

TEMPORARY AWARD DENYING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 09-108756

Employee: Sheila McCoun
Employer: OPAA Food Management, Inc.
Insurer: Illinois National Insurance Co.

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. Pursuant to § 286.090 RSMo, we issue this temporary award and decision modifying the May 5, 2011, 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

Temporary award

The hearing in this matter was the result of employee's filing a request for a hardship setting pursuant to § 287.203 RSMo. The parties presented this matter for resolution by the administrative law judge only as to certain specific issues touching on employee's entitlement to medical treatment and temporary total disability benefits. The parties expressly reserved certain issues for resolution at a later time, such as the issue of employee's entitlement to past medical expenses.

Accordingly, we modify the award of the administrative law judge in order to make clear that we are issuing a "Temporary Award," pursuant to § 287.510 RSMo. The parties should be mindful of the terms and provisions of that section.

Stipulated issues

The administrative law judge made a finding that the accident alleged to have occurred on October 27, 2009, was "an aggravation of a pre-existing injury and not the prevailing factor." *Award*, page 6. The administrative law judge further stated: "Injury number 09-108756 is denied." *Id.*

Employee argues the administrative law judge acted in excess of his powers by resolving the issue whether the injury alleged to have occurred on October 27, 2009, is compensable under the Missouri Workers' Compensation Law. Employee argues the parties only asked the administrative law judge to determine the issue which of two different events (both of which were admitted by employer to constitute an "injury by accident or occupational disease") caused employee's need for the specific medical treatments and temporary total disability benefits that employee sought at the hardship hearing on March 31, 2011.

Employee: Sheila McCoun

In his award, the administrative law judge states that the parties stipulated the following issue for determination: "Which injury, if any, is the prevailing factor¹ in Claimant's injury and the resulting need for temporary total disability and the need for additional medical treatment to be provided by Dr. Geoffrey Leigh Blatt, M.D." *Award*, page 3. But a review of the record validates employee's assertion that, in fact, the parties stipulated that employee sustained an injury by accident or occupational disease arising out of and in the course of employment on October 27, 2009, and that the parties did not ask the administrative law judge to resolve the issue whether that injury was ultimately compensable. As a result, it was improper for the administrative law judge to make findings and conclusions purporting to resolve such issues. *Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705 (Mo. App. 2001).

Accordingly, we modify the award of the administrative law judge by deleting the final paragraph of the award, which states: "In Injury number 09-108756, I find and believe from the evidence that the Claimant's accident on October 27, 2009 was simply an aggravation of a pre-existing injury and not the prevailing factor. Injury number 09-108756 is denied."

Award

We modify the award of the administrative law judge in the manner described above.

The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued May 5, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 1st day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

¹ We note that, on its face, the issue is not a valid one for consideration, as the law does not require an employee to prove that an "injury" was a prevailing factor in causing an "injury," nor in causing a need for TTD or medical treatment, but rather, that an alleged "accident" was the prevailing factor in causing both the resulting medical condition and disability." See § 287.020.3(1) RSMo (emphasis added).

AWARD

Employee: Sheila McCoun

Injury No. 09-108756

Employer: OPAA Food Management

Additional Party:

Insurer: Illinois National Insurance Co.

Hearing Date: March 31, 2011

Checked by: NGA

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: October 27, 2009.
5. State location where accident occurred or occupational disease was contracted: Buchanan County, Mo.
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: Employee was working in the freezer and fell on some ice.
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: Back.

- 14. Nature and extent of any permanent disability: None.
- 15. Compensation paid to-date for temporary disability: None.
- 16. Value necessary medical aid paid to date by employer/insurer? None.
- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: N/A.
- 19. Weekly compensation rate: \$199.08/199.08.
- 20. Method wages computation: by stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning _____ for claimant's
lifetime.

22. Second Injury Fund liability:

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:

weekly differential _____ payable by SIF for _____ weeks
beginning _____ and, thereafter, for claimant's lifetime.

TOTAL:

23. Future requirements awarded: None.

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: Claim is denied because Claimant's accident was not the prevailing factor in Claimant's injury.

AWARD

Employee: Sheila McCoun

Injury No. 09-108756

Employer: OPAA Food Management

Additional Party:

Insurer: Illinois National Insurance Co.

Hearing Date: March 31, 2011

Checked by: NGA

Injury numbers 07-126867 and 09-108756 were held concurrently.

Prior to presenting evidence, the parties stipulated that the issues to be determined by his hearing are:

1. Liability for additional partial temporary total disability from March 8, 2010 through July 21, 2010.
2. Which injury, if any, is the prevailing factor in Claimant's injury and the resulting need for temporary total disability and the need for additional medical treatment to be provided by Dr. Geoffrey Leigh Blatt, M.D.

In Injury 07-126867, prior to presenting evidence, the parties stipulated that on December 17, 2007, Sheila McCoun was an employee of OPAA Food Management Inc. The employer was operating under the provisions of the Missouri Workers' Compensation Act and was fully insured by American Insurance Co.

The parties further agreed that on December 17, 2007, the Claimant sustained an injury by accident arising out of and in the course of her employment. The employer had proper notice of Claimant's injury and a timely Claim for Compensation has been filed.

The parties also agreed the correct rate of compensation is \$199.08 per week for both temporary total disability and permanent partial disability. Compensation has been paid in the amount of \$9243.01 representing a period of 46 3/7 week for December 20, 2007 through December 21, 2007; March 22, 2008 through 31, 2008; and July 22, 2010 through March 29, 2011. Medical aid has been furnished in the amount of \$9125.79.

In Injury number 09-108756, prior to presenting evidence, the parties stipulated that on October 27, 2009, Sheila McCoun was an employee of OPAA Food Management Inc. The employer was operating under the provision of the Missouri Compensation Act and was fully insured by Illinois National Insurance Co.

The parties further agreed that on October 27, 2009, the Claimant sustained an injury by accident arising out of and in the course of her employment. The employer had proper notice of Claimant's injury and a timely Claim for Compensation has been filed.

The parties also agreed the correct rate of compensation is \$199.08 per week for both temporary total disability and permanent partial disability. No compensation or medical aid has been furnished.

The Claimant testified in person. She is 51 years old. I find her to be a believable witness.

She said that on December 17, 2007, she was running an errand for her employer to pick up items from a grocery store to use at a school lunchroom. She was getting out of a pickup and she slipped and fell hitting her back on the running board of the pickup. She had pain in her back. The pain went down her left leg.

Sometimes she would have a little pain in her right leg, she said the pain varied with what she did. The more she did, the more pain she had.

The Claimant went to her primary physician, Dr. James G. Day, D.O. Dr. Day had an MRI performed on March 25, 2008.

Dr. Day said the MRI indicated no herniated disk or encroachment. There was a posterior disk bulge at L3-4. He released the Claimant and rated her as having a 15 per cent partial disability to the body as a whole on August 5, 2008.

Dr. Daryl L. Thomas, M.D. examined the Claimant on June 20, 2009 for the first insurer. He diagnosed the Claimant as having chronic low back pain and non-verifiable complaints of her left leg radiculopathy. He rated her as having 65 percent partial disability.

The deposition of Dr. Geoffrey Leigh Blatt, M.D. was taken on October 10, 2010 and admitted into evidence as Employer and Insurer's Exhibit No. Illinois 7. All objections thereto are hereby overruled.

Dr. Blatt is a neurological surgeon. He examined the Claimant on August 23, 2010. He reviewed the reports of the MRI of March 25, 2008 and a report of a subsequent MRI performed on March 19, 2010. He had at that time not seen the initial MRI. He had only reviewed the records and not the actual MRI and found no indication of a herniated disk in the first MRI. He did in the second MRI and found that the October 27, 2009 accident was the prevailing factor in the Claimant's injury. He found the Claimant sustained a disk herniation in her last injury.

After his deposition, he examined both MRI's. He said there were slight changes which indicated that the Claimant's last injury was the prevailing factor in her disk herniation.

Dr. Blatt also added if the Claimant had the same symptoms before October, 2009, his opinion would change. The Claimant did have most of the same symptoms. The only difference was some numbness in her right leg.

The deposition of Dr. Gregory Walker, M.D. was taken on November 11, 2010 and admitted into evidence as Employer and Insurer's Exhibit Illinois 6. All objections thereto were hereby overruled.

Dr. Walker is a neurological surgeon. He examined the Claimant on February 25, 2010. Dr. Walker actually read the Claimant's two MRI's. His finding on the MRI taken on March 25, 2008, which is before the Claimant's last injury, was that the claimant had a contained disk herniation of the L4-5 disk. It caused significant spinal stenosis and the L5 nerve roots were compressed.

He said the first MRI was consistent with the last MRI. There was no significant change between the two. He said the accident of December 17, 2007 was the prevailing factor in Claimant's resulting medical condition. The October 27, 2009 injury merely aggravated her underlying condition.

With respect to the MRI, he said really this kind of clinches it. There's no change between the first and second MRI and I think the damage was done by the first accident and just aggravated by the second accident.

He said the Claimant needs a neurosurgical evaluation. He believed she was a surgical candidate.

I believe Dr. Walker.

In Injury number 07-126867, I find and believe from the evidence that on December 17, 2007, the Claimant sustained an injury to her back arising out of and in the course of her employment. I find that her fall on December 17, 2007 is the prevailing factor in causing her injury.

I find and believe from the evidence that the Claimant is in need of medical treatment in order to cure and relieve the conditions caused by her December 17, 2007 accident. I order and direct OPAA Food Management and its insurer American Insurance Co. to provide Sheila McCoun with such medical treatment as may be reasonable and necessary to cure and relieve the conditions caused by her accident at work on December 17, 2007. Since the parties have stipulated that any treatment ordered should be directed by Dr. Geoffrey Leigh Blatt. Dr. Geoffrey Leigh Blatt is hereby ordered to direct the medical treatment.

I find and believe from the evidence that the Claimant was temporarily totally disabled from March 8, 2010 through July 21, 2010, a period of 19 weeks. I order and direct the Employer

OPAA and its Insurer American Insurance Co to pay to the Claimant the sum of \$199.08 per week for 19 weeks for a total of \$3,782.52.

Mr. Mark E. Kelly is hereby assigned a lien in the amount of 25 per cent of this Award for necessary legal services provided claimant.

In Injury number 09-108756, I find and believe from the evidence that the Claimant's accident on October 27, 2009 was simply an aggravation of a pre-existing injury and not the prevailing factor. Injury number 09-108756 is denied.

Date: May 5, 2011

Made by: /s/ Nelson G. Allen
Nelson G. Allen,
Chief Administrative Law Judge
Division of Workers' Compensation

This Award is dated and attested to this 5th day of May, 2011

/s/ Naomi Pearson
Naomi Pearson