

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

Injury No.: 06-064603

Employee: Noneeka Massey
Employer: Marsha and Frank Spasser
Insurer: None

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated August 5, 2009.

Preliminaries

The administrative law judge heard this matter to consider the following issues: 1) whether employee, as a Certified Nurse Aide (CNA), is exempt from workers' compensation coverage under § 287.090 RSMo; 2) whether employee provided proper notice; 3) whether an accident occurred; 4) whether her injuries were medically causally related to her accident; 5) liability for past medical expenses; and 6) liability for any temporary total disability benefits.

The parties stipulated that employee suffered an injury on May 7, 2006, and as a direct result, employee sustained 6% permanent partial disability of the body as a whole rated at the lumbar spine.

The administrative law judge found that employee was working for employer as a "domestic servant" as referred to in § 287.090 RSMo and, therefore, is exempt from Missouri Workers' Compensation Law coverage. All other issues were deemed moot.

Employee appealed to the Commission alleging the administrative law judge erred in finding that employee was a domestic servant and exempt from Missouri Workers' Compensation Law coverage.

Therefore, the primary issue currently before the Commission concerns whether employee was properly classified by the administrative law judge as a domestic servant. All other issues are dependent on that determination.

Findings of Fact

Employee is a Certified Nurse Aide (CNA) and was hired by Marsha Spasser to care for her home bound husband, Frank Spasser, who is afflicted with a neurological condition (Parkinson's Disease), making him unable to stand or walk. Employee was hired as one of six CNAs to provide 24 hour care for Mr. Spasser. Employee was paid \$12.00 per hour for full time work five days per week. Mrs. Spasser did not deduct any taxes or other amounts from employee's remuneration.

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The CNAs all charted the day to day care of Mr. Spasser. Data entered daily by each CNA included temperature, blood pressure, eating activities, sanitary activities, and general health. Employee provided preventive skin care, administered medication, and provided bathroom assistance. This information was recorded for periodic review by Mr. Spasser's doctor.

Employee was not responsible for general housekeeping, shopping, cooking meals for the household, or laundry services. Employee's sole responsibility was to care for Mr. Spasser. Any and all household or housekeeping duties done by employee were directly related to his care. A separate housekeeper came to the home two times per month to take care of the housekeeping duties or chores.

Employee testified that on May 7, 2006, she was moving Mr. Spasser from one room to another using a wheelchair. When she attempted to get him into his reclining chair, his knees buckled, pulling the weight of his body down while employee was holding him. Employee felt a sudden onset of pain, which grew worse during her shift. Employee notified Mrs. Spasser shortly after the injury occurred. Mrs. Spasser told employee to go to the doctor, have herself checked out, and bring her the bills for payment.

Employee was taken to the emergency room on May 9, 2006, with a chief complaint of pulling her low back while transferring a patient. Employee was diagnosed with a muscle strain. On May 19, 2006, employee was taken to People's Health Center due to back pain complaints. Employee was prescribed medication for pain and inflammation. On June 27, 2006, employee began treating with Dr. Gene Bell, a chiropractor. Employee complained to Dr. Bell of pain in her lower back trailing through her buttocks on the right side. Employee also had tightness and muscle spasms. Dr. Bell held employee off work through September 1, 2006.

On February 10, 2009, employee was seen by Dr. Robert Poetz for an independent medical evaluation at the request of the employee's attorney. Dr. Poetz noted that employee's chief complaints were lower back pain with sitting, standing, and walking for prolonged periods of time. Dr. Poetz also noted that employee complained of occasional numbness and pain down the front part of her right leg to her foot.

Dr. Poetz opined that as a result of the May 7, 2006, injury, employee is 20% permanently partially disabled of the body as a whole, as measured at the lumbar spine. Dr. Poetz also opined that as a result of employee's 2001 development of bilateral carpal tunnel syndrome, employee is 35% permanently partially disabled of the left upper extremity rated at the left hand and wrist and 25% permanently partially disabled of the right upper extremity rated at the right hand and wrist. Finally, Dr. Poetz opined that the combination of present and prior disabilities results in a total which exceeds the simple sum by 15%.

Conclusions of Law

The administrative law judge found that employee was exempt from workers' compensation coverage in accordance with § 287.090.1(1) RSMo, because she was a "domestic servant."

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Section 287.090.1(1) states as follows:

1. This chapter shall not apply to:

(1) Employment of farm labor, domestic servants in a private home, including family chauffeurs, or occasional labor performed for and related to a private household;

There are no Missouri cases on point regarding whether a CNA in a private home is a “domestic servant.” However, case law from other jurisdictions with similar exemptions is helpful. In *McCallister v. Workers’ Compensation Appeals Board*, 61 Cal.App.3d 524 (Ca.App. 1976), the court found that where an employee performed only duties related to the care and comfort of an invalid and did not perform any services connected with the general operation and maintenance of the household, she was an “employee” entitled to compensation coverage and was not a person engaged in “household domestic service,” which is exempt from coverage.

Similarly, in *Viola v. Workmen’s Compensation Appeal Board*, 549 A.2d 1367 (Penn. 1988), the court found that an employee who performed duties directly related to the care of employer’s invalid wife, and who did not perform any general household services, was an “employee” and not a “domestic” within the meaning of the statutory exception to the Compensation Act.

Black’s Law Dictionary (Black’s) is also a helpful resource in evaluating issues of this sort. Black’s defines domestic servant as “a person hired or employed primarily for the performance of household duties and chores, the maintenance of the home, and the care, comfort and convenience of members of the household.” (Emphasis added). BLACK’S LAW DICTIONARY 435 (5th ed. 1979).

In this particular case, the administrative law judge focused on the last part of the aforementioned definition and reasoned that employee’s care of Mr. Spasser was ultimately for the care, comfort and convenience of the members of the household. However, in his findings of fact, he listed that a separate housekeeper came to the home two times per month for the household chores.

The administrative law judge also reasoned that a home or private residence is not part of the general labor market or industry. Employee was employed by a home owner, for the care of a home occupant. He stated that employee was hired and employed primarily for the comfort and convenience of a member of the household.

In evaluating Black’s definition of domestic servant, we find it particularly important that the first part of the definition states that a domestic servant is hired “**primarily for the performance of household duties and chores....**” In this case, employee was hired primarily for the purposes of providing nursing assistance to Mr. Spasser. Any household duties that employee performed were minimal. This distinction is important in light of the courts’ decisions in *McCallister* and *Viola*, listed above. In those cases, the court focused on the fact that any household duties or chores performed by the

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employee were only done in relation to the care and comfort of the invalid. Therefore, like the courts in those cases, we find that employee is not a domestic servant and, therefore, is not exempt from coverage of Missouri Workers' Compensation Law.

We find that on May 7, 2006, employee sustained a compensable work-related accident that arose out of and in the course of her employment. We find that employee provided proper notice to employer by informing her of the accident shortly after it occurred on May 7, 2006. As a direct result of the accident, we find that employee suffered an injury to her lumbar spine and that she received medical treatment for this condition resulting in her incurring medical expenses amounting to \$3,772.70. We find that this accident caused her temporary total disablement of 16 4/7 weeks (5/7/06—9/1/06). Further, we find that this May 7, 2006, accident is the prevailing factor in causing her the 6% permanent partial disability of the body as a whole rated at the lumbar spine, which was stipulated to by both parties.

Therefore, we find employer liable to employee for her unpaid medical expenses of \$3,772.70, temporary total disability benefits of \$6,628.57 (16 4/7 weeks x \$400.00), and permanent partial disability benefits of \$9,600.00 (Stipulated 6% PPD BAW = 24 weeks x \$400.00).

Matthew J. Sauter, Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee which shall constitute a lien on said compensation.

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

The award and decision of Administrative Law Judge John A. Tackes, issued August 5, 2009, is attached hereto for reference.

Given at Jefferson City, State of Missouri, this 17th day of November 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary