

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

Injury No.: 02-011769

Employee: Elizabeth A. Jordan  
Employer: St. John's Mercy Health Systems  
Insurer: Self-Insured c/o Sisters of Mercy Health Systems

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the September 29, 2010, award and decision of the administrative law judge. We adopt the findings, conclusions, decision and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision and modifications set forth below.

**Preliminaries**

The issues stipulated in dispute at the hearing were: (1) rate of compensation; (2) past medical expenses; (3) temporary total disability benefits; (4) nature and extent of permanent disability resulting from the work injury; (5) future medical treatment; and (6) the date employee reached maximum medical improvement.

The administrative law judge made the following findings: (1) employer is liable to employee for \$543,737.80 in past medical expenses; (2) employer is liable for future medical treatment "as projected in the life care plans which is contained in employee's Exhibit R"; (3) employer is liable to employee for temporary total disability benefits for the period of May 7, 2004 through August 9, 2004, and from January 27, 2005 through June 13, 2005; (4) the appropriate rate of compensation is \$628.90 per week; (5) employee is permanently and totally disabled and employer is liable for permanent total disability benefits; and (6) employee reached maximum medical improvement on August 15, 2005.

Employer submitted a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in concluding employer is liable for permanent total disability benefits; (2) in making findings as to the issue of past medical expenses because the administrative law judge did not list past medical expenses under the section entitled "Issues" in his award; (3) in finding employer liable to employee for \$543,737.80 in past medical expenses; (4) in admitting the life care plan and Home Health Care records into evidence because those documents are hearsay; (5) in finding employer liable for future treatment as projected in the life care plan; (6) in finding employee entitled to temporary total disability benefits after April 25, 2003, when employer's Dr. Coyle found employee to have reached maximum medical improvement; and (7) in finding a rate of compensation of \$628.90.

For the reasons set forth in this award and decision, the Commission modifies the award of the administrative law judge.

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**Discussion****Rate of compensation**<sup>1</sup>

The administrative law judge found, without explanation, the rate of temporary total and permanent total disability benefits to be \$628.90 per week. This finding is contrary to the evidence. Employee's wages were fixed by the hour. Accordingly, we look first to § 287.250.1 RSMo, which provides, in relevant part, as follows:

Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows: ...

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. ...

The only evidence we have of employee's earnings in the thirteen weeks prior to the work injury comes from employer's Exhibit 4, which is a "Schedule of Earnings of Employee," and employee's testimony that she was a full-time employee who generally worked three 12-hour shifts per week. Employer's Exhibit 4 reveals what appears to be a somewhat sporadic attendance history in the thirteen weeks preceding February 6, 2002. Employee did not provide any evidence to explain what appear to be significant absences from work during the weeks November 11, 2001 through November 17, 2001, and November 18, 2001 through November 24, 2001. Employer suggests we take out those weeks and divide employee's earned wages for the remaining weeks (\$8,790.61) by 11 rather than 13, yielding an average weekly wage of \$799.15, with resulting compensation rates of \$532.77 for temporary total and permanent total disability and \$329.42 for permanent partial disability. Section 287.250.4 RSMo provides, as follows:

If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

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<sup>1</sup> Employee asserts, in her brief, that the parties stipulated to the maximum compensation rate and thus we should not review this issue. Employee misrepresents the record, which shows that employee's counsel indicated that she could agree to the maximum compensation rate, but that both parties thereafter unmistakably listed the issue "rate of compensation" as one for the administrative law judge to decide. See *Transcript*, pages 1 and 3-4.

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Considering employee had the burden on this issue, and because employee failed to provide us any evidence of the reason for her absences from work and whether they were absences from “regular or scheduled work days,” we find employer’s suggestion abundantly reasonable and a fair means of determining the appropriate average weekly wage.

We find under § 287.250.1 RSMo, that employee’s average weekly wage is \$799.15, which yields compensation rates of \$532.77 for temporary total and permanent total disability under §§ 287.170 and 287.200 RSMo, respectively, and \$329.42 for permanent partial disability under § 287.190 RSMo.

#### Future medical treatment

We agree that employee met her burden of proving she is entitled to future medical treatment from the employer. We are concerned, however, with the form in which the administrative law judge awarded future medical treatment. Specifically, we find it inappropriate to award future medical treatment “as projected in the life care plans which is contained in Employee’s Exhibit R.” *Award*, page 7. We modify the award to give effect to the statutory language pertaining to future medical treatment. Section 287.140.1 RSMo provides, in relevant part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

The language of the award raises a question whether the administrative law judge inappropriately awarded the projected expenses for specific future treatments and procedures. Such an award is not contemplated by the foregoing section. Rather, where the employee’s burden of proof is met, the statute makes clear that employee is entitled to that treatment which “may reasonably be required ... to cure and relieve from the effects of the injury.” *Id.* We therefore modify the award of the administrative law judge to find employee entitled to, and employer obligated to provide, that future medical treatment which may reasonably be required to cure and relieve her condition resulting from the injury of February 6, 2002. We do not award any projected expenses connected to a specific future course of treatment, nor do we bind employee’s award of future medical treatment to the specific treatments or procedures outlined in any life care plan.

#### **Award**

We modify the award of the administrative law judge. We find the appropriate rates of compensation are \$532.77 for temporary total and permanent total disability, and \$329.42 for permanent partial disability. We find that employee is entitled to that future medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, which may reasonably be required to cure and relieve from the effects of the injury of February 6, 2002.

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

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

The award and decision of Administrative Law Judge Cornelius T. Lane, issued September 29, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 11<sup>th</sup> day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Elizabeth A. Jordan Injury No.: 02-011769  
Dependents: N/A Before the  
Employer: St. John's Mercy Health Systems **Division of Workers'**  
**Compensation**  
Additional Party: N/A Department of Labor and Industrial  
Relations of Missouri  
Insurer: Self Insured Jefferson City, Missouri  
Hearing Date: July 15, 2010 Checked by: CTL:ms

### 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: February 6, 2002
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? Self
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
While lifting a patient with a co-worker into bed, the co worker dropped the patient, causing Claimant to feel a pop in her back.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Back
14. Nature and extent of any permanent disability: Permanently and totally disabled
15. Compensation paid to-date for temporary disability: \$11,643.60
16. Value necessary medical aid paid to date by employer/insurer? \$39,802.18

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17. Value necessary medical aid not furnished by employer/insurer? \$543,737.80
18. Employee's average weekly wages: \$25.00 per hour times 36 hours per week totaling \$900.00 per week
19. Weekly compensation rate: \$628.90/\$329.42
20. Method wages computation: Per Claimant's testimony

**COMPENSATION PAYABLE**

21. Amount of compensation payable:
  - A. Claimant is permanently and totally disabled as of August 15, 2005 and Employer is liable for weekly payments of \$628.90 per week commencing August 15, 2005 and continuing thereafter in accordance with the law.
  - B. Employer is liable to Claimant for temporary total disability benefits for the period of May 7, 2004 through August 9, 2004 and January 27, 2005 through June 13, 2005, for a total of 32 6/7 weeks at a rate of \$628.90 per week for a total of \$20,665.65.
  - C. Employer is liable to Claimant for \$543,737.80 in past medical expenses.
22. Second Injury Fund liability: None
23. Future requirements awarded: Employer is liable to Claimant for future medical treatment as projected in the life care plan contained in Claimant's Exhibit R.

Said payments to begin 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: Cynthia Hennessey

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Elizabeth A. Jordan	Injury No.:	02-011769
Dependents:	N/A		Before the
Employer:	St. John's Mercy Health Systems		<b>Division of Workers'</b>
Additional Party:	N/A		<b>Compensation</b>
			Department of Labor and Industrial
			Relations of Missouri
			Jefferson City, Missouri
Insurer:	Self Insured	Checked by:	CTL: ms

### **PREFACE**

A hearing was held in the above mentioned matter on July 15, 2010. The Claimant, Elizabeth Jordan, was represented by attorney Cynthia Hennessey. The Employer, St. John's Mercy Health Systems, self insured, was represented by Attorney Maurice Early.

### **ISSUES**

1. Nature and extent of permanent partial/permanent total disability;
2. Rate;
3. Temporary total disability benefits owed;
4. Date of commencement of temporary total disability benefits;
5. Compensation rate;
6. Liability for future medical treatment.

### **STIPULATIONS**

The parties stipulated the following:

1. Claimant sustained an injury arising out of and during the course of her employment with her Employer.
2. Employer received proper notice.

### **EXHIBITS**

The Claimant offered the following exhibits into evidence:

Exhibit A: Dr. Musich's report.  
Exhibit B: Mr. James England's report.  
Exhibit C: Dr. Coyle's records.  
Exhibit D: Dr. Kennedy's records.  
Exhibit E: Dr. Metzler's records.  
Exhibit F: Dr. Sheehan's records.  
Exhibit G: Dr. Smith/Midwest Pain records.  
Exhibit H: Dr. Johann/Pain Management Service's records.  
Exhibit I: Midwest Urological records.  
Exhibit J: ESSE Health records (Dr. Rice).  
Exhibit K: NW Infectious Disease records.  
Exhibit L: Christian Hospital records.  
Exhibit M: Barnes-Jewish West records.  
Exhibit N: HHLA Home Health Care Records  
Exhibit O: Dr. Terschluse's records.  
Exhibit P: King's Spinal records.  
Exhibit Q: DePaul records.  
Exhibit R: Dr. Musich's deposition with exhibits.  
Exhibit S: Mr. James England Deposition with exhibits  
Exhibit T: St. Louis Orthopedic Institute Records  
Exhibit U: Unity Health Corp. Health Records  
Exhibit V: Current Medications  
Exhibit: X: Medical Bills  
Exhibit Y: Minute Entries

The Employer offered the following exhibits into evidence:

Exhibit I. Deposition of Dr. James Coyle.  
Exhibit II. Deposition of Mr. Donna Abram.  
Exhibit III. Letter written by Claimant requesting a continuance from the February 5, 2005 prehearing conference.  
Exhibit IV The Claimant's 13-week wages prior to the date of injury.

All Exhibits were accepted into evidence.

### **FINDINGS OF FACT**

Based upon competent and substantial evidence, I find:

1. At the time of the hearing Claimant was 49 years of age, married, and had one daughter.
2. Claimant in 1998 became a board certified nurse. Claimant began working for the Employer as a registered nurse in 1998 and worked there through the year 2003. Claimant testified that while working for the Employer she earned income of \$25.00 per hour and worked 36 hours per week.

3. Claimant testified on February 6, 2002, while working for the Employer she was lifting a bed with a 400 pound woman in it with a co-worker, and the co-worker dropped her end of the bed causing the Claimant to feel a pop in her lower back as well as immediate pain in the right side of her back.
4. Claimant was seen at Unity Corporate Health Care on February 7, 2002, and she was prescribed medicine, given physical therapy and treated there until March 25, 2002. During this period of time the Claimant testified very credibly that she was having a lot of problems in her low back.
5. The Claimant was referred to a physiatrist, Dr. Tate, for care and treatment. Dr. Tate treated her for her low back problems from April 1, 2002 thru May 1, 2002, and she was given injections, and an MRI was performed on April 29, 2002, which showed a large central disc herniation L5-S1.
6. Claimant was referred to Dr. Coyle, an orthopedic surgeon as a result of the MRI and she first saw Dr. Coyle on May 1, 2002, and she complained to Dr. Coyle that she had low back pain, bilateral dysesthesia in her legs, and had numbness in her right foot.
7. On May 16, 2002, Dr. Coyle performed lumbar microdiscectomy surgery on the Claimant. Claimant testified that even after the surgery she still had a great deal of pain in the low back, and on a visit to Dr. Coyle Claimant was diagnosed as having acute lumbar strain, she had re-aggravated her back injury by restraining a patient at work. Dr. Coyle ordered a CT myelogram which he stated revealed an obstruction of right S1 nerve root.
8. Claimant stayed under the care of Dr. Coyle until April 25, 2003, and still had a great deal of problems with her low back, legs, and into her feet, but Dr. Coyle was of the opinion that surgery would not be beneficial for the Claimant.
9. On April 25, 2003, Dr. Coyle placed the Claimant at MMI rating her as having 20 percent disability of the body as a whole but did place certain restrictions, that being no lifting over 10 pounds. Claimant testified even though Dr. Coyle released her and placed her at MMI she was still suffering a great deal of pain. Claimant testified she notified her Employer about Dr. Coyle placing her at MMI with certain restrictions and was advised not to clock into work and she would have to apply for other openings at the Employer's place of business with restrictions of limited lifting of 10 pounds, sedentary work, and no repetitive bending at the waist greater than 20 degrees. Claimant testified she tried to apply for other positions with the Employer but did not get a job.
10. Claimant testified that she did request further treatment but was told that no further treatment would be authorized since Dr. Coyle placed her at MMI.
11. The Employer Workers' Compensation manager, Miss Ellis, testified that Claimant's husband did contact her in May of 2003 and indicated his wife was still having problems with her low back and requested additional treatment and a second opinion. Miss Ellis testified that she denied that request in May of 2003.

12. Claimant saw Dr. Kennedy, a neurosurgeon on August 26, 2003, and he diagnosed the Claimant with post laminectomy syndrome and ordered an MRI which showed Claimant had a recurring herniated disc at L5-S1.
13. Claimant because of her problems then began to see Dr. Metzler who after having reviewed the medical records and the MRI noted that Claimant had a central and right paracentral disc herniation at L5-S1. Dr. Metzler gave her injections and prescribed medication while she was under his care.
14. Dr. Metzler on March 12, 2004, performed an MRI which disclosed a disc fragment seen in the right lateral recess L5-S1 with displacement of the right lateral recess at L5-S1.
15. On April 28, 2004, Claimant saw Dr. Sheehan and because of her complaints of back pain, right leg numbness and tingling radiating to her foot he diagnosed a recurrent L5-S1 herniated nucleus pulposus on the right and on May 7, 2004, performed a L5-S1 lumbar microdiscectomy.
16. After Dr. Sheehan's surgery of May 7, 2004, Claimant still had problems in her low back, etc., and he indicated to the Claimant that she should have a two-level anterior and posterior lumbar fusion.
17. Claimant, after the surgery performed by Dr. Sheehan, went to see Dr. Kennedy and he was of the opinion that the Claimant needed fusion surgery. Dr. Sheehan on January 27, 2005, performed two-level anterior and posterior fusion surgery on Claimant.
18. After the January 27, 2005, surgery with Dr. Sheehan Claimant underwent a placement of suprapubic catheter, had post operative bowel spasm, rectal bleeding, and developed a severe post operative infection which required antibiotic therapy.
19. Claimant as a result of the problems she was having with her low back went to see Dr. Johannas who diagnosed her with post lumbar laminectomy syndrome and performed radial frequency neuroablation.
20. Claimant continued having problems after having seen Dr. Johannas and went to see Dr. Kutz in July 2006 who planted a permanent spinal cord stimulator because of Claimant's back problems.
21. Dr. Kutz on December 28, 2006, because of Claimant's back problems implanted a intrathecal morphine pump.
22. Claimant testified very credibly she still has a great deal of pain in her low back, legs, etc., and she goes to see Dr. Steven Smith for pain management who she has been seeing since 2004 and she is still treating with him at the time of this hearing.
23. Dr. Musich testified on behalf of the Claimant and testified very credibly that the Claimant was permanently and totally disabled as a result of her injury of February 6,

2002, and stated that the injury resulted in discogenic pain, radiculopathy, and bowel and bladder complaints. Dr. Musich was also of the opinion that the Claimant should not make any profession judgment decisions due to the effects of the medication that she was taking as a result of the work related back injury. Dr. Musich also testified very credibly that he reviewed the medical bills that have been incurred by the Claimant since being released by Dr. Coyle and he felt as a result of reviewing all the medical records and bills that the medical records and bills are very reasonable and they were very necessary in trying to help the Claimant from all the problems she was having as a result of the work injury of February 6, 2002.

24. Dr. Musich reviewed the life care plan prepared by Small Enterprises and felt it was necessary as a result of the Claimant's work injury that Claimant would require the items of the life care plan in the future. Dr. Musich further testified that the Claimant is permanently and totally disabled as a result of the February 6, 2002, work injury.
25. The Claimant was seen by James England, a vocational expert, who testified very credibly that the Claimant was permanently and totally disabled as a result of her injuries of February 6, 2002.
26. Claimant's evidence showed very credibly that Claimant's past medical expenses in the amount of \$543,737.80 were necessary to cure and relieve her from the effects of her work related injury.
27. In the period of time of May 7, 2004, through August 9, 2004, and from January 27, 2005, through June 13, 2005, while Claimant was off work for a total of 32 6/7 weeks that the Claimant is entitled to temporary total disability of \$628.90 per week.

### **RULINGS OF LAW**

1. The Employer in May of 2003 denied Claimant treatment when she was in need of further treatment to relieve herself from the problems she was having from her work injury. Thus I find the Employer is liable to the Claimant for \$543,737.80 for past medical expenses.
2. Employer is liable for future medical treatment as projected in the life care plans which is contained in Employee's Exhibit R.
3. Employer is liable to the Claimant for temporary total disability benefits for the period of May 7, 2004, through August 9, 2004, and from January 27, 2005, through June 13, 2005, for a total of 32 6/7 weeks at the compensation rate of temporary total disability of \$628.90 per week.

4. I find that the Claimant is permanently and totally disabled as of the date of MMI of August 15, 2005, and therefore the Employer is liable for weekly payments in the amount of \$628.90 per week commencing on August 15, 2005, and continuing in accordance with the law.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

Cornelius T. Lane  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated and attested to as of this \_\_\_\_\_ day of September, 2010.

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*