

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

Injury No.: 07-109955

Employee: Grace Ketchum
Employer: Missouri Department of Corrections
Insurer: C A R O

This 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, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the 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.

Discussion

Nature and extent of disability resulting from the work injury

The administrative law judge found that, as a result of the work injury, employee sustained a 50% permanent partial disability of the body as a whole, and did not suffer permanent total disability. In so finding, the administrative law judge expressly relied on the opinions of employer's vocational expert, James England.

Employer offered a report from Mr. England into evidence; the parties did not depose him. Although we agree that the opinions expressed in Mr. England's report are credible (and not materially inconsistent with the opinions expressed by employee's vocational expert, Phillip Eldred) a careful reading of the report does not reveal an opinion regarding the ultimate issue of 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, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 411 (Mo. App. 2011)(citation omitted).

Mr. England states that employee would be "physically able" to perform some very limited jobs, but he does not address the issue whether an employer in the ordinary course of business would be reasonably expected to hire her. Instead, Mr. England states that employee could perform "some" cashiering positions, "some" security positions, and/or "some" home health positions. Absent additional evidence or testimony, we are left to speculate as to whether such positions actually exist in significant numbers in the open labor market, and whether employee could reasonably compete for such positions.

We find that employer has failed to present any evidence to rebut Mr. Eldred's opinion that, as a result of the work injury considered in isolation, it is highly unlikely that any

Employee: Grace Ketchum

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reasonable employer in the normal course of business would hire employee for competitive, gainful employment. We find persuasive Mr. Eldred's opinion on this issue.

The parties stipulated that employee reached maximum medical improvement on September 15, 2010. We find that employee is permanently and totally disabled as a result of the last injury considered in isolation. Employer is liable for permanent total disability benefits.

Award

We modify the award of the administrative law judge as to the issue of nature and extent of permanent disability resulting from the work injury. Beginning September 15, 2010, employer is liable for weekly payments of permanent total disability benefits at the stipulated rate of \$344.19. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

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.

The award and decision of Administrative Law Judge Carl Strange, issued April 26, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 22nd day of November 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Grace Ketchum

Injury No. 07-109955

Dependents: N/A

Employer: Missouri Department of Corrections

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing Date: January 29, 2013

Checked by: CS/rm

SUMMARY OF FINDINGS

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? November 11, 2007.
5. State location where accident occurred or occupational disease contracted: St. Francois County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was a passenger in a van when it backed into a dock and she injured her neck.
12. Did accident or occupational disease cause death? N/A.

13. Parts of body injured by accident or occupational disease: Neck.
14. Nature and extent of any permanent disability: 50% permanent partial disability of the cervical spine.
15. Compensation paid to date for temporary total disability: \$3,048.54.
16. Value necessary medical aid paid to date by employer-insurer: \$104,364.10.
17. Value necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: Not calculated.
19. Weekly compensation rate: \$344.19 for temporary total disability, permanent total disability, and permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: Employee awarded permanent partial disability from the employer in the amount of \$68,838.00. (See Findings.)
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: Employer-insurer directed to pay future medical aid pursuant to Section 287.140 RSMo (See Findings).

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the employee shall be subject to a lien in the amount of costs plus 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Van Camp Law Firm, LLC.

FINDINGS OF FACT AND RULINGS OF LAW

On January 29, 2013, the employee, Grace Ketchum, appeared in person and by her attorney, Christine Kiefer, for a hearing for a final award. The employer-insurer was represented at the hearing by Assistant Attorney General, Gregg Johnson. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about November 11, 2007, Missouri Department of Corrections was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about November 11, 2007, the employee was an employee of Missouri Department of Corrections and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about November 11, 2007, the employee sustained an accident out of and in the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's rate for temporary total disability, permanent total disability, and permanent partial disability is \$344.19.
7. The employee's injury is medically causally related to the work injury occurring on or about November 11, 2007.
8. The employer has furnished \$104,364.10 in medical aid to the employee.
9. The employer has paid temporary total disability benefits for 8 6/7 weeks at a rate of \$344.19 per week for a total of \$3,048.54.
10. The employee reached maximum medical improvement on September 15, 2010.

ISSUES:

1. Future Medical Aid.
2. Nature and Extent of Disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits:

- A. Medical records of Bonne Terre Medical Associates;
- B. Medical records of Parkland Health Center;
- C. Medical records of Farmington Hand & Physical Therapy;
- D. Medical records of Pain Prevention and Rehabilitation Center;
- E. Medical records of Farmington Hand & Physical Therapy;
- F. Medical records of Midwest Spine Surgeons;
- G. Medical records of Midwest Spine Surgeons;
- H. Medical records of Midwest Spine Surgeons;
- I. Medical records of Barnes-Jewish West County Hospital;
- J. Medical records of Midwest Spine Surgeons;
- K. Medical records of Barnes-Jewish West County Hospital;
- L. Medical records of Farmington Hand & Physical Therapy;
- M. Medical records of Pain Management Services;
- N. Medical records of Pro Rehab;
- O. Medical records of Midwest Spine Surgeons;
- P. Medical records of Pain Management Services;
- Q. Medical records of Pain Management Services;
- R. Medical records of Pain Management Services;
- S. Medical report of Dr. Raymond Cohen;
- T. Deposition of Dr. David Volarich; and,
- U. Deposition of Mr. Philip Eldred.

Employer-Insurer's Exhibits

- 1. Deposition of James England; and,
- 2. Medical records of Dr. Anthony Guarino.

FINDINGS OF FACT:

Based on the testimony of Grace Ketchum ("Employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, Employee was 58 years old and had been married to her husband, Richard Ketchum, for 38 years. After obtaining her CNA license and psychiatric aide certificate, Employee began working for Missouri Department of Corrections ("Employer") in February 2006. Her job duties included supervising inmates for preparation, providing food, and maintaining supplies.

On November 11, 2007, while working for the Employer, Employee was a passenger in a food supply truck and the driver backed into a loading dock. After receiving initial treatment for her whiplash injury, Employee's care was transferred to Dr. James Coyle. The MRI obtained on March 25, 2010, indicated Employee had multilevel degenerative disc disease and degenerative joint disease C3 through C7, lateralization of changes to the left with foraminal encroachment on

the left at C4-C5 and C5-C6, disc protrusion and osteophyte lateralizing to the right at C6-C7 with foraminal encroachment on the right, and mild canal stenosis is produced by the changes on the right at C6-C7. On April 8, 2010, Dr. Coyle performed a anterior cervical decompression C4-C5, C6-C7 with bilateral foraminotomies C4-5, C5-6, C6-7, anterior interbody arthrodesis C4-5, C5-6, C6-7 with Synthes machined allograft spacers, INFUSE bone morphogenic protein, SKYLINE anterior cervical plate. On September 15, 2010, Dr. Coyle placed Employee at maximum medical improvement and noted that Employee “does have arthritic changes proximally and distally which were noted prior to surgery, but I advised her that she has extensive arthritis in her cervical spine and that the levels addressed represented a compromise between pain relief and continued range of motion” (Employee's Exhibit H). Following her release, Employee worked for approximately one month and then applied for extended medical leave and long term disability.

Following her release by Dr. Coyle, Employee treated with Dr. Anthony Guarino for pain management. Dr. Guarino administered pain medication and cervical facet injections. On November 30, 2010, Dr. Guarino noted that Employee was three weeks post injections and that Employee “has had an 80% reduction of pain that continues...this is the best that she has felt in three years...she is able to do all of the activities of daily living around the house” (Employer-Insurer's Exhibit 2). At the time of the hearing, Employee testified that four days later when she saw Dr. Volarich that the injection had wore off and she felt horrible. On December 3, 2010, Dr. Volarich examined Employee and opined that Employee suffered a 65% permanent partial disability of the body as a whole rated at the cervical spine as a result of the November 11, 2007 work-related injury. Further, Dr. Volarich noted that no disability was found regarding Employee's pre-existing cervical strain from 2001, underlying degenerative disc disease, degenerative joint disease, right knee, and left elbow since they were asymptomatic. Although Dr. Volarich opined that Employee should not return to her prior work due to safety, he recommended that she undergo vocational assessment to determine if she is able to return to the open labor market in any capacity in the future. Dr. Volarich also noted that if vocational assessment was able to identify a job for which she is suited, he has no objection with her attempting to return to work based on his limitations at the end of his report. If vocational assessment was unable to identify a job for which Employee was suited, Dr. Volarich noted that Employee would be considered to be permanently and totally disabled as a direct result of the work-related injury of November 11, 2007 standing alone (Employee's Exhibit T).

On February 17, 2011, Employee was seen by Mr. Philip Eldred, a vocational rehabilitation expert, who issued his report on February 24, 2011 and opined that Employee was unemployable in the open labor market and was permanently and totally disabled as a result of her injury on November 11, 2007 in isolation. On July 27, 2011, Employee was seen by Mr. James England, a vocational rehabilitation expert, who issued his report on August 8, 2011 and opined that Employee may be precluded from her past work but “would still be physically able to perform some types of entry-level service employment such as some cashiering positions, some security positions as working in an office building or as an alarm monitor for a security company. She would be a logical person for some home health positions with ambulatory patients or working as a companion.” Finally, Mr. England noted that Employee would benefit from additional skill development and assistance from the Missouri Division of Vocational Rehabilitation (Employer-Insurer's Exhibit 1).

APPLICABLE LAW:

- The employee has the burden to prove all material elements of her claim. Melvies v Morris, 422 S.W.2d 335 (Mo.App.1968). The employee has the burden of proving not only that she sustained an accident that arose out of and in the course of her employment, but also that there is a medical causal relationship between her accident and the injuries and the medical treatment for which she is seeking compensation. Griggs v A B Chance Company, 503 S.W.2d 697 (Mo.App.1973).
- Under Section 287.140.1 RSMo., “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 employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. Emert v Ford Motor Company, 863 S.W. 2d 629 (Mo.App. 1993); Shores v General Motors Corporation, 842 S.W. 2d 929 (Mo.App.1992) and Hendricks v Motor Freight, 520 S.W. 2d 702, 710 (Mo.App.1978).
- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.
- The phrase “the inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. Kowalski v M-G Metals and Sales, Inc., 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. Reiner v Treasurer of the State of Missouri, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. Brown v Treasurer of the State of Missouri, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Reiner at 365. See also Thornton v Haas Bakery, 858 S.W.2d 831,834(Mo.App.1993).

Issue 1. Future Medical Aid

Employee has alleged that she will require additional medical treatment to cure and relieve her from the effects of her November 11, 2007 work-related injury. In support of her position, Employee has offered the opinion of Dr. David Volarich. Following his examination of Employee, Dr. Volarich opined that Employee will require pain management and ongoing care for her pain syndrome using modalities, including but not limited to narcotics and non-narcotic medications (NSAID’s), muscle relaxants, physical therapy, and similar treatments as directed by

the current standard of medical practice for symptomatic relief of her complaints. After reviewing all of the evidence, I find that Employer has failed to offer sufficient evidence to discredit Employee's testimony. It is important to note that Employer has also failed to offer sufficient evidence to discredit the opinions of Dr. David Volarich. Consequently, I find the opinions of Dr. Volarich to be credible and more credible than any other conflicting opinions. The medical evidence supports a finding that Employee will require future medical treatment to cure and relieve her from the effects of her November 11, 2007 work-related injury.

Based on the evidence and my above findings, Employer is therefore directed to furnish additional medical treatment related to Employee's November 11, 2007 work-related cervical condition in accordance with Section 287.140 RSMo.

Issue 2. Nature and Extent of Disability

Employee has alleged that she is permanently and totally disabled as a result of her November 11, 2007 work injury alone. In support of her position that she is permanently and totally disabled as a result of her November 11, 2007 work injury alone, Employee has offered the opinions of her vocational rehabilitation expert Mr. Phillip Eldred. Employer has offered the opinions of vocational rehabilitation expert Mr. James England that Employee is not permanently and totally disabled. At the time of his deposition, Dr. Volarich testified that it doesn't matter to him if it's the employer's expert or the claimant's expert if the vocational expert can find a job for her to try to do (Employee's Exhibit T). Mr. Eldred did not have the benefit of Dr. Guarino's records when he formed his opinions. Based on a thorough review of all the evidence, I find that Mr. England's opinions are more credible and supported by the evidence more than the opinions of Mr. Eldred. Based on my above findings, I find that Employee has failed to meet her burden of proof regarding permanent total disability against the Employer.

Although the Employer is not liable for permanent total disability benefits, the Employer is still liable for permanent partial disability. Based on the evidence, I find that Employee suffered a fifty percent (50%) permanent partial disability of the body as a whole at the 400 week level referable to the cervical spine as a result of the November 11, 2007 work-related injury. The fifty percent (50%) of her body as a whole is equal to 200 weeks. Accordingly, Employer-Insurer is therefore directed to pay Employee the sum of \$344.19 per week for 200 weeks for a total of \$68,838.00.

ATTORNEY'S FEE:

Van Camp Law Firm, LLC is allowed a fee of costs plus 25% of all sums awarded under the provisions of this award for necessary legal services rendered to Employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Carl Strange
Administrative Law Judge
Division of Workers' Compensation