

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

Injury No.: 96-441677

Employee: Cecelia Martinez
Employer: Deaconess Health Services Corporation
Insurer: Self c/o Sedgwick Claims Management Services
Date of Accident: September 27, 1996 (Alleged)
Place and County of Accident: St. Louis City, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge (ALJ) dated January 5, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge William L. Newcomb, dated January 5, 2004, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the medical and lay evidence in reaching his conclusions. We adopt the findings of the ALJ as to the credibility, reliability and probative worth of the medical and lay evidence. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001); *Chatmon v. St. Charles County Ambulance District*, 55 S.W.3d 451 (Mo. App. E.D. 2001).

Neither of the signatories below were members of the Labor and Industrial Relations Commission at the time of the oral argument of this case.

The parties were advised of the change of Commissioners and asked whether they wished to present their arguments to the newly constituted Commission. There has been no response to this invitation. Accordingly, the Commission is taking the matter as submitted.

The Commission has read the transcripts and briefs of the parties and is thoroughly familiar with the case.

Given at Jefferson City, State of Missouri, this 30th day of March 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest:

John J. Hickey, Member

Secretary

DISSENTING OPINION

I must respectfully dissent the conclusion of my fellow Commissioners. I do not agree with the findings and conclusions of the administrative law judge (ALJ). I would find the matter compensable and award compensation.

I disagree with the ALJ's interpretation of the testimony concerning the resignation of employee. In my opinion, employee was asked to resign and, in fact, forced to resign. There is a conflict in the testimony on the resignation question. The employer says that the resignation was voluntary. Employee contends she was forced to resign. I find the testimony of employee to be the more credible. *Kaderly v. Race Brothers Farm Supply*, 993 S.W.2d 512 (Mo. App. 1995).

After the resignation, employee was assaulted by security guards as she was leaving employer's premises. The ALJ excuses this assault on the grounds that employee had resigned and, therefore, was no longer an employee. I certainly do not think the employer would raise that defense had the employee filed a civil lawsuit. Rather, the employer would be crying for a dismissal on the grounds that the employee was still within the course and scope of employment while leaving the building. *Jones v. Jay Truck Driving Center, Inc.*, 736 S.W.3d 464 (Mo. App. W.D. 1987).

The assault left employee with diagnosed severe depression, low back strain and acute anxiety. The ALJ determined that the mental stress came from a "possible" poor work performance evaluation. I disagree. The record is quite clear that the mental anguish resulted from the assault. The ALJ considers the assault as not occurring while employee was an employee of employer. But, the assault clearly occurred while employee was at a place where she could reasonable be expected to be. *Jones, supra*. No one can reasonably argue that the course and scope doctrine does not extend to exiting the work place.

As to the resignation, the record reflects that the papers were signed on Friday. The papers were transmitted to personnel on Monday. Three days later. The record reflects employee was listed as an employee of employer on the Friday admission sheet of employer's hospital. The resignation was not effective until accepted by someone with that authority on Monday.

The ALJ excuses the assault as being "in good faith" on the part of the employer. It is not the employer's motives that touch upon liability under the Act. Rather, we look to the end result. Even actions done "in good faith" can result in injury.

The question of injury leads me to conclude that employee has sustained a permanent partial disability of 20% of the unscheduled 400 weeks referable to the nervous system and psyche.

Employee's expert witnesses testify that she is unable to perform any work. The record does not support such a sweeping statement of disability. However, a disability which is permanent in nature but partial in degree is obvious considering the impact that this incident has had on employee's life and work ability. *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886 (Mo. App. W.D. 1975).

In my opinion, the 20% reflects the impact on that psychiatric disability upon employee. *Elmer v. Bd. of Police Comm'rs.*, 895 S.W.2d 117, 120 (Mo. App. 1995); *Kerns v. Midwest Conveyor*, 126 S.W.3d 445, 452-453 (Mo. App. 2004).

It would seem reasonable that other, physical, injury resulted from this assault. However, the evidence in this regard was not well developed.

John J. Hickey, Member