

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

Injury No.: 06-082116

Employee: Doris Ray
Employer: Cooperative Attendant Services, Inc.
Insurer: Missouri Retailers Insurance Trust
c/o Uhlemeyer Services Administrators Inc.

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 5, 2009, and awards no compensation in the above-captioned case.

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

Given at Jefferson City, State of Missouri, this 6th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Doris Ray

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Employee's work for employer involved her performance of the duties of caregiver in the home of three autistic individuals, young men aged from 28 to 30 years old. Employee occasionally experienced difficulties with the patients, who would grow combative or attempt to fight employee. On September 2, 2006, employee attempted to persuade one of the patients to sit down. The patient refused and came toward employee. Employee backed away. The patient raised his arm and swung his hand at employee's face. Employee held up her hand to protect herself. The patient struck the palm side of employee's right hand. The force of the blow caused employee's thumb to extend all the way back toward employee's wrist. Employee experienced immediate pain and swelling and when the pain did not subside, she was seen at the emergency room at BarnesCare on September 5, 2006. Employee was diagnosed as having suffered a contusion to the right thumb and was released with work restrictions of no lifting over 10 pounds, and limitations on grasping, gripping, and squeezing with the right hand and pinching movements with the thumb. Employee was provided ibuprofen for pain and swelling and instructed to treat her symptoms with heat or ice. When employee followed up at BarnesCare on October 10, 2006, it was noted that she continued to experience persistent pain and swelling in the area of the MP joint of the right thumb. Employee was referred to Dr. Ollinger, who concluded that employee's symptoms were caused by degenerative changes in employee's joints due to underlying osteoarthritis. Based on this diagnosis, employer declined to provide further care, despite employee's ongoing pain and swelling triggered by the September 2, 2006, incident.

Both of the doctors offering medical opinions in this case agreed that employee would require additional medical treatment. Nevertheless, despite finding that employee sustained a compensable accident on September 2, 2006, while working for employer, the administrative law judge found that no future medical care was needed in connection with the accident, and that no permanent disability resulted from the accident. The administrative law judge found the opinion of Dr. Ollinger, that employee's pain and need for medical treatment were caused by preexisting degenerative osteoarthritis, to be more persuasive than that of Dr. Schlafly, who opined that the September 2, 2006, injury was the prevailing factor causing employee's disability and her need for continuing medical care. I disagree with the administrative law judge's reading of the expert medical opinions provided in this case.

First, it is worth noting the evidentiary standard employee was required to meet in order to demonstrate that employer was responsible for providing her future medical care in connection with the September 2, 2006, injury. In order for employer to be liable, the "[e]vidence must demonstrate that future medical care required flows from the accident ... An employer is not responsible for compensation for future medical care unless the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury, even if the treatment will also

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provide a benefit to a non-compensable condition.” *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 85 (Mo. App. 2006). I believe that employee met the foregoing burden in this case. That such future medical care may also have treated a pre-existing condition is irrelevant: “[w]hile an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury.” *Stevens v. Citizens Mem’l Healthcare Found.*, 244 S.W.3d 234, 238 (Mo. App. 2008) (citations omitted).

The evidence clearly demonstrates that employee’s need for treatment was caused by the work injury on September 2, 2006, when she was attacked by the patient. Employee testified that before September 2, 2006, she never had any problems or any pain in either of her hands or in any of her fingers. There was absolutely no evidence presented to refute employee’s credible testimony. As of the time of the hearing in this case, employee continued to experience ongoing pain and swelling at the base of her right thumb near the wrist. Employee estimated her pain level as sometimes reaching a 10 on a scale of 1 to 10. Employee testified that these painful episodes last anywhere from one hour to an entire week. I would find that the opinion offered by Dr. Schlafly in this case conforms to reason and logic. Dr. Schlafly opined that employee’s symptoms of pain and swelling were caused by the work injury on September 2, 2006, and that the work injury was the prevailing factor when all other factors were considered.

The ultimate determination of credibility of witnesses rests with the Commission. The Commission is not bound to yield to an administrative law judge’s findings. The law only requires the Commission to take into consideration the credibility determinations of an administrative law judge and not give those determinations deference. *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865 (Mo. App. 2004). I find Dr. Schlafly credible and his opinion competent as supporting an award in favor of the employee. On the other hand, I am not persuaded by Dr. Ollinger’s medical opinions in connection with this case. Consequently, I do not find the award of the administrative law judge to be founded upon competent and substantial evidence.

There are several important problems with the opinion offered by Dr. Ollinger. First, it is evident from his deposition testimony that Dr. Ollinger misunderstood the mechanism of injury in this case. Despite having treated and examined employee on three separate occasions in connection with the September 2, 2006, work injury, Dr. Ollinger nevertheless was mistaken as to the basic facts of the incident resulting in that injury. Dr. Ollinger believed that employee suffered a “low force” injury, akin to “clapping hands.” Dr. Ollinger stated his mistaken belief thus: “[Employee] works as a homecare giver for the elderly. Max out what an elderly person is able to do, I don’t think it would ever be high force.” It is clear that Dr. Ollinger took this mistaken belief into account when formulating his opinion as to medical causation in this case, as Dr. Ollinger went on to offer his opinion that a low force injury could not have caused employee’s symptoms, and would not otherwise change the “natural history” of employee’s underlying osteoarthritis.

Second, Dr. Ollinger’s examination turned up significant degenerative changes in each of the joints of employee’s right thumb, including the CMC joint and the IP joint, in addition to the MP

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joint. Yet, Dr. Ollinger readily acknowledged that employee did not experience pain or swelling in any of the joints other than the joint that was injured in the incident on September 2, 2006. When pressed, Dr. Ollinger was unable to satisfactorily explain why, if the pain and swelling suffered by employee were caused, as he asserts, by underlying degenerative changes, employee was not symptomatic in these other joints.

Finally, I believe it is telling to ask the following question in connection with Dr. Ollinger's opinion in this case: if employee's symptoms were caused by an underlying degenerative condition and were in no way related to her work injury, why did employee's symptoms of pain and swelling appear exactly concurrent with the trauma she sustained as a result of the work injury on September 2, 2006? On cross-examination, Dr. Ollinger was unable to answer that question, other than to acknowledge that it was a coincidence.

I would find that employee met her burden of establishing that the accident, on September 2, 2006, was the prevailing factor causing the resulting medical condition and disability in this case. Additionally, I would find that employee demonstrated a reasonable probability that future medical care is needed, and that the need for treatment was caused by her work injury. Accordingly, I would reverse the award of the administrative law judge and award future medical care to this employee.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member