

**FINAL AWARD ALLOWING COMPENSATION**

Injury No.: 09-014034

Employee: Beverlie Leonard  
Employer: Francis Howell R-III School District  
Insurer: Missouri United School Insurance Council

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 and considered the whole record. We find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the October 20, 2011, award and decision of the administrative law judge, as modified herein.

Employee filed an Application for Review asking that we modify the administrative law judge's award of future medical treatment from an award of specific treatment to an award of that care as may be reasonably required to cure and relieve employee from the effects of the injury.

We grant employee's request and modify the award of future medical care. 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 as required by § 287.140.1 RSMo.

In all other respects we affirm and adopt the award of the administrative law judge.

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 Edwin J. Kohner, issued October 20, 2011, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 5<sup>th</sup> day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee:	Beverlie Leonard	Injury No.:	09-014034
Dependents:	N/A		Before the
Employer:	Francis Howell R III School District		<b>Division of Workers'</b>
			<b>Compensation</b>
Additional Party:	Second Injury Fund (Voluntarily Dismissed)		Department of Labor and Industrial
			Relations of Missouri
Insurer:	Missouri United School Insurance Council		Jefferson City, Missouri
Hearing Date:	September 28, 2011	Checked by:	EJK/ch

### 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: March 3, 2009
5. State location where accident occurred or occupational disease was contracted: St. Charles 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 occurred or occupational disease contracted:  
The claimant, a school custodian, fell while putting trash into a dumpster fracturing her left ankle.
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: Left ankle
14. Nature and extent of any permanent disability: 40% Permanent partial disability
15. Compensation paid to-date for temporary disability: \$4,853.42
16. Value necessary medical aid paid to date by employer/insurer: \$45,964.85

- 17. Value necessary medical aid not furnished by employer/insurer? None to date
- 18. Employee's average weekly wages: \$300.00
- 19. Weekly compensation rate: \$186.67/\$200.00
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

62 weeks of permanent partial disability from Employer	\$12,400.00
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- 22. Second Injury Fund liability: No

TOTAL:	\$12,400.00
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- 23. Future requirements awarded: See additional Findings of Fact and Rulings of Law

Said payments to begin immediately 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 M. Hennessey

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

Employee:	Beverlie Leonard	Injury No.: 09-014034
Dependents:	N/A	Before the
Employer:	Francis Howell R III School District	<b>Division of Workers'</b>
Additional Party: Second Injury Fund (Voluntarily Dismissed)		<b>Compensation</b>
Insurer:	Missouri United School Insurance Council	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/ch

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a school custodian, suffered a left ankle injury when she fell while carrying trash to a school trash dumpster. The sole issues for determination are (1) Future medical care and (2) Permanent disability. The Second Injury Fund claim was voluntarily dismissed prior to presentation of evidence. The evidence compels an award for the claimant as indicated below.

At the hearing, the claimant testified in person and offered a medical report from David T. Volarich, D.O., and medical records from ProRahab, P.C. The defense offered medical records from Richard Helfrey, D.O., Paul M. Spezia, D.O., and John O. Krause, M.D., a medical report from Dr. Krause, and a copy of attorney Alan S. Mandel's withdrawal as counsel for the claimant.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

### **SUMMARY OF FACTS**

On March 3, 2009, this 65 year old school custodian sustained a left ankle injury while taking trash outside to a school dumpster. She accidentally stepped into a hole, fell to the ground, and heard an immediate pop in her left ankle but was unable to get up due to pain. A co-worker transported the claimant to a hospital emergency room. She was diagnosed with a triamalleolar fracture and admitted to the hospital. On the following day Dr. Spezia performed an open reduction and internal fixation. On March 16, 2009, Dr. Spezia opined that x-rays revealed good postoperative alignment of the fracture. Dr. Spezia placed her in a boot allowing 50% weight bearing. On April 15, 2009, Dr. Spezia noted that she was not progressing and opined that she might have regional pain syndrome. He injected her Achilles tendon.

The claimant requested a second opinion and Dr. Krause examined the claimant on April 24, 2009, opining that she had a misalignment of the left medial malleoli. On April 28, 2009, he performed a revision surgery, ankle release, and Achilles lengthening. At her final evaluation, on

October 14, 2009, Dr. Krause noted moderate swelling, weakness, and loss of motion with plantarflexion as well as aching in the foot.

The claimant reported to Dr. Volarich that she continues to experience difficulty with ambulation due to pain, weakness, stiffness, and swelling in the ankle. See Exhibit A. While she has returned to work, she testified that she has significant difficulty performing her job function and must take rest breaks every 30 minutes. She reported that she has problems with balance, pain, as well as difficulty walking on slick or wet surfaces. She has problems getting up from a kneeling position, as well as performing heavy lifting. She has difficulty ascending stairs and cannot climb ladders due to balance problems. She must rely on co-workers to assist her in more demanding tasks such as operating the floor strippers. The claimant reported that the injury also impacted her activities of daily living. See Exhibit A. She has difficulty with bathing and getting into and out of the bathtub. See Exhibit A. Housework is difficult due to pain, swelling, and balance problems. See Exhibit A. She cannot operate a car with a manual transmission. See Exhibit A. She is only able to wear tennis shoes and sandals and has difficulty walking on uneven surfaces such as grass and has difficulty performing her gardening and other hobbies.

On November 17, 2010, Dr. Volarich examined the claimant and opined that as a direct result of the work injury, the claimant sustained a 60% permanent partial disability of the ankle. See Exhibit A. He opined that the claimant will require ongoing care for pain syndrome to maintain her current state. See Exhibit A. Dr. Krause opined that the claimant sustained a 20% permanent partial disability of the ankle and will not “need any further medical or surgical treatment for her ankle.” However, he also opined that the claimant will not “need any type of medications other than occasional Tylenol or over the counter anti-inflammatory medication. I do not anticipate she will need any type of bracing. While I cannot state this with 100% certainty, I would anticipate this would be the case in 85% of the patients who have the injury and treatment that Ms. Leonard sustained.” See Exhibit 6.

The claimant’s job duties include sweeping floors, picking up and taking out trash, mopping, waxing, and stripping floors, cleaning sinks and toilets and bathrooms, classrooms, hallways, stairs. She is required to perform heavy lifting, as well as significant standing, walking, kneeling, squatting, and reaching. The claimant testified that she had no physical problems, limitations, or restrictions which prevented her from performing her job duties before the March 2009 accident.

### **FUTURE MEDICAL CARE**

The Workers' Compensation Act requires employers “to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]” § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

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.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002).

In order to receive future medical benefits under the Act, a claimant is not required to present "conclusive evidence" that future medical treatment is needed. Rather, he only needs to demonstrate a "reasonable probability" that future medical treatment is necessary by reason of his work-related injury. "Probable" in this context means "founded on reason and experience which inclines the mind to believe but leaves room for doubt." The claimant is not required to present evidence of the specific medical care that will be needed, but he is required to establish through competent medical evidence that the care requested "flows from the accident." An employer is required to compensate for future medical care only if "the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury." ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 52 (Mo.App. W.D. 2007). For an employer to be responsible for future medical benefits, such care "must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury". Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App. S.D. 2004).

The medical reports show that the claimant has moderate swelling and pain or aching in her foot and weakness with planatarflexion. Both of the medical experts opined that the claimant was at "maximum medical improvement." The claimant testified that she needs bracing for her ankle, however neither of the medical experts opined that the claimant required bracing and Dr. Krause opined that bracing was not indicated. Neither expert opined that the claimant requires any surgical procedure at this time.

Dr. Volarich opined that the claimant will require future medical care to maintain her functioning as a result of the work injury. Specifically, he opined that the claimant will "require 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." See Exhibit A. He also opined that the claimant "is prone to develop post traumatic arthritis in this ankle and foot because of the fracture dislocation and malunion. She may require a debridement procedure in the future if symptoms worsen and she experiences intractable pain. The decision to perform any additional surgeries on this ankle should be made in conjunction with her wishes, change in symptoms, and expert surgical opinion. I recommend she return to see Dr. Krause if her foot and ankle symptoms worsen." See Exhibit A.

In analyzing Dr. Volarich's recommendations, Dr. Volarich contended that the claimant could develop arthritis and may require treatment for that condition at some unspecified time in the future. However, Dr. Volarich did not find an arthritic condition when he examined the claimant in November 2010, many months after the surgical procedures. He recommended that the claimant obtain an expert surgical opinion, which the claimant has not obtained as of the date

of the hearing. He appeared to endorse Dr. Krause in this respect. This appears to be more speculation than a reasonable probability the claimant will require future medical care for her medical condition. Dr. Volarich also recommended physical therapy, but the claimant had substantial physical therapy after each surgical procedure, which lasted until September 1, 2009. Finally, Dr. Volarich also recommended pain medications for symptomatic relief of her foot pain. He made no specific recommendations, but offered "treatments as directed by the current standard of medical practice for symptomatic relief of her complaints."

Dr. Krause opined that the claimant will not "need any type of medications other than occasional Tylenol or over the counter anti-inflammatory medication. I do not anticipate she will need any type of bracing. While I cannot state this with 100% certainty, I would anticipate this would be the case in 85% of the patients who have the injury and treatment that Ms. Leonard sustained." See Exhibit 6.

Dr. Krause last examined her on October 14, 2009, about six weeks after she concluded physical therapy and returned to work. He opined that the claimant would make slow, steady progress over the next six months and that the claimant was at maximum medical improvement. That is confusing and seemingly contradictory. He offered no other solutions for the claimant's condition other than occasional Tylenol or over the counter anti-inflammatory medication. Based on the reports, Dr. Krause appears to be an orthopedic surgeon, but Dr. Volarich's specialties are not set forth.

The claimant's persistent pain and swelling in her foot seems to be a difficult concern that the medical experts did not provide clear guidance regarding the reason for her continuing condition. She continues employment in a position involving extensive use of her foot with little opportunity for sitting. Neither expert was able to cogently explain the cause of the claimant's moderate pain and swelling. The only common point is over the counter medications consisting of Tylenol or anti-inflammatory medications.

Generally, Administrative Law Judges and the Labor and Industrial Commission are barred from following lay experience that is contrary to uncontradicted recommendations of medical experts. In this case, neither party sought any additional orthopedic or pain management expert opinion evidence or if they did, the results were not offered in evidence. Based on the evidence submitted, the medical experts agree that the claimant will require occasional Tylenol or over the counter anti-inflammatory medication. Therefore, the claimant is awarded Tylenol or over the counter anti-inflammatory medication to cure and relieve from the effects of the accident.

### **PERMANENT DISABILITY**

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

In this case, both Dr. Volarich and Dr. Krause opined that the claimant has sustained permanent partial disability to her left ankle. Dr. Volarich opined that the claimant suffered a 60% permanent partial disability of the left ankle. See Exhibit A. Dr. Krause opined that the claimant sustained a 20% permanent partial disability of her left ankle. See Exhibit 6. Based on the evidence as a whole, the claimant is awarded a 40% permanent partial disability to her left ankle.

Made by: /s/ EDWIN J. KOHNER  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*