, 2010

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: VRM/db

INTRODUCTION

The undersigned administrative law judge heard this workers' compensation claim on December 3, 2010. Robin Johnson (Claimant and Employee) appeared in person and by her attorney of record, Jeffrey Goodnight. James Wesley appeared on behalf of Jared Enterprises, Inc., and its insurer Guarantee Insurance Company (hereafter referenced collectively as Employer). Any medical fee dispute has been dismissed. There is no Second Injury Fund claim.

STIPULATIONS

The parties reached the following stipulations:

- 1) On May 23, 2008, Robin Johnson sustained injuries as a result of an automobile accident. On that date, she was an employee of Jared Enterprises.
- 2) Jared Enterprises was an employer operating in the State of Missouri and was fully insured by Guarantee Insurance Company on the date of the accident.
- 3) Robin Johnson was covered by, and Employer was subject to, the Missouri Workers' Compensation Act on the date of the accident.
- 4) The accident occurred in Taney County, Missouri, but the parties have agreed to venue in Greene County Missouri.
- 5) Employee's average weekly wage on the date of the accident was \$330.00, yielding a weekly rate of \$220.00 for temporary total, permanent partial, and permanent total disabilities.
- 6) There is no dispute as to jurisdiction, notice, or statute of limitations.
- 7) Employer has paid no medical benefits and no temporary total disability.

ISSUES

The parties agree that the following are the issues are in dispute:

1. Did Employee's injuries arise out of and within the course of her employment?
2. Is Employer liable for temporary total disability?
3. Is Employer liable for \$154,480.27 in past medical care?
4. Is Employer liable for future medical care, and the extent of that care?
5. What is the nature and extent of any permanent disability for which Employer is liable?
6. Is Employer liable for the whole cost of the proceeding due to an unreasonable defense as set forth in § 287.560 RSMo?

EXHIBITS

The administrative law judge has agreed to take official notice of the Division's administrative file, including all claims and answers in this case. In addition, the following exhibits were admitted:

On behalf of Employee:

- A - F Medical Records
- G Medical Report – Dr. P. Brent Koprivica
- H. Vocational Rehabilitation Evaluation – Wilburn Swearingin
- I. Deposition – Wilbur Swearingin
- J. Deposition – Jeffrey Coursen
- K. Deposition – Matt Hediger
- L. Summary of Medical Expenses
- M – W Billing Records (Exhibit X was withdrawn)
- Y. Deposition – Randy Talley
- Z. Summary of Attorneys Fees and Expenses

On behalf of Employer:

1. Deposition of Dr. Hendler
2. Deposition of Terry Cordray

FINDINGS OF FACT

Claimant is a 49 year old woman with a high school diploma, but no formal post secondary education or vocational training. She has been married 30 years and lives with her husband, Scott Johnson. She worked 25 years as a graphic artist. Her prior jobs required that she not only design, but help with customers, type-set, and operate the presses. In other words, her prior occupation required more movement than just sitting at a computer

all day, but some jobs were more physical than others. She said the job had changed significantly with technology.

Claimant had a break in her employment, and then accepted a job at a Cody's, a convenience store in Republic, Missouri. She accepted the clerk position at the store rather than returning to graphic arts because it was close to her home. The work schedule also allowed her time to watch her daughter's high school softball games. The job was physical, requiring a great deal of lifting and standing and moderate stooping.

On May 23, 2008, Claimant reported to her usual work location at the Cody's store in Republic, Missouri. Shortly after the start of her shift, Claimant's supervisor asked Claimant if she would cover a shift at the Hollister, Missouri store because a worker at that location had to attend a funeral. While Cody's generally does not pay for travel time between job sites in unauthorized vehicles, Claimant was unaware of this policy. She understood that she would be paid for her travel time. In fact, Claimant had not clocked-out.

Jeffrey Coursen, a corporate representative of Jared Enterprises, Inc., which operates the Cody's convenience stores where Claimant worked, confirmed that Claimant was requested to travel from the store in Republic to Hollister on May 23, 2008, due to an understaffing issue at the Hollister store. He had no evidence that the travel policy was ever conveyed to Claimant.

Matthew Hediger, the store manager of the Republic store, could not recall discussing the company travel policy with Claimant on the morning of May 23, 2008. He anticipated that Claimant would have left the Republic store and traveled directly to Hollister, which he estimated as a 45 minute drive.

As Claimant was traveling on Highway 65 South to Hollister on May 23, 2008, she came upon a slow-moving vehicle which cut in front of her. In an attempt to avoid a collision with that vehicle Claimant swerved; she lost control of her vehicle and hit two sets of guard rails. The crash caused serious injury to Claimant, including multiple fractures, lacerations, and damage to the femur, hip, and ankle.

Initially, Claimant was taken by ambulance to Skaggs Hospital in Branson, Missouri. From there, she was transported to Cox Medical Center in Springfield, Missouri where an MRI and x-rays were taken. She was diagnosed at Cox with facial abrasions, fractures to four ribs, pulmonary contusion, and a right acetabular fracture through the posterior column with a subluxation. Because the appropriate orthopedic surgeon was not available at

Cox at the time, Claimant traveled by ambulance to the University of Missouri Medical Center in Columbia, Missouri. She underwent an open reduction and internal fixation of a hip fracture. She remained in Columbia until June 6, 2008, at which time she returned to Springfield, Missouri. She stayed at the Cox Walnut Lawn facility until June 20, 2008, but her medical care did not cease on that date.

Current Condition

Claimant takes prescription medication daily, including Oxycodone for pain. She continues to have sharp pain in her foot and throbbing pain in her hip. She walks with a slight limp with the aid of a foot-ankle orthosis which is fitted in the one pair of shoes that Claimant must wear. Claimant and her spouse testified credibly that Claimant no longer can perform essential housekeeping functions such as laundry, cooking, baking, or anything that requires stooping. Claimant's spouse described grocery shopping as a pretty big undertaking since Claimant is unable to shop by herself and must ride in motorized shopping carts. Even walking to the bathroom or sitting in front of a computer is difficult for Claimant.

Claimant said she does not know how far she can walk, but 10 minutes is the maximum. She testified credibly that she can stand for five or ten minutes and sit or lie down for 30 minutes without making an adjustment in her posture. She cannot sit on bleachers to watch her daughter's college softball games. Claimant no longer can attend Springfield Cardinal baseball games or movies because she is unable to sit that long. While car shows had been a big part of their lives in the past, Claimant no longer can participate in that activity. She is able to care for her personal hygiene. She can enter her home through the garage, but not through the front door which requires maneuvering three steps. She has driven locally, such as to church, but driving is difficult. A treating physician, Dr. Marquis, cleared Claimant to drive, but only with modifications to her vehicle such as left-footed controls or hand controls.

Expert Opinions

Dr. William Wester treated Claimant for her hip fracture when she was transferred to the Cox Walnut Lawn facility in June 2008. On December 4, 2008, Claimant's treating physician, Dr. William Wester, indicated that Claimant had reached maximum medical improvement. Dr. Wester recommended an AFO brace for her right foot after EMG/NCG studies performed by Dr. Marquis indicated that Claimant suffered from a right foot drop.

Dr. Wester restricted Claimant to standing no more than 20 to 30 minutes per hour and sitting no more than 30 to 40 minutes per hour. He restricted Claimant from squatting, kneeling, climbing, bending, stooping, or climbing stairs. He said she could lift 20 pounds occasionally. He indicated that Claimant could drive, but only with appropriate hand or modified foot controls.

Dr. P. Brent Koprivica performed an independent medical examination on February 25, 2009, at Claimant's request. He determined that Claimant suffered a significant fracture/dislocation of the right hip resulting in a severe sciatic neuropathy. He believed Claimant's medical treatment was necessary and reasonable to cure and relieve the effects of her injuries, and the billings were reasonable and customary. He believed Claimant had reached maximum medical improvement, although he had concerns with post-traumatic degenerative arthropathy involving the right hip, and recommended that future medical remain open to address these concerns. He rated Claimant's impairment at 35 percent of the body as a whole, but deferred to a vocational expert to determine if she was employable.

Dr. Steven Hendler performed an independent medical examination on Employer's behalf. He concurred with the diagnoses of other physicians. He noted Claimant's multiple trauma, including the right acetabular fracture, right rib fractures with pulmonary contusion, nasal fracture, sciatic neuropathy, as well as thromboembolic disease, anemia, diabetes mellitus, and hypertension. He agreed that Claimant needed ongoing bracing to her foot, and may need a future hip surgery as well as medications. He believed Claimant could sit continuously, but otherwise generally agreed with the postural limitations imposed by Dr. Wester. He said he would restrict Claimant from stooping and only rarely bending. Despite these restrictions, Dr. Hendler opined that Claimant could return to sedentary work. He rated Claimant's permanent disability as 50 percent to the right leg at the 207-week level.

Terry Cordray is the vocational expert hired by Employer. Based on the records, his interview with Claimant, and the restrictions of various physicians, Mr. Cordray noted that Claimant currently retains the ability to lift 20 pounds and work in a sedentary position. He said Claimant reported to him that her concentration and mood were okay. She was capable of attending to her personal hygiene and dressing. He attached to his report a "detailed job specialty report," regarding the position of illustrator and various alternative job titles which include

graphic artists. He said these jobs are sedentary and required no lifting over 10 pounds occasionally. He opined that Claimant retains the physical capacity and has the appropriate education, work background, and skills to work as a graphic artist. He also said Claimant could work in a few other sedentary positions that did not require lifting, such as a hotel desk clerk.

Wilbur Swearingin, a certified rehabilitation counselor, determined that Claimant could not perform her relevant past work. Mr. Swearingin indicated that Claimant also could not perform sedentary unskilled work because one could not expect her to meet the postural expectations if she is unable to squat, kneel, climb ladders, bend, stoop, or climb stairs. He also did not believe she was capable of maintaining the pace of work. He opined that Claimant could not compete for competitive employment as a result of the injuries sustained from her last accident on May 23, 2008, and was permanently and totally disabled. For the reasons discussed in the Conclusions of Law, I find Mr. Swearingin's testimony credible and more persuasive than that of Mr. Cordray.

Medical Bills

Exhibits A through F reflect the treatment that Claimant received for the injuries sustained as a result of the accident on May 23, 2008. Exhibits M through W reflect the medical expenses Claimant incurred as a result of that treatment. Expert testimony substantiates that the medical treatment Claimant received was reasonable and necessary and the bills for such treatment appeared reasonable and customary. Exhibit L is Claimant's summary of her medical expenses. Claimant's Exhibit L indicates that Claimant's bills total \$158,840.27, although Claimant would subtract \$160.00 from the total because Exhibit X – a bill from Cox Home Health – was withdrawn. Claimant, however, has asked for reimbursement of only \$154,480.27. This request was made at the start of the hearing as well as in Claimant's brief. Claimant's spouse also said the couple had incurred approximately \$154,000.00 in medical bills, and these bills had not been written off. I find Claimant incurred \$154,480.27 in medical bills that have not been written off.

CONCLUSIONS OF LAW

Claimant bears the burden of proving her case on all issues in dispute. *Walsh v. Treasurer of the State of Missouri*, 953 S.W.2d 632 (Mo. App. S.D. 1997), *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). I conclude that Claimant has demonstrated her entitlement to benefits, including temporary total disability, reimbursement of past medical expenses, future medical treatment, permanent total disability, as well as costs in prosecuting her claim.

Arose Out of and Within the Course of Employment

To receive workers' compensation benefits, Claimant must demonstrate that her injuries were caused by an accident "arising out of" and "in the course of" her employment. § 287.120.1 RSMo; *Gardner v. Contract Freighters, Inc.*, 165 S.W.3d 242, 245 (Mo. App. S.D. 2005). An injury "arises out of" the employment if it is a natural and reasonable incident thereof. *Custer v. Hartford Ins. Co.*, 174 S.W.3d 602, 610 (Mo.App. W.D. en banc 2005). It is "in the course of employment" if the action occurs within a period of employment at a place where the employee may be reasonably fulfilling the duties of employment. 174 S.W.3d at 610.

An accident occurring while an employee is going to and from work and home generally is not compensable. *Garrett v. Industrial Commission*, 600 S.W.2d 516, 519 (Mo. App. W.D. 1980). In this case, however, Claimant was not traveling to work from her home. Rather, she was traveling between her usual place of employment and another of Employer's store locations at the behest of Employer. When an employee's work entails travel away from the primary work premises, she is held to be within the course of employment during the entire trip, except when on a distinct personal errand. *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299, 305 (Mo. App. S.D. 2009). The *Harness* case addressed the compensability of traveling employees within the context of the 2005 amendments to the Workers' Compensation Law.

Much has been made of the Employer's policy requiring its store clerks to "clock out" when traveling between stores. Such evidence is inconsequential in this case. Irrespective of whether Employer intended to pay Claimant for her travel time, her travel between the two stores was for the sole benefit of Employer. And in this case, Claimant was not aware of the policy and, in fact, remained on the time clock during her travel. The

accident, and the injuries sustained as a result of that accident, arose out of and within the course of Claimant's employment.

Past Medical Care

In *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818, 822 (Mo. banc 2003), the Supreme Court held that "if [the employer] establishes by a preponderance of the evidence that the healthcare providers allowed write-offs and reductions for their own purposes and [the employee] is not legally subject to further liability, [the employee] is not entitled to any windfall recovery." 110 S.W.3d at 812. In this case, Claimant has requested reimbursement of \$154,480.27 in unpaid medical expenses. Her spouse testified that the couple had incurred approximately \$154,000 in medical bills which had not been written off. There are at least \$154,480.27 in medical bills submitted. Claimant is awarded \$154,480.27 in past medical, as was requested at the onset of the hearing and in Claimant's brief.

Temporary Total Disability

Temporary Total Disability is for an employee's healing period, and is awarded only for that period of time the employee is unable to work or has reached maximum medical improvement. *Cooper v. Medical Center, Independence*, 955 S.W.2d 570, 576 (Mo. App. W.D. 1997), *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Dr. Wester said Claimant was at maximum medical improvement effective December 4, 2008. There is no credible evidence suggesting that Claimant could have returned to any work between the date of the accident and the date of the release, a period of 28 weeks. Claimant is entitled to \$6,160.00 in temporary total disability (28 weeks x \$220.00).

Permanent Total Disability

The test for permanent total disability is whether the worker is able to compete in the open labor market. "The critical question is whether an employer could reasonably be expected to hire the claimant, considering his present physical condition, and reasonably expect him to successfully perform the work." *Forshee v. Landmark Excavating and Equip.*, 165 S.W.3d 533, 537 (Mo. App. E.D. 2005).

Terry Cordray testified that Claimant could perform work as an illustrator. Claimant certainly has the practical experience needed for the position, although she had no formal education or training beyond high school. Reviewing the physician-imposed physical restrictions, Mr. Cordray also opined that Claimant has the physical capability to perform a number of sedentary jobs. Mr. Swearingin, however, disagreed. And Claimant, testifying from knowledge of the graphic arts field after 25 years of experience, did not believe she had the physical capability of working in that field, or any other job. Most convincing is Mr. Swearingin's opinion that Claimant is incapable of maintaining the pace of employment.

This is a close case, but I have personally observed Claimant. Even from a layman's point of view, Claimant has severe postural limitations. Expert and lay testimony establishes that she is severely limited in stopping, bending, standing, and climbing. Even *if* there were jobs to fit Claimant's postural limitations, I accept Wilbur Swearingin's opinion that Claimant could not maintain the pace of employment, and thus could not maintain employment on the open labor market. Claimant is permanently and totally disabled. Employer shall pay her the permanent total disability rate of \$220.00, beginning the December 4, 2008, the date Dr. Wester stated that Claimant had reached maximum medical improvement.

Future Medical Care

Claimant need not provide conclusive testimony or evidence to support her claim for future medical benefits. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. W.D. 2007). It is sufficient to award future medical benefits if the claimant shows, by reasonable probability, that she is in need of additional medical treatment by reason of her work-related accident. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo. App. E.D.1997). The statute entitles her to medical treatment as may be reasonably required "to cure and relieve from the effects of the injury." § 287.140.1 RSMo. This includes treatment that provides comfort, even if restoration to soundness is not possible. *Poole v. City of St. Louis*, 2010 WL 4340695, 13 (Mo. App. E.D. 2010). Claimant is not required to present evidence on the specific medical treatment which will be necessary in the future in order to receive an award of future medical care. *Aldredge v. Southern Missouri Gas Co.*, 131 S.W.3d 876, 883 (Mo. App. S.D. 2004).

Employer's expert indicated that bracing for the lower extremity is likely, and a future surgery was a distinct possibility. Dr. Wester indicated that Claimant needs the AFO brace, which Claimant currently employs. Obviously, this brace is going to need replacement throughout Claimant's life. Dr. Marquis has recommended modifications to Claimant's vehicle so that she can safely drive. Determining what modifications are best suited to Claimant's disability may require expert consultation. Having considered the whole record, I conclude that Claimant is entitled to future medical care, and the same shall remain open and be provided by Employer. Employer shall provide such medical care as recommended by Dr. Wester and Dr. Marquis. This includes all expenses related to the modifications to Claimant's vehicle so that she is able to drive.

Costs

Claimant requests that the whole cost of the proceeding be awarded to her because Employer defended this case without reasonable ground. Section 287.560 RSMo, states that "if the division or the commission determines that any proceedings have been brought, prosecuted or *defended without reasonable ground*, it *may* assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them." (emphasis added). A defense is without reasonable ground where the employer offers "absolutely no ground, reasonable or otherwise" for refusing benefits clearly owed because the injury was indisputably work-related. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. banc 2003) (quoting *Stillwell v. Universal Constr. Co.*, 922 S.W.2d 448, 457 (Mo. App. W.D.1996)), *Landman* and *Stillwell* overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. banc 2003).

In *Clark v. Harts Auto Repair*, 274 S.W.3d 612, 618 (Mo. App. W.D. 2009), the Labor and Industrial Relations Commission awarded costs after determining that although an employer had admitted accident and liability, it "refused to even listen to settlement demands" and "refused to negotiate in good faith" without justification, and the "defense if one existed was contrary to its own evidence." 274 S.W.3d at 618. The appellate court affirmed the award of costs noting that "the Commission did not award the *entire* cost of the proceedings against Employer, but awarded a portion of the costs and fees that, in the Commission's view, could have been avoided if Employer had offered to settle the case in accordance with its own evidence." 274 S.W.3d at 619.

In this case, given the extensive changes to the Workers' Compensation Law in 2005, it was not unreasonable for Employer to initially challenge compensability. But once the Missouri Court of Appeals issued its decision interpreting the changes to § 287.020 RSMo Cum Supp 2005, in *Harness v. Southern Copy Roll, Inc.*, 291 S.W.3d 299, Employer was alerted that the instant case was clearly compensable. The Court's decision was issued on June 29, 2009, approximately 18 months prior to the hearing in the instant case. While Employer may have had a reasonable basis for challenging the extent of disability (permanent total versus permanent partial disability), it is unconscionable to starve out the Claimant by continuing to deny medical care and temporary total disability once compensability is clear and the injuries are severe, requiring extensive medical treatment. Moreover, even if Employer had a basis for arguing that Claimant was permanently and partially disabled, there is no denying that Claimant had at least 103 weeks of permanent disability based on the opinion of Employer's own expert, Dr. Hender.

Section 287.800 RSMo Cum Supp. 2005, now requires strict construction of all provisions of the Workers' Compensation Law. *Smalley v. Landmark Erectors*, 291 S.W.3d 737, 738 (Mo. App. E.D. 2009); *Gordon v. City of Ellisville*, 268 S.W.3d 454, 459 (Mo. App. E.D. 2008). Administrative law judges may not expand the application of the statute's plain and unambiguous terms. *State ex rel. Wright v. Carter*, 319 S.W.2d 596, 598 (Mo. banc 1958); *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823, 829 (Mo. App. S.D. 2009). The plain terms of § 287.560 RSMo, are permissive (the whole cost *may* be awarded). In this case, as in *Clark v. Hart's Auto Repair*, 274 S.W.3d 618, an award of costs is appropriate, but not to the extent requested by Claimant.

I conclude that Employer acted unreasonably in continuing to contest compensability and in refusing to pay accrued temporary total disability and medical care once the Court issued its decisive opinion in *Harness v. Southern Copyroll, Inc.*, 291 S.W.3d 299, on July 29, 2009. Claimant is awarded costs equal to 1) her expenses of \$5,692.78, as set forth in Exhibit Z, and 2) the attorneys fees associated with the award of Claimant's past medical care (25% x \$154,480.27) and temporary total disability (25% x \$6,160.00). Therefore, the costs awarded to Claimant for Employer's unreasonable defense is \$45,852.85 (\$5,692.78 + \$38,620.07 + \$1,540.00).

Summary

Employer shall pay the following to Claimant:

- 1) Temporary total disability in the amount of \$6,160.00.
- 2) Reimbursement of past medical bills in the amount of \$154,480.27.
- 3) Accrued permanent total disability from December 5, 2008 to the date of hearing on December 3, 2010, (104 weeks x \$220.00) \$22,880.00.
- 4) Permanent total disability beginning December 3, 2010 at the weekly benefit rate of \$220.00 for the remainder of Claimant's life.
- 5) Future medical benefits consistent with the recommendations of Dr. Wester and Dr. Marquis, including modifications to Claimant's vehicle and related expenses.
- 6) Costs due to an unreasonable defense in the amount of \$45,852.85.

Attorney Jeffrey Goodnight shall have a lien of 25 percent of all compensation awarded for reasonable and necessary legal services rendered to Claimant. Interest shall be paid as provided by law. This Award is subject to review and modification as provided by law.

Date: February 7, 2011

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Administrative Law Judge
Division of Workers' Compensation

Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation