

**FINAL AWARD ALLOWING COMPENSATION**

Injury No.: 10-111746

Employee: Patricia Nouraie  
Employer: Missouri Baptist Medical Center  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and considered the whole record and we find 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, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the August 29, 2012, award and decision of the administrative law judge, as modified herein. 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.

**Preliminaries**

On August 29, 2012, the administrative law judge issued her award of compensation in this matter. The administrative law judge concluded that employee sustained a work-related injury by occupational disease caused by the repetitive heavy lifting of her job. The administrative law judge awarded past medical expenses, temporary total disability benefits and permanent partial disability benefits. We do not disturb the administrative law judge's findings or conclusions as to those matters.

The administrative law judge found employer did not act unreasonably in denying employee's claim, so the administrative law judge denied employee's request for an award of costs under § 287.560 RSMo. We disagree and we reverse the administrative law judge's award on that point. In this award, we will discuss only evidence and argument pertaining to the reasonableness of employer's claim denial and the propriety of an award of costs. Employee requests costs equal to the attorney's fees she incurred relative to the permanent partial disability and temporary total disability benefits awarded.

**Findings**

On February 4, 2010, employee reported to employer that she suspected her back condition was caused by her work duties. Employer's occupational health nurse told employee to take Ibuprofen and apply ice. On February 5, 2010, employer acknowledged that employee reported a work injury. Then, on that same date, Peg Bequette, the manager of employer's Workers' Compensation Administration, sent claimant a letter reading, in relevant part:

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2009, unless otherwise indicated.

Employee: Patricia Nouraie

- 2 -

We have reviewed your report of injury of 12/22/2009 and multiple unknown dates of injury and the records of Missouri Baptist Medical Center Occupational Health on your back. Based on the review of these records, we are denying any Workers' Compensation Benefits as outlined under Missouri State Law. If any treatment was authorized by occupational health, the employer will pay for that treatment only.

We respectfully suggest that you contact your personal health insurance carrier and personal physician if you feel you are in need of any additional medical treatment.

Ms. Bequette's letter denying employee's claim identifies the information upon which employer based its denial. The first item employer claims to have reviewed is employee's "report of injury of 12/22/2009 and multiple unknown dates of injury." The only document in the record purporting to be a report of injury is the BJC HealthCare form entitled "Employee Report of a Work-Related Injury, Illness or Exposure." The form was signed by employee on February 4, 2010. Nowhere on this document did employee report a date of injury of December 22, 2009. Employee did describe that "[a]bout a month + a half ago, I helped move a large pt in Rm 513 (the pt had scabbies) and felt as though I wrenched by lower back."<sup>2</sup> We conclude that the Employee Report of a Work-Related Injury, Illness or Exposure admitted into the record as Claimant's Exhibit A is the "report of injury of 12/22/2009" upon which Ms. Bequette relied.

We reprint all words from Exhibit A that were hand-written by employee in their entirety. In the space provided for *Date of Injury/Illness/Exposure*, employee wrote "1½ mo. ago and 4 days ago + Last Night."

In response to "[d]escribe in detail exactly how the injury/illness/exposure occurred," employee wrote:

Little by little since I started work as a PCT on 4/13/09, my back has gotten sore. About a month + a half ago, I helped move a large pt in Rm 513 (the pt had scabbies) and felt as though I wrenched my lower back. Since then, it seemed like it could be healing, until about 4 days ago, when I helped a pt in Rm 579 + hauled a large quantity of dirty linens from his room. Last night my back was strained further just by helping slightly to move 2 pts, one in Rm 573 and one in Rm 574.

Where the form asked employee to "[l]ist your injury, symptoms and affected body parts," employee wrote:

My lower back hurts. It seems to center on the rt side after a day or two of no work; but when it's aggravated it seems to expand out to left side as well as the rt.

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<sup>2</sup> We suspect Ms. Bequette subtracted 45 days – approximately 1 ½ months – from the February 4<sup>th</sup> report date to conclude that employee's date of injury was December 22, 2009.

Employee: Patricia Nouraie

- 3 -

On a page of the form asking employee to graphically depict the location and type of pain she was experiencing, employee indicated she has burning pain in her low back and she has dull and aching pain in her mid-back. Employee marked that her pain level was at seven on a ten-point scale.

The other records upon which employer relied in denying workers' compensation benefits to employee were "the records of Missouri Baptist Medical Center Occupational Health on employee's back." There are four pages in the Missouri Baptist Medical Center Occupational Health Notes. The first two pages are the office visit notes of Joyce Higgins, R.N., documenting employee's February 4, 2010, visit to the Occupational Health clinic. Nurse Higgins mainly repeats what appears on employee's Report of Injury. Nurse Higgins then adds:

...States she never had any back problems and was strong and was a dancer who did ballet. States she has been begging off from assisting others. States has not taken any medications, because back in ? July she took an antibiotic that messed her stomach up. States if she hurts she takes 500 mg of Aspirin. A 56 y.o. female Ht 5'6½ WT 120. Rates today's pain 7/10, marking multiple "burning X's" on pain chart, but currently refusing Ibuprofen or ice to site. States needs to eat after having worked all night. Ibuprofen 200 mg if tolerates + ice to site as tol. Informed that OH would notify W/C. Given W/C info.

Employee reported to her personal physician on February 19, 2010, and her physician took her off work until March 8, 2010. Employee testified credibly that she repeatedly left messages for Ms. Bequette and employer's human resources office in an attempt to discuss her need to be off work because her supervisor was still scheduling her to work. Employee's calls were not promptly returned. Exhibit E includes documentation establishing that employee communicated with employer on multiple occasions between February 5, 2010, and mid-March 2010, about employee's medically-certified need to be off work due to her back condition and about her request for treatment.

Eventually, employee secured the assistance of counsel and filed her initial claim for compensation on March 18, 2010. Employee's counsel contacted employer on March 25, 2010, demanding that employer provide to employee medical care and benefits. Two weeks later, on April 7, 2010, employer fired employee for not timely returning an application for personal leave. Employer did not have employee medically examined until April 2011, more than a year after learning of the claimed injury.

## **Discussion**

### *Basis for Employer's Denial of Benefits*

Employer offered no evidence to explain the basis for Ms. Bequette's February 5, 2010, denial of treatment. All we can confirm is that Ms. Bequette saw something in either the Employee Report of a Work-Related Injury, Illness or Exposure or in the records of the Occupational Health clinic of the Missouri Baptist Medical Center that convinced Ms. Bequette that employee was not entitled to benefits under "Missouri State Law." Ms. Bequette did not favor employee with an explanation for why employer denied benefits.

Employee: Patricia Nouraie

- 4 -

In its brief, employer asserts that the February 5, 2010, “initial denial of benefits was based on lack [sic] of any medical evidence that Employee had sustained a compensable work injury...” Employer cites to no evidence in the record supporting its assertion that benefits were denied on February 5, 2010, because employer had no medical opinion that employee’s claim was work-related. As found above, we do not know why employer denied benefits on February 5, 2010.

Employer then seems to argue that its denial of benefits before sending employee for examination was appropriate conduct because the workers’ compensation law imposes no obligation on an employer to provide medical examination to a worker claiming a work-related injury until such time as the worker proves her claim is compensable, maybe as late as at trial.

Employee further argues in her brief that prior to denying all benefits, that Employer did not have a single medical provider physically examine Employee. Remarkably, Employee does not cite to any statute, regulation or case law indicating that an employer is required to have an Employee physically examined prior to denying all benefits. Again, Employee appears to be ignoring or overlooking the long-held point of law, that the burden of proof that her injury is compensable lies with the claimant (citation omitted).

We reject employer’s suggestion that an injured worker must prove the compensability of her injury before employer has any obligation to provide medical examination or treatment. It is contrary to the express language of § 287.140 RSMo, that provides “the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” The statute says an employer shall provide the medical services listed therein and the statute does not make employer’s obligation to provide medical service contingent upon a medical opinion (or, worse yet, an award) finding the injury compensable. It would be absurd, for example, if the legislature intended that an employer must provide ambulance transportation to a critically injured worker, but only after the critically injured worker provided employer with a medical opinion that the injury giving rise to the need for ambulance transportation was work-related.

In any event, whether an employer has sent a worker for a medical examination prior to denying a claim is a factor for our consideration in determining whether an employer had reasonable grounds for denying a claim.<sup>3</sup>

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<sup>3</sup> See *Monroe v. Wal-Mart Assocs.*, 163 S.W.3d 501, 507-509 (Mo. App. 2005) (“[T]here is no evidence that Wal-Mart even scheduled an examination for Claimant with its own medical examiner until months after two unsuccessful mediations. In fact, the record reflects that it was not until more than eight months after Claimant’s emergency surgery that Wal-Mart scheduled Claimant for an appointment with its medical examiner).

Employee: Patricia Nouraie

- 5 -

We do not believe the legislature intended to craft a system wherein an employer possessed of the knowledge that a worker claims she suffered a work-related injury can sit idly by, refuse to investigate a worker's claimed injury through inquiry and/or medical examination, and then later offer up its willful ignorance as the *reasonable* ground for denying benefits. In other words, we do not believe the legislature intended to craft a workers' compensation law that permits an employer to deny a claim with impunity without conducting even the barest of investigations.

To put the parties' respective evidentiary burdens into context, we refer to § 287.808 RSMo:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Employee claims we should order employer pay to her the costs of this proceeding on the ground that employer denied benefits to employee without reasonable grounds. In support of her claim, employee offered evidence proving that employer was aware employee believed her back injury was caused by her work for employer; that employer knew employee demanded evaluation and/or treatment for her injury; and, that employer's claims manager denied employee's claim without even asking the employee to tell her what happened. Employee satisfied her burden of producing evidence tending to show that it is more likely to be true than not true that employer denied workers' compensation benefits to employee on February 5, 2010, without reasonable ground.

The burden then shifted to employer to put on evidence to discredit, rebut, or outweigh employee's evidence. Employer failed to do so. Employer put on no evidence to show what provisions of "Missouri State Law" employer relied upon to justify the denial of benefits *at the time* Ms. Bequette issued the denial. That employer later articulated a colorable ground for denying employee's claim for compensation during formal proceedings before the Division of Workers' Compensation does not cure employer's earlier baseless denial.

#### *Costs*

The courts have instructed us we are only to award such costs "where the issue is clear and the offense egregious." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250-251 (Mo. 2003). We think it is clear that employers have an obligation to investigate the circumstances giving rise to alleged work injuries before denying benefits. And where the worker is available to discuss the injury, we think any reasonable employer conducting an investigation designed to determine whether an injury is work-related would discuss the alleged injury with the worker. In the instant case, Ms. Bequette, as employer's agent, denied evaluation, treatment and benefits to employee without even discussing employee's alleged back condition with employee.

We think employer's act of denying workers' compensation benefits to employee before even discussing the alleged injury with employee constituted an egregious offense.

Employee: Patricia Nouraie

Based upon the forgoing, we find employer defended this claim at the outset without reasonable ground.

**Award**

In addition to the amounts awarded by the administrative law judge, we award from employer to employee \$3,788.59 as costs pursuant to § 287.560 RSMo.<sup>4</sup> In all other respects, we affirm the award of the administrative law judge.

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.

The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued August 29, 2012, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

<sup>4</sup> Sum of permanent partial disability and temporary total disability = 15,154.37 X 25% attorney fee = \$3,788.59.