

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

Injury No.: 04-148845

Employee: Sharon Morgan
Employer: School District of Kansas City, Missouri
Insurer: Travelers Casualty & Surety Company

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 25, 2009. The award and decision of Administrative Law Judge Emily Fowler, issued August 25, 2009, is attached and incorporated by this reference.

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.

Given at Jefferson City, State of Missouri, this 22nd day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Sharon Morgan Injury No: 04-148845
Dependents: N/A
Employer: School District of Kansas City, Missouri
Additional Party: N/A
Insurer: Travelers Casualty & Surety Company
Hearing Date: August 7, 2009 Checked by: EF/cg

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 12, 2004
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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 insurers? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While in the course and scope of her employment, Employee was attempting to hang a poster on a wall by standing on a table. She stepped onto a chair to get off of the table, stepping on the edge of the chair, which slipped causing her to fall on her back, also hitting her legs.
12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Body as a whole, back

14. Nature and extent of any permanent disability: 22 ½%

15. Compensation paid to date for temporary disability: \$0

16. Value necessary medical aid paid to date by employer/insurer? Not determined

17. Value necessary medical aid not furnished by employer/insurer? \$33,901.87

18. Employee's average weekly wages: \$1,500.00

19. Weekly compensation rate: \$662.55/\$347.05

20. Method wages computation: Agreement of parties

21. Amount of compensation payable:

Employer shall pay to Employee the sum of \$6,625.50 as and for temporary total disability benefits for a period of ten weeks beginning June 19, 2007. Employer shall also pay to Permanent Partial Disability benefits of 22 ½% body as a whole equaling 90 weeks of compensation at the rate of \$347.05 per week equating to \$31,234.50

22. Second Injury Fund liability: N/A

23. Future requirements awarded: Employer shall provide to Employee all reasonable and necessary medical treatment to cure and relieve the effects of Employee's injury to her back, including all diagnostic testing, physical therapy and surgery as required, as well as pain management if necessary. Further, employer shall provide to Employee temporary total disability if Employee is rendered temporarily but totally disabled during such treatment.

The compensation awarded to Employee shall be subject to a 25 percent lien in favor Employee's attorney, Charles McKeon, for reasonable and necessary attorney's fees.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sharon Morgan Injury No: 04-148845
Dependents: N/A
Employer: School District of Kansas City, Missouri
Additional Party: N/A
Insurer: Travelers Casualty & Surety Company
Hearing Date: August 7, 2009 Checked by: EF/cg

On August 7, 2009, Employee and employer/insurer appeared for a final hearing. The Employee appeared through her counsel, Charles McKeon, and the employer/insurer appeared through its attorney, Shelly Naughtin. The Division had jurisdiction to hear this case pursuant to §287.110 RSMo.

STIPULATIONS

The parties stipulated to the following:

- 1) That both employer and employee were operating under and subject to the Missouri Workers' Compensation Law on May 12, 2004 and the employer was fully insured by Travelers Casualty & Surety Company;
- 2) That Sharon Morgan was its employee and was working subject to the law in Kansas City, Jackson County, Missouri;
- 3) That the employee sustained an accident or occupational disease arising out of and in the course of her employment;
- 4) That the employee notified the employer of the injury as required by law and filed her claim within the time allowed by law;
- 5) That the employee's average weekly wage was approximately \$1,500.00 resulting in a compensation rate of \$662.55 for temporary total disability and \$347.05 for permanent partial disability compensation;
- 6) That the employer has paid no temporary total disability to date but has provided some medical care, the total amount of which was unknown at the time of trial.

ISSUES

The parties request the Division to determine the following:

- 1) Whether the employee is entitled to ten weeks of temporary total disability benefits totaling \$6,625.50;
- 2) Whether the employer must provide employee with additional medical care in the form of future medical care;
- 3) Whether the employee suffered any disability and, if so, the nature and extent of employee's disability;
- 4) Whether the accident or occupational disease caused the disability the employee claims;
- 5) Whether the employer must reimburse the employee the cost of this proceeding for defending the claim without reasonable grounds pursuant to §287.560.

FINDINGS OF FACT AND RULINGS OF LAW

Employee testified on her own behalf and presented the following exhibits, all of which were admitted into evidence:

- A- Menorah Medical Center Bills
- B- Anesthesia Associates of KC, PC Bills
- C- Blue Cross Blue Shield EOB
- D- Blue Cross Blue Shield EOB
- E- Johnson County Spine, P.A. Bills
- F- Rockhill Orthopaedics, PC Bills
- G- Blue Cross Blue Shield EOB
- H- Blue Cross Blue Shield EOB
- I- Pain Management Associates Bills
- J- Blue Cross Blue Shield EOB
- K- Blue Cross Blue Shield EOB
- L- Blue Cross Blue Shield EOB
- M- Medical Records and Reports
- N- Physical Therapist Medical Bills

Employer/Insurer offered no live testimony but offered the following exhibit, which was admitted into evidence without objection:

- 1- 8/3/2009 Deposition of Gregory E. Walker

Sharon Morgan, (hereinafter referred to as Employee), is a 50-year-old woman who has worked for the Kansas City School District for approximately 25 years. She had been working as a third grade teacher and vice principal at the time of her accident on May 12, 2004. While working for her employer, she was required to place posters on the wall of her classroom for a literacy program. She attempted to do this by standing on a table to put the poster up and, as she was stepping down, she placed her foot on a chair, stepping on the edge and slipped off the edge of the chair and fell to the ground, hitting her back and tailbone. Her legs also hit the table as she came down. She told her supervisor of the injury and on May 13, 2004 she sought treatment at Employee Health Services with Dr. Pennington. She was initially evaluated and had X-rays, which were negative. Dr. Pennington noted that there were no bruises on examination but there was diffuse tenderness across the entire left hip and low back, a bruise on the lateral right calf, no hematoma but some tenderness in the ankle. She was felt to have contusions of the hip and calf

and strains to the back. She was given an Ace wrap and prescribed Naproxen and Robaxin. She was seen by Dr. Pennington two more times and on June 3, 2004 she was released from medical care with some stiffness in her ankle but a full range of motion of the spine and ankle without discomfort. On this last exam, she did mention she had aching in her low back at the end of the day and during the night. He also found that her right proximal lateral gastrocnemius muscle remained slightly tender. She was told by Dr. Pennington that if she had further problems she should follow up with her own doctor. Employee had no further medical treatment for her back until December 13, 2004, when she saw her family doctor, Dr. Toubes. At that time, she had pain that was radiating to her right leg which had been getting worse. He related these problems to her fall in May of 2004. He prescribed Bextra for her back pain. On December 29, 2004, she was referred to Dr. Kam Fai Pang by Dr. Toubes, who felt she may be suffering from possible lumbar radiculopathy. She had recently discontinued her Naproxen and it was recommended she restart that medication for pain and an MRI was scheduled. On January 4, 2005, Dr. Scott Sher performed an MRI of the lumbar spine, which demonstrated a disc bulge at L4-5 with degenerative changes on the right at L4-5 facet joint and disc bulge to L5-S1 with bilateral facet joint changes. By February 22, 2005, Dr. Pang felt that Employee was suffering from chronic low back pain with right radicular symptoms and was continued on Flexeril. Apparently Employee declined any invasive procedure at that time.

In September of 2005, Employee was seen by Dr. Pratt, where it was found she had radicular symptoms on the right, was taking Flexeril and ibuprofen, although there had been no significant improvements with ibuprofen.

Employee continued to see her physicians, either Dr. Toubes or Dr. Pratt, through December 29, 2006 for reoccurring and continued low back pain. In February of 2007, she was seen by Dr. Mark Chaplick at the Kansas City Pain Center, where she underwent an L5-S1 left sided lumbar epidural steroid injection, which according to the follow-up doctor's visit on February 22, 2007, had given her approximately 80 to 90% improvement in her back, hip and leg pain. On June 8, 2007, she was seen at Johnson County Spine by Dr. Harold Hess, where an additional MRI was taken showing a left L5-S1 disc herniation and it was recommended she have surgical decompression, which was done on June 19, 2007 by Dr. Hess. She followed up with physical therapy with Dr. DeeDee Naumann in July of 2007. On July 26, 2007, Dr. Kenneth Kinnan saw her for post-operative checkup where most of her pain was gone but she continued to have pain in her right leg. Apparently she had not mentioned this before surgery because her left leg was the primary source of her pain. She stated there was no back pain or leg pain on the left and she had good strength and sensation. She was to continue on physical therapy.

The Employee testified that during the time period after she was released from Dr. Pennington at Employee Health Services, until the notations in Dr. Toubes' records in December 2004, she had been in contact with Dr. Toubes regarding the problems with her back and had spoken to him by telephone a number of times. As her problems became worse over time she ultimately went in to see Dr. Toubes. When she was initially offered injections, she was scared and refused them, however, she did eventually submit to a total of three injections. The first one did give her relief from pain but, when she returned and upon subsequent injections, she had no relief from her pain. She said that she ultimately started dragging her left foot and that this was

when she eventually saw Dr. Hess, who did perform surgery. After the surgery, her left foot drag had improved and the pain in her left side had improved dramatically. She was not certain how the Workers' Compensation insurance worked, but she knew that anytime she talked a Ms. Berry and was asked to give medical records, she submitted everything that was requested. She said initially her Blue Cross/Blue Shield paid for her medical care but eventually denied her when it was deemed that her injury was work related. She filed a claim for disability and was denied because they deemed the injury as work related. Initially the employer picked up her medical care but this was terminated prior to her surgery. At the time of her surgery she spent three days in the hospital and then had weeks off afterwards. She had been assigned to summer school duty on June 17, which was the same day she found out she needed immediate surgery and she had to resign from that summer school job because of her surgery. After her surgery, she participated in physical therapy and follow-up checkups with her doctors, as well as took pain medications. Although the pain in her left side got better, she continued to have pain in her right side. At times, she would have sharp pain, muscle spasms and at times would have to lay on the floor until the pain went away. She stated she suffers from pain 24 hours a day. She takes pain medications every day. She will take a hot shower and then use Bengay on her back. She is never 100% pain free. She states she was late for work a number of times, almost fifty times in the past year due to her back problems. She has been told that she may need a fusion in the future. Employee stated she did everything her principal told her to do with regard to her medical care.

Employee submitted medical bills for treatment to her back, specifically for her surgery in 2007, which totaled \$33,901.87. The medical care she received from her surgery did help to cure and relieve the pain to her back. Currently she is suffering continued pain to her low back, including pain in her right leg.

Employee also submitted a medical report from Dr. Allen Parmet. Dr. Parmet reviewed Employee's medical records and examined her. He noted that she complained of diffuse lower lumbar tenderness extending across the iliac crest bilaterally. He could not feel a spasm. She could anteriorly flex 45 degrees while standing. Straight leg raising was 90 degrees on the right and 70 on the left. Lasegue's test was negative. Lateral bending and extension was 20 degrees. She had a three-inch-long surgical scar over her lower lumbar region that was well healed. Her lower extremities demonstrated full strength and range of motion of the hips, knees and ankles. Patrick's test was normal. Motor strength was 5x5 in all muscle groups. Her gait and station were normal. He felt that she suffered from chronic low back pain status post-lumbar discectomy and laminectomy L5-S1. He felt that her condition was causally related to the on-the-job slip and fall injury in May of 2004 and that she had had appropriate care and treatment. He felt the surgery successfully relieved the bulk of her leg pain, but she had ongoing lower back pain probably due to residual facet problems. He felt she was going to need continued medical care for pain management. He felt that additional surgery was unlikely, however, that there was a 50/50 chance she would need a fusion. He felt that she suffered from a 25% permanent partial disability to the body as a whole.

On cross-examination, she was asked if she ever asked the school district specifically to pay for her surgery, she said no. However, she did speak to Ms. Berry about how things were going a number of times and she did ask for treatment prior to her surgery but was declined. She

stated she did not know how Workers' Compensation worked and since she originally told them of her injury and she never received any bills because Blue Cross/Blue Shield was paying, she thought everything was okay. She was asked if she liked to travel and she stated not as much as she used to. Since the accident she has been to Texas and Indianapolis. She apparently went on a trip in either January or February of 2007 to Dallas. She stated this was for the school district for training. She was asked about a medical record of February 22, 2007 from Dr. Chaplick who noted that on a trip to Dallas she had been getting luggage off of a carousel, nobody else was there to help her and she picked it up herself. Dr. Chaplick felt that this might have caused a bit of a setback. On redirect she was asked about Dr. Chaplick's note of an 80 to 90% reduction in pain, and she felt this was attributed to the first injection and that because of a prior MRI, it had already been established that there was a bulge present in her spine at L4-5 and L5-S1 prior to her picking up the baggage. She also stated that the shots after the initial injection gave her no relief. She understood that Irma Berry, whom she had spoken to over the course of this injury, was with the school district and she felt she was the liaison between employees and Workers' Compensation.

Employer's evidence consisted of the deposition of Dr. Gregory Walker. Included in the deposition is Dr. Walker's report. He examined Employee on July 17, 2009 and after examining her and reviewing her medical records, he felt that the fall that occurred on May 12, 2004 was not a direct cause of Employee's lumbar disc herniation. He thought it may have been an aggravating factor causing some damage or weakness to the disc, however, that would be speculation. It could not be seen on her first MRI with any certainty. He therefore considered the fall an aggravating factor but not a direct cause of the herniation. He felt that the L5-S1 instability might have been a result of her surgery and combined with scar tissue from the healing discectomy site might be contributing to her ongoing pain. He recommended flexion extension views of the lumbar spine and if there was an instability present, that a treatment option might be to fuse her lumbar spine at L5-S1. He felt her disability would be rated at 20% permanent partial disability to the body as a whole based on her disc herniation and subsequent surgery. In his deposition it is noted that he had not seen her original MRI in January of 2005, but only the follow-up MRI in 2007. He, therefore, does not know personally the difference between what was on the first MRI versus the second MRI.

The first issue to be determined herein is whether the accident caused the disability the Employee claims. Prior to the incident in 2004, when Employee fell off the table and injured her back, she had no back complaints or any treatment for her back. Immediately after the accident, Employee complained of pain in her back which eventually caused pain down her legs. She was treated for a short period of time with the employer's doctor, but upon release, it is clear in the medical notes that she was still complaining of low back pain. Employee testified that over the course of the next four or five months she continued to have back pain for which she took over-the-counter medications such as Aleve. She also testified that she spoke with her personal physician about this back pain and ultimately went to see him in person in December of that same year. Employee's testimony is credible in this matter. Employee continued to seek out medical care in 2005 through 2006 and ultimately into 2007 for her back complaints. Employee underwent physical therapy, injections, and ultimately surgical treatment to alleviate the pain that had been progressively getting worse over the three-year time period. Although the surgery did help alleviate her weakened foot and pain in the left side, she continues to have pain to date in

her back and in her right side. These problems, although they have grown and changed, have continued since their starting point on May 12, 2004 and continue today. Dr. Walker felt the Employee's symptoms were merely an aggravation of a pre-existing condition. However there was no evidence of any pre-existing back problems or medical care for Employee's back prior to her injury in 2004. Dr. Parmet's determination that the fall caused her initial and continuing complaints is found to be more credible.

Employer points out an incident that was reported in the medical records when she had lifted luggage from a carousel and apparently had what the doctor described as "a bit of a setback." Employer is trying to point out that this is an intervening accident which caused the necessity for the medical care, including the surgery that was provided to her and the continued problems she has to date. There is no evidence in the record from a physician discussing the effect of this one-time event, other than a note that it was a bit of a setback. There is no determination by a physician that the picking up of the luggage was a substantial factor causing her back pain or her need for surgery in 2007 or in the future. Further it appears the incident occurred while Employee was traveling in the course of her employment for some sort of training seminar. Although not discussed at length it appears this may also have been a work related incident. After having reviewed the medical records and the testimony of Employee, this Court finds that, in fact, the accident Employee suffered on May 12, 2004 caused the disability the Employee claims.

The next issue to be determined is whether the employer must reimburse Employee for a total of \$33,901.87 as and for medical expenses Employee incurred. Employee testified that prior to her surgery, she did request treatment from the employer but such treatment was declined. Because Employee requested this treatment and it was denied by the employer, Employee was then free to move forward to find her own medical care and if, in fact, such care was related to the problems she suffered as a result of her accident, this Court could then find that the employer is liable for those medical costs. As this Court has already determined that the accident caused her disability and her physical problems and those physical problems necessitated medical care, this Court herein finds that the medical bills totaling \$33,901.87 are the responsibility of the employer and herein orders the employer to pay to Employee \$33,901.87 as and for medical expenses incurred.

The next issue to be determined is whether the Employee is owed a total of \$6,625.50 for unpaid temporary total disability benefits. Employee testified that in the summer in 2007 she underwent spinal surgery. Just prior to being told she needed the surgery, she had agreed to teach summer school. She states that the same day she was assigned to teach school was the day she found out she had to have surgery and due to that surgery, she was unable to return to work for the ten weeks and that she was recovering. Therefore, Employee is owed the temporary total disability benefits for that time period wherein she was recovering from her back surgery as she was unable to work. This Court orders the employer to pay to Employee the total of \$6,625.50 as and for temporary total disability benefits.

The next issue to be determined in this matter is whether the employer must provide Employee with additional medical care. Dr. Parmet's review of her need for future medical care includes the need for ongoing medical care for pain management. He felt there was a possibility

she would require a fusion of her spine. Dr. Walker, felt if it was determined that she has an instability to her lower spine at the L5-S1 level, a treatment option to help her with her pain would be a lumbar fusion. It appears that both doctors believe Employee needs additional medical management of her pain and both have discussed the possibility of the lumbar fusion. This Court finds that the employer is responsible for future medical which will cure and relieve her symptoms, including pain management and possible additional surgery to alleviate her pain. Therefore, this Court orders employer to provide Employee with medical care which will cure and relieve the symptoms from which she suffers, due to the injury of May 12, 2004.

The next issue to be determined by this Court is whether Employee suffered any disability and, if so, the nature and extent of Employee's disability. It is clear to this Court that Employee does suffer from disability due to her accident of May 12, 2004. She has undergone surgery which has alleviated some of her problems, but she continues to have additional problems with pain. After reviewing the medical reports, this Court notes that Dr. Parmet deems Employee at a 25% permanent partial disability to the body as a whole, and Dr. Walker, felt that her disability was at 20% permanent partial disability to the body as a whole. In reviewing the medical records and Employee's testimony, this Court feels that Employee suffers a disability of 22 ½% permanent partial disability to the body as a whole. This equates to 90 weeks of disability at \$347.05 per week for a total of \$31,234.50 as and for permanent partial disability. Employer is ordered to pay to Employee Permanent Partial Disability benefits in the sum of \$31,234.50.

The next issue for this Court to determine is whether the employer must reimburse to the Employee the cost of this proceeding for defending the claim without reasonable ground pursuant to §287.560. In order to prevail in this matter, this Court feels that there needs to be a strong showing of the unreasonableness of employer's stance herein. This Court notes that the employer's doctors had released Employee and that the employer believed there was a possible intervening act which may have caused Employee's continued back problems and the need for additional medical care and surgery. Based on this information, this Court does not find that employer's defense was unreasonable herein and, therefore, denies Employee's request for costs of this proceeding pursuant to §287.560.

Finally, this Court awards to Employee's attorney, Mr. Charles McKeon, 25% as and for reasonable attorney's fees.

Date: _____

Made by: _____

Emily Fowler
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation