

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No. 07-074239

Employee: Nancy McDonald
Employer: Midland Radio Corporation
Insurer: Hartford Casualty Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Permanent total disability and subsequent 2007 lifting event

The administrative law judge found that employee is permanently and totally disabled as a result of her work injury of May 22, 2007, when employee tripped and fell over a cart, landing on her outstretched hands. Employer appeals, arguing that employee should not be deemed permanently and totally disabled as a result of the May 2007 accident because of the occurrence of a subsequent lifting event on June 23, 2007. Employer seeks to shift any liability for permanent total disability benefits to the Second Injury Fund. We are not persuaded, for the following reasons.

First, we note that the administrative law judge found that the accident of May 22, 2007, caused employee's left shoulder rotator cuff tear. We agree. The treating physician, Dr. Craig Satterlee, suggested in his note of August 20, 2007, that employee's suspected rotator cuff tear was referable to employee's history of a fall on her outstretched hands with weakness and pain in the left shoulder. Similarly, the treating physician Dr. Rhoades suggested in his note of October 29, 2007, that employee's likely partial rotator cuff tear was attributable to the May 2007 fall.

Second, we acknowledge that employee's expert, Dr. Koprivica, in rendering his opinion that the June 2007 lifting event did not cause any permanent injury, relied upon somewhat inaccurate facts in that he was unaware of the weight of the radios that employee was attempting to lift. Having said that, we do not find persuasive the competing opinion from Dr. Zarr, because his opinion is purely conclusory. In his one-page response to employer's request for a rating, Dr. Zarr provides no explanation or reasoning for his assignment of left shoulder disability to the June 2007 event, apart from his review of a letter from employer and portions of employee's deposition testimony. We note that each of the parties agreed, at oral argument in this matter, that the lifting event on June 23, 2007, involved employee's performance of a task that was within the scope of her normal work duties. Ultimately, we find insufficient credible expert medical evidence on this record to support a finding that the June 2007 lifting event was the prevailing factor resulting in any condition or disability;

Employee: Nancy McDonald

- 2 -

rather, we find that the prevailing factor causing increased symptoms and disability after the June 2007 lifting event was the preexisting weakened condition of employee's left shoulder owing to her May 2007 rotator cuff tear. See *Johnson v. Ind. Western Express, Inc.*, 281 S.W.3d 885 (Mo. App. 2009).

Third, we note that each of the experts to address the issue found that employee's psychological problems, particularly her emotional lability and uncontrollable crying episodes, are a major factor in her permanent total disability. Employee credibly testified (and we so find) that her crying spells began after her May 2007 accident, and employee's psychiatric expert, Dr. Todd Hill, assigned all of employee's psychiatric disability to the May 2007 event. We deem Dr. Hill's opinion on this point to be persuasive, and find that the May 2007 accident caused all of employee's permanent psychiatric disability.

Finally, we respond to employer's argument that the May 2007 accident should not be deemed to result in permanent total disability because employee did not receive any medical treatment until after the June 2007 event. Employer's argument is specious. We note that employer denied, for no apparent reason, employee's timely and repeated requests for authorized medical care following the May 2007 accident. Employer cannot advance its own disregard of its duties under the Missouri Workers' Compensation Law as a basis for questioning the seriousness of the injuries employee sustained as a result of the May 2007 accident, nor as a reason to shift liability for permanent total disability onto the Second Injury Fund.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Lisa Meiners, issued May 23, 2014, is attached and incorporated by this reference.

We approve and affirm 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.

Given at Jefferson City, State of Missouri, this 31st day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Nancy McDonald

Injury No. 07-074239

Dependents: N/A

Employer: Midland Radio Corporation

Insurer: Hartford Casualty Insurance Company

Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund

Hearing Date: April 3, 2014

Checked by: LM/lh

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: May 22, 2007.
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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: While in the course and scope of employment, Claimant fell over a dolly of boxes sustaining injury of her shoulders, back and psychological condition.
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: Shoulders, back, psychological condition.
14. Nature and extent of any permanent disability: permanent total disability

15. Compensation paid to-date for temporary disability: \$586.68
16. Value necessary medical aid paid to date by employer/insurer? \$21,867.57
17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: N/A
19. Weekly compensation rate: \$293.55.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable:
The Employer is liable to Employee for past medical expenses in the amount of \$5,948.63.
The Employer is liable to Employee for weekly permanent total disability benefit of \$293.55 beginning July 1, 2009.

Amount: Unknown

22. Second Injury Fund liability: None.
23. Future requirements awarded: The Employer is liable to Employee for future medical care reasonably required to cure/relieve the effects of the May 22, 2007 injury.

Said payments to begin as of the date of the award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: William Spooner

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Nancy McDonald Injury No. 07-074239
Dependents: N/A
Employer: Midland Radio Corporation
Insurer: Hartford Casualty Insurance Company
Additional Party: Missouri Treasurer as Custodian of the Second Injury Fund
Hearing Date: April 3, 2014 Checked by: LM/lh

FINDINGS OF FACT AND RULINGS OF LAW

On April 3, 2014, the parties appeared for final hearing. Nancy McDonald appeared in person and with counsel, William Spooner. The Employer and Insurer appeared by counsel with Shelly Naughtin as their representative. The Second Injury Fund was represented by counsel, Eric Lowe.

STIPULATIONS

The parties stipulated to the following:

- 1) That Midland Radio Corporation was working subject to Missouri's workers' compensation law on May 22, 2007;
- 2) That Ms. McDonald was their employee;
- 3) That she sustained an accident that occurred within the course and scope of her employment on May 22, 2007;
- 4) That Missouri jurisdiction was proper;
- 5) That the claim was filed within the time allowed by law and notice was given;
- 6) That the Employer had provided medical expenses in the amount of \$21,867.57 and temporary total disability benefits of \$586.68; and
- 7) That the compensation rate is \$293.55.

ISSUES

The issues to be determined by this award are:

- 1) Whether Claimant sustained any disability; and if so, the nature and extent of that disability;
- 2) Whether the Employer is liable to the Employee for past medical expenses in the amount of \$5,948.63;
- 3) Whether the Employer is liable to the Employee for future medical care that is reasonably required in order to cure and relieve the effects of the May 22, 2007 injury;
- 4) The liability of the Second Injury Fund; and
- 5) Future medical.

As background information, the parties stipulated that the Claimant sustained two specific accidents: one on May 22, 2007 and one on June 23, 2007. On May 22, 2007, Claimant fell over a cart containing boxes. She landed on outstretched hands and tore her left pants leg. Claimant testified she felt pain in both shoulders, hands, pelvis, legs and toes. Claimant notified and requested medical care as a result of the fall but it was not provided until she sustained the second accident on June 23, 2007.

On June 23, 2007, Claimant felt increased pain and a pulling sensation of her left shoulder when she lifted two radios out of a box. The Employer at that time then sent Claimant to Concentra Medical Care where she was referred to an orthopaedic surgeon, Dr. Rhoades. Dr. Rhoades found Claimant sustained a partial rotator cuff tear of the left shoulder. Claimant underwent injections of the left shoulder as well without relief.

Claimant during this time period saw her own physician, Dr. Fox, for complaints relating to the neck and the lumbar spine. MRI scans revealed degenerative disc disease, annular tear and disc bulging of the low back. Claimant also saw Dr. Smith who diagnosed Claimant with significant psychological comorbidity that amplified Claimant's pain condition. Claimant received psychiatric treatment in January of 2008 by a Dr. Trombley. Dr. Trombley diagnosed Claimant with generalized anxiety disorder with moderate recurrent major depression. Another doctor who treated Claimant was Dr. Clinefelter. Dr. Clinefelter diagnosed Claimant with chronic myofascial pain syndrome and noted her anxiety and depression coincided with ongoing secondary gain from her workers' compensation case. Regardless, Dr. Clinefelter still recommended psychiatric treatment for depression and trigger injections for the myofascial pain.

Further medical records indicate Claimant received conservative care for chronic pain of the shoulders, back and neck. The majority of records described the accident of May 2007 as the mechanism of injury to her shoulders and back. These records coincide with the treatment she received for the chronic pain of the shoulders, back and neck. Eventually Claimant underwent a left shoulder acromioplasty on March 27, 2009. On July 1, 2009, Claimant was found to be at maximum medical improvement regarding her shoulder by Dr. Rhoades but he continued to administer steroid injections. Claimant then continued to treat at the Kansas Free Health Clinic for various unrelated conditions, as well as complaints to her low back and neck, which she alleges are from the May 2007 injury.

Currently Claimant is unable to lift more than 10 pounds. She has limited range of motion with the inability to perform overhead activities. Claimant alternates between sitting and standing due to back and leg pain. Claimant relates the persistent pain of her shoulders and body as a whole and physical limitations to her fall of May 22, 2007. Claimant also has bouts of uncontrollable crying.

Claimant's vocational career matches her 8th grade education. She worked the majority of her career as an unskilled laborer with the exception of welding. Claimant has not welded in over 15 to 20 years. Claimant last worked for the Employer in January 2008 when the employer was no longer able to accommodate her.

Between the May and June injuries of 2007, Claimant worked 40 hours a week without accommodation by her Employer. However, she worked with pain and asked the Employer for accommodation but accommodation during the four weeks was never received. Claimant's son after May 22, 2007 but prior to June 23, 2007 assisted Claimant in performing her job duties because Claimant could not lift as she did prior to the May 22, 2007 fall. Claimant was accommodated after the June of 2007 injury and was moved from shipping to another department based on her doctor's restrictions. Claimant last worked on January 25, 2008, when her Employer could no longer accommodate her work restrictions. Prior to May of 2007, Claimant worked without restrictions, hindrances or obstacles to her

employment. Claimant testified, and medical records revealed, she did not have a pre-existing medical condition that I would find as a hindrance or obstacle to her employment.

Claimant alleges that she is permanently and totally disabled as a result of the May 22, 2007 injury. Claimant presented several experts' opinions stating she is permanently and totally disabled from this May 22, 2007 fall at work. Dr. Koprivica, who performed an independent medical evaluation, examined Claimant and reviewed medical records to render his opinion that Claimant is permanently and totally disabled based solely on the May 22, 2007 accident. Dr. Koprivica formed this opinion that the May 22, 2007 accident was the prevailing factor of Claimant's chronic impingement, partial tear of the left shoulder, and chronic cervical/thoracic/lumbar pain. Dr. Koprivica opined Claimant was not a malingerer but had psychological factors contributing to her disability. Dr. Koprivica listed restrictions that are contained within his report. Dr. Koprivica also believed the June 23, 2007 accident was not the prevailing factor to any disability of the left shoulder or any disability to the back or body as a whole.

Another expert, Dr. Hill, performed a psychiatric evaluation for an independent medical evaluation. Dr. Hill felt that the May 22, 2007 accident alone is the prevailing factor of Claimant's major depressive disorder and generalized anxiety disorder. Dr. Hill found Claimant sustained 30 percent permanent partial disability body as a whole referable to Claimant's psychological disabilities. Dr. Hill, like Dr. Koprivica, believed Claimant unemployable based on the psychological and physical disabilities from the May 2007 fall.

The Employer on the other hand presented expert testimony from Dr. Zarr, Dr. Rhoades, and Dr. Hughes. Dr. Zarr rated Claimant in 2008 prior to Claimant being released from care in July of 2009 for the left shoulder. Dr. Zarr felt both the May 22, 2007 and the June 23, 2007 accidents were the prevailing factor of Claimant's neck, back and left shoulder. Dr. Zarr gave 5 percent permanent partial disability body as a whole referable to the neck and the back only. However, in 2010 Dr. Zarr separated the injuries stating the May accident caused the neck and back condition while the June accident caused the left shoulder disability.

Dr. Rhoades, the authorized treating physician, found in 2009 Claimant sustained 12 percent impairment of the left shoulder. However, in 2010 Dr. Rhoades separated the injuries in corresponding percentages of disability by stating 9 percent impairment was due to the June accident and 3 percent impairment to the May accident.

Like Dr. Trombley and Dr. Hill, Dr. Hughes diagnosed Claimant with major depression disorder and generalized anxiety disorder. However, Dr. Hughes found these conditions were caused by genetic component and not related to any of the accidents of May and June 2007. Dr. Hughes diagnosed Claimant with a pain disorder but finds this condition is caused by the patient's inner drive to remain disabled than an actual physical injury. Dr. Hughes did not believe Claimant sustained any psychological disability from the May and June 2007 injuries.

The parties each presented vocational expert opinions. Terry Cordray found Claimant capable of gainful employment when reviewing Dr. Zarr's medical restrictions alone. Cordray testified there are many jobs in the open labor market that don't require a GED and fit within the 25 pound lifting restriction. However, Cordray admitted on cross-examination that if he considered Dr. Hill's opinion on Claimant's psychological condition combined with the physical restrictions, that Claimant would be disabled and unemployable. (See Employer's Exhibit 3, p 38). Mary Titterington, Claimant's vocational expert, and Terry Cordray, the Employer's vocational expert, both agreed Claimant has no transferrable skills and a very limited education. Both experts agree when looking at Claimant's age, education, physical and psychological restrictions that she is unemployable in the open labor market.

The issue is whether Claimant sustained any disability, and if so, the nature and extent of that disability regarding the June 2007 accident. I do not find Claimant sustained any disability as a result of the June 2007 accident. Instead, I find the May 2007 accident the prevailing factor of Claimant's chronic back pain, myofascial pain, left shoulder impingement and rotator cuff tear. This finding is based on Dr. Koprivica's opinion, the medical evidence presented, and Claimant's testimony. I also find the May 2007 accident the prevailing factor of Claimant's generalized anxiety disorder and major depressive state. This also is based on the opinions of Dr. Hill and Dr. Trombley. I disregard Dr. Hughes' opinion with these particular set of facts and in this case alone since his opinion is contrary to the medical evidence presented. Indeed, Dr. Trombley's medical records indicate Claimant had a psychological diagnosis.

I also find overall, Claimant sustained a 55 percent body as a whole due to the May 22, 2007 accident. As stated above, I do not find Claimant sustained any disability relating to the June 2007 accident. I do not find lifting two radios from a box caused any permanent disability.

Claimant is a 64-year-old woman with an unskilled work history. She has worked the majority of her vocational career in unskilled positions other than welding, which she has not worked in welding for over 20 years. She has a limited education of 8th grade, low academic skills as she has flunked the GED on various occasions. She has physical limitations based on Dr. Koprivica and her own testimony and significant emotional disability as outlined by Dr. Trombley and Dr. Hill. I find based on her overall vocational, physical and psychological conditions that she is unemployable in the open labor market. There is no expectation that any employer would hire her for any job as it is customarily performed. Even Claimant's vocational expert, Terry Cordray, agrees when one considers her psychological condition that she is unemployable in the open labor market.

Because I find the physical and psychological conditions are causally related to the May 2007 accident, I find Claimant is unemployable in the open labor market based on the May 22, 2007 accident alone. I do not find the Second Injury Fund is liable to Claimant because Claimant did not have hindrances or obstacles to her employment prior to May of 2007. Additionally, I do not find Claimant sustained any disability as a result of the June 23, 2007 accident and there is no synergistic effect of the June and May accidents.

The next issue is whether the Employer is liable to the Employee for past medical expenses in the amount of \$5,948.63 as outlined in Claimant's Exhibit WW. The past medical expenses pertain to treatment from November 16, 2007 to April 15, 2008 for back and bilateral shoulder pain. Dr. Koprivica found this treatment received was reasonable required in order to cure and relieve the effects of the May 2007 injury. Further, Claimant demanded treatment for her back and shoulders as a result of the May 22, 2007 accident but was denied. As such, the Employer is liable to the Employee for past medical expenses as outlined in Claimant's Exhibit WW.

The Employer is also liable to the Employee for future medical care based on the reports of Drs. Clinefelter, Hill and Koprivica. Dr. Hill and Dr. Koprivica state future medical care is reasonably required in order to cure and relieve the effects of the May 22, 2007 accident. They recommend pain management and pain psychotherapy along with medication. As such, I find the Employer is liable to Claimant for future medical care in order to cure and relieve the effects of the May 22, 2007 accident. This is based on Dr. Hill's and Dr. Koprivica's opinions but not limited to those suggestions contained within the reports should an authorized treating physician recommend other care.

The Employer is liable to Claimant for weekly permanent total disability benefits of \$293.55 beginning on July 1, 2009, the date of maximum medical improvement. The Employer is liable to the Claimant for the past medical expenses in the amount of \$5,948.63, as well as future medical care that is

reasonably required to treat the effects of the May 22, 2007 psychological and physical conditions. I do not find the Second Injury Fund as liable to Claimant, since Claimant did not suffer from conditions that were hindrances or obstacles to her employment prior to May of 2007.

This award is subject to an attorney's lien for services rendered by William Spooner in the amount of 25 percent.

Made by: _____
Lisa Meiners
Administrative Law Judge
Division of Workers' Compensation