

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

Injury No.: 00-170529

Employee: Jeanette Jones
Employer: Washington University
Insurer: Colleges and University Trust
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: December 30, 2000
Place and County of Accident: St. Louis, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations 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, except as modified herein, and was made in accordance with the Missouri Workers' Compensation Act.

In the second paragraph of the administrative law judge's award, the administrative law judge misstates a stipulation of the parties. We modify the award to correct this misstatement. The parties stipulated the employee sustained an accident but the parties did not stipulate that the accident arose out of and in the course of employment. "Arising out of" was an issue stipulated to be tried.

Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 19, 2005, as modified, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret D. Landolt, issued April 19, 2005, is attached and incorporated, with modification, by this reference.

Given at Jefferson City, State of Missouri, this 1st day of December, 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Jeanette Jones Injury No.: 00-170529
Dependents: N/A Before the
Division of Workers'
Employer: Washington University Compensation

Additional Party: Second Injury Fund
Insurer: Colleges and University Trust
Hearing Date: January 19, 20, and 21, 2005

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: MDL:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: December 30, 2000
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? No
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:
Claimant was administering dialysis when she was fondled by a patient.
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: Alleged psychiatric injury
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

Employee: Jeanette Jones Injury No.: 00-170529

17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$654.98
19. Weekly compensation rate: \$436.65/\$314.26
20. Method wages computation: Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: -0-
22. Second Injury Fund liability: No
- TOTAL: -0-
23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jeanette Jones	Injury No.: 00-170529
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Washington University	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Colleges and University Trust	Checked by: MDL:tr

PRELIMINARIES

A hearing was held on January 19, 20 and 21, 2005 at the Division of Workers' Compensation in the City of St. Louis. Jeanette Jones (Claimant) was represented by Ms. Sally Heller. Washington University (Employer) and its Insurer, Colleges and University Trust were represented by Mr. Carl Kessinger. The Second Injury Fund was represented by Assistant Attorney General Dana Ellison. Ms. Heller requested a fee of 25% of Claimant's award.

The parties stipulated that on or about December 30, 2000 Claimant sustained an accident arising out of and in the course of employment; at that time Claimant was an employee of Employer; venue is proper in the City of St. Louis; Employer received the requisite notice of injury; and the claim was timely filed. The parties further stipulated that Claimant was earning an average weekly wage of \$654.98 resulting in applicable rates of compensation of \$436.65 for total disability benefits and \$314.26 for permanent partial disability benefits. Employer has paid no benefits to date.

The issues for determination by hearing are: whether Claimant sustained an accident arising out of and in

the course of her employment; medical causation, Employer's liability for past and future medical expenses; nature and extent of permanent disability; Second Injury Fund liability; and past temporary total disability benefits.

FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

Claimant's Testimony

Claimant is 56 years old and has been married for 33 years. The eldest of ten children, Claimant grew up in Madison, Illinois. Claimant testified that she had a happy childhood. Claimant's family of origin is very close and loving. After graduating from high school, Claimant attended nursing school for two years and obtained her LPN diploma. Claimant is still a certified LPN.

Over the years Claimant has attended some junior college classes. Most recently she attended Phoenix University in May 2001 for a few weeks. She went to class once a week, two to three hours a night. She quit because there was a lot of paperwork and she had difficulty concentrating.

Claimant worked for Employer for twenty-one years. Since May 5, 1980 Claimant worked in the outpatient dialysis department administering dialysis treatment to patients. She served as a team leader and supervised others. Claimant had an exemplary work record and was well respected by her supervisors.

This Claim for Compensation revolves around an incident that occurred on December 30, 2000. At approximately 2:00 p.m., Claimant was bent over a male patient who was in his 60s preparing him for dialysis. She was wearing a v-neck scrub top with a uniform skirt. As Claimant leaned over to prepare the patient, he reached his hand inside her scrub blouse and grabbed her breast. Claimant removed his hand and yelled at him and told him he was not supposed to touch the nurses. The patient looked at her and smiled and said, "I guess I'm in trouble because I am a white man." Claimant advised the patient that it didn't matter what color he was, he was not allowed to touch her. Claimant was shocked, embarrassed, humiliated, and felt degraded. After the incident, Claimant continued to treat the patient because that was her job and she knew that they were short-staffed on the weekends. The patient remained under her care for approximately three and one-half to four hours. A co-worker, Patricia Jackson, was present a few feet away at the time of the assault. Claimant thought that Ms. Jackson saw the incident. Claimant testified that Ms. Jackson immediately left to report the incident to Kathy York, the charge nurse.

Claimant testified that she left work that day at approximately 7:30 p.m. After she left there, she "broke down" emotionally in her car. Claimant testified that after the incident, co-workers asked her about it. Claimant called Dr. Cohn, the doctor in charge of the dialysis unit. Dr. Cohn reported he was going to talk to her supervisor because he thought she needed to see a counselor. Claimant testified that she spoke to Ms. Colletti-Cook, the Director of Renal Operations, who informed Claimant that Employer did not provide any treatment. Claimant then called April Cotton in Human Resources who also told her that Employer did not provide any treatment for employees in her circumstances.

Claimant continued to work her regular shift. She took some prescheduled vacation time in January. At the end of January or beginning of February, she saw a psychiatrist on a referral from her primary care physician. She saw Dr. Davis and Linda Medlock. According to Claimant, she was a complete wreck and had lost all of her confidence. She did her best and continued to work. She tried not to talk about what had happened too much, but it was upsetting to her when co-workers asked her about it. The first family member she told was her husband, but she didn't tell him right away. It was humiliating and she thought she could handle it on her own. Dr. Davis took her off work and she applied for FMLA. She used her vacation and sick days. Claimant did not receive any workers' compensation benefits while Dr. Davis had her off work. Claimant never returned to work for Employer. She wrote a letter of resignation to Toni Colletti-Cook.

In the twenty years Claimant worked for Employer, no patient had ever grabbed her sexually. Claimant testified that she thought the sexual assault was extraordinary and unusual in her nursing career.

Claimant testified that she stopped treating with Dr. Davis in the spring of 2001 because her health insurance changed. Claimant then saw Pat Sartini, a counselor, and Dr. Zia, a psychiatrist, who provided medications. She then saw Dr. Rutledge and Peggy Galantowicz, a counselor. Claimant had co-pays with all of the doctors that she saw. At one point, her husband's insurance stopped paying for Ms. Galantowicz, and then Claimant paid \$65.00 for each visit until she had to stop seeing Ms. Galantowicz. Currently, Dr. Rutledge sees Claimant once a month. She talks to him, and he gives her Xanax for anxiety attacks, and Gavitrol for depression.

Claimant has not looked for a job because she does not feel she is able to do a full-time job, and nursing is all she knows. In order to do nursing, she has to be focused and in charge, but she has lost her confidence. Claimant feels that she is a wreck and just cannot do the job. Claimant has panic attacks and heart palpitations. She is constantly depressed and has crying spells and low self-esteem. She feels unattractive and doesn't socialize much anymore. She sometimes stays in her house for five days at a time, and no longer does housework like she used to. She used to be outgoing and had a lot of confidence, and now she feels inferior. She has severe nightmares about a man chasing her. She falls out of bed, and the right side of her face is numb because she has hit the side of her face on her night table. She fights her husband in her sleep and doesn't get much sleep.

Claimant never saw a therapist or psychologist before the primary injury. Before the primary injury, she sought the services of Dr. Light, a cardiologist, because she was having shortness of breath and heart palpitations. She was given a stress test and nitroglycerin tablets. She was told that she was having panic attacks. She does have aschemic heart disease.

Claimant's sister died of pancreatic cancer in July 2003. Although Claimant was saddened by her sister's death, she doesn't think that affected her state of mind. Claimant never drinks or smokes and has been happily married to her supportive husband, Fred, for 33 years. Her husband now does a lot of the housework, laundry, and grocery shopping.

Claimant's typical day is now unstructured. She tries to go to the beauty shop once a week and church on Sundays, although she sometimes misses. Her family has dinner at her mother's house once a week. She is told she needs to exercise and sometimes she walks through the mall. Before the work incident, she never missed church on Sundays or family dinners and was socially active. She now doesn't go to church as often, and she doesn't want to be around people like she used to. She has gone out of town twice since the work incident, once on a church trip, and once to her nephew's wedding last June in Texas. Before the work incident, she had a close physical relationship with her husband, but that has changed.

Claimant testified that she might have had some anxiety or panic attacks before the primary injury. Before December 30, 2000, Claimant does not remember being abused emotionally, physically or sexually. Before December 30, 2000, Claimant was never sent to a psychiatrist for depression, but it was suggested to her that she might be depressed.

Other Witnesses

Fred Jones testified that he has been married to Claimant for 33 years. Mr. Jones testified that he has a wonderful, caring and loving relationship with his wife. Before her work incident she had a great personality and was outgoing. She is now withdrawn and not as active as she used to be. She doesn't want to go out at all. There are times when he can see that she has been crying and when he asks her why it always goes back to the assault. Before the assault, they went out socially with friends and relatives. They go out infrequently now. Claimant's sleep patterns have changed and their sex life has changed in that they are not as intimate as they used to be. Claimant used to write poems, but does not do that anymore.

Ms. Toni Colletti-Cook testified on behalf of Employer. She is Employer's Director of Operations for the Renal Division and has been in that position since August 1998. Ms. Colletti-Cook has extensive health care experience and is responsible for three dialysis units, and oversees the care of patients. Ms. Colletti-Cook supervised Claimant, and first became aware of the assault when Dr. Cohn called her on January 8, 2001 to talk about it. Ms. Colletti-Cook testified that after the assault and before January 1, 2001, she had a conversation with Claimant, and Claimant did not mention the incident. When she found out about the incident, she called Claimant to check on her well being, ask about the assault, and request an incident report. Claimant told Ms. Colletti-Cook she was going to her own doctor because she was upset about what had happened. Ms. Colletti-Cook saw Claimant at work after the assault up until the time she left in February of 2001 and Claimant never appeared to be visibly distraught or upset. After the incident, she asked Claimant how she was, and Claimant informed her she was getting counseling. Ms. Colletti-Cook testified that she would have noticed if Claimant was

acting any differently, and she saw no decline in Claimant's work performance after the accident. Ms. Colletti-Cook testified that she was happy with Claimant's work and Claimant was very knowledgeable in her area. Claimant cared for her patients well and she had no performance issues or concerns with respect to Claimant.

Ms. Colletti-Cook testified that although assaults like what happened to Claimant do not happen on a daily basis, they are not uncommon, and she has heard of similar incidents happening in the past. Over the years Ms. Colletti-Cook has heard inappropriate comments from patients, and has had her buttocks grabbed. Ms. Colletti-Cook testified that she knows of five or six assaults happening at the Kidney Center since she has worked there. Of the five or six incidents, two or three of them were sexual assaults and the others were inappropriate comments or threats. Ms. Colletti-Cook testified that patients' thinking isn't always clear. With regard to the patient who assaulted Claimant, Ms. Colletti-Cook described him as an elderly gentleman who was fairly debilitated, and of average height and weight. He was weak and frail.

Katherine York testified on behalf of Employer. She works for Employer as an RN and has been in the Kidney Center for twenty-four years. She has been in the nursing profession for thirty-four years. She knows Claimant because they work together at the Kidney Center. She knows about the December 30, 2000 incident because she was the charge nurse on that date. Although she doesn't remember much about what happened, she remembers someone mentioning the incident. The procedures that were in place at that time were that if a nurse was having problems with a patient, the charge nurse would assess the situation to see what intervention was necessary. If a problem with a patient were a confrontation, she would try to rearrange the work assignment. Ms. York testified that although she does not remember any similar incidents such as what happened to Claimant happening in the past, she does not consider the incident to be extraordinary and unusual. Although Ms. York has never been sexually assaulted during her twenty-four years on the job, she testified that it is something that "comes with the territory." Ms. York testified that you are seeing people at their worst mentally and physically.

Patricia Jackson testified on behalf of Employer. Ms. Jackson has worked as a Patient Care Technician for Employer for four and one half years and has an extensive background in the healthcare profession. On December 30, 2000, Ms. Jackson was within about three feet of Claimant when the incident happened, although her back was to Claimant and she did not witness the event, report it or get help. She testified that she would have noticed if Claimant was visibly upset, and Claimant did not appear to be visibly upset when she saw her after December 30, 2000. Ms. Jackson described the offending patient as "a little old man." Ms. Jackson also testified that she did not believe that the assault is an extraordinary and unusual event.

Ms. April Cotton testified on behalf of Employer. She is the Employee Relations Manager in the Human Resources Department and has been in that position for four and one half years. Claimant explained the incident to Ms. Cotton and told Ms. Cotton that she wanted counseling made available for her. Ms. Cotton explained to Claimant that Employer did not have an EAP available at that time, but she could arrange to have counseling set up for her through her health insurance. Ms. Cotton testified that she contacted Behavioral Health Services and arranged a fee for service, which could be billed back through Claimant's insurance company. Ms. Cotton is not the workers' compensation coordinator.

Medical Evidence

Claimant treated at Psychiatric Care Consultants from January through April 2001. The diagnosis was major depression and she was referred to Patricia Sartini for counseling from October 2001 through December 2001. She was diagnosed with major depression and post-traumatic stress disorder (PTSD). She was referred to Dr. Zia, a psychiatrist, and saw Dr. Zia from November 2001 through May 2002. He diagnosed depression and PTSD, and prescribed various anti-depressants.

Claimant was referred to Peggy Galantowicz, MALPC. Claimant continued to experience flashbacks, recurrent nightmares, panic and anxiety, avoidance of talking or thinking about the event, avoidance of contact with ex co-workers, limited affect, frequent crying, inability to go to work, and other symptoms. The medical records of Ms. Galantowicz are sometimes inconsistent with Claimant's testimony. A July 3, 2002 note mentions Claimant's co-workers teasing her. At trial, Claimant testified that they were just joking, and were not being facetious. In a note of October 23, 2002, Ms. Galantowicz reports that Claimant described in detail some of the terrible things that happened to her as a child. At trial, Claimant denied any problems and stated she had a good childhood. Although a December 18, 2002 note states that Claimant reported that workers were showing pornography and talking badly about women, Claimant did not remember that at trial. A November 6, 2002 note states that Claimant's family was in turmoil, although Claimant could not remember her family ever being in turmoil at trial. An October 15, 2003 note states that Claimant reported having been sexually harassed at work. At trial,

Claimant could not remember this.

Dr. Volarich testified on behalf of Claimant. He diagnosed major depression and panic disorder related to the December 30, 2003 incident although he testified that he would defer to her treating psychiatrist when it came to rating the primary injury. He also deferred to a vocational expert regarding the issue of employability.

Mr. James England testified on behalf of Claimant. He opined that based on Claimant's emotional problems alone, she is permanently and totally disabled.

Dr. Rutledge, who is currently treating Claimant, testified on her behalf. He testified that Claimant was permanently and totally disabled and that the incident of December 30, 2000 caused PTSD. Based upon the PTSD, she was one hundred percent disabled. Dr. Rutledge opined that Claimant's PTSD met the DSM criteria because the work event threatened Claimant's life. According to Dr. Rutledge, Claimant feared that she would be raped, stabbed or killed by the patient. Dr. Rutledge relied on Claimant's history and subjective perception of the incident in rendering his opinions. He testified that the incident was an extraordinary and unusual occurrence. He disagreed with Dr. Stillings' assessment of preexisting schizoid and avoidant personality traits.

Dr. Liss testified on behalf of Claimant. He directly attributed her PTSD, anxiety, and depression to the December 30, 2000 incident. He opined that the psychiatric illness taken alone was evidence of a total permanent disability. Dr. Liss testified that the December 30, 2000 event was life threatening and equated the event to a physical rape. In his opinion, the seriousness of the event does not matter in diagnosing PTSD. His diagnosis is based on Claimant's subjective perception of events.

Dr. Stillings testified on behalf of Employer. Dr. Stillings diagnosed a major depressive disorder severe with psychotic features, an adjustment disorder, and schizoid and avoidance personality traits, and opined that the incident of December 30, 2000 was not a substantial factor causing major depressive disorder. He also felt that Claimant did not suffer from PTSD. He opined that her major depressive disorder preexisted the December 30, 2000 incident based on records from Dr. Terrell and Dr. Light. Only the adjustment disorder was related to the work incident.

RULINGS OF LAW

Based upon my comprehensive review of the evidence, including my observations of Claimant and other witnesses at hearing, the review of the medical records and deposition testimony of the respective medical experts, and the application of the Missouri workers' compensation law, I find:

Accidental Injury Arising Out Of and In the Course of Employment

Although the conduct of the offending patient in this case was reprehensible and inexcusable, and despite the fact that Claimant's suffering is real and debilitating, this claim does not meet the statutory requirements to make it a compensable case.

Claimant did not sustain any physical injury directly as a result of the December 30, 2000 incident. Since Claimant did not sustain any physical injury directly as a result of the work incident, this case is what is generally characterized as a "mental case" versus a physical, mental situation. As such, in order to arise out of and in the course of Claimant's employment the injury must meet the requirements of §287.120.8 of the Missouri Workers' Compensation Act. That statute reads: "Mental injury resulting from work related stress does not arise out of the and in the course of employment unless it is determined that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events."

Pursuant to §287.120.8, "the injury is not compensable unless claimant shows that the stress was extraordinary and unusual. This is done by comparing work related stress with the stress encountered by employees having similar positions regardless of employer with a focus on evidence of the stress encountered by similarly situated employees for the same employer." *Sherman v. First Financial Planners, Inc.*, 41 S.W.3d 633 at 637 (Mo.App. E.D. 2001).

Employer presented the testimony of three others working at the center where the event took place. All three, Patricia Jackson, Kathy York, and Toni Colletti-Cook, testified on direct examination that the event was not extraordinary and unusual. All three of these witnesses have extensive experience in direct patient care. I find their testimony to be persuasive. As they pointed out, although assaults such as that which occurred are not an every day occurrence, they do happen, and are not extraordinary and unusual. When patients are ill they are often at their worst mentally and physically, and those who are charged with their care are often subjected to their bad conduct. Claimant has not met her burden of proving that the stress was extraordinary and unusual. She therefore did not meet the criteria set out in §287.120.8, and failed to prove that the incident arose out of and in the course of employment. In light of that, compensability is denied.

Furthermore, to be compensable, §287.120.8 requires that “the amount of work stress shall be measured by objective standards and actual events.” Both of the psychiatric experts upon whom Claimant relies to make her case: Drs. Liss and Rutledge testified that their opinions were based on Claimant’s subjective perception of the December 30, 2000 events. Their opinions, thus, fail to use the requisite statutory standard to measure the amount of alleged stress. Since they did not use the appropriate standard, their opinions are found not to be credible. Drs. Liss and Rutledge testified that the event was life threatening. The assault was perpetrated by an older man who was described as somewhat debilitated, weak and frail. Dr. Rutledge testified that Claimant gave a history that she was fearful she would be raped, stabbed or killed. While this may have been Claimant’s subjective perception of the assault, it does not reflect the reality of the actual event.

In light of the Court’s finding that this claim does not meet the statutory requirements to make it a compensable case, the remaining issues are moot.

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