

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

Injury No. 10-020677

Employee: Robert Rickerson
Employer: Camdenton R-III School District
Insurer: M U S I C
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

Employee's request for costs under § 287.560 RSMo

The administrative law judge awarded future medical treatment to employee based on the essentially unanimous opinions from the testifying experts (including employer's own witness Dr. Lennard) that employee will need prescription medications to cure and relieve him from the effects of his work injury. Employer has not challenged this determination on appeal. Yet, employee complains in both his brief and at oral argument that employer has refused to designate a provider to furnish employee with the awarded care. Employee renews a request for costs under § 287.560 RSMo, which the administrative law judge denied.

We deny the § 287.560 request for costs for several reasons. First, employee did not file an application for review challenging the administrative law judge's decision on that issue. Second, employee has failed, in his brief and at oral argument, to cite the transcript for any evidence that would contradict the administrative law judge's finding that the record does not contain evidence that would permit us to determine the amount of costs employee incurred as a result of employer's purported unreasonable defense of the medical care issue. Third, this record (for obvious reasons) does not contain evidence that would support a finding that employer/insurer have ignored their obligation to provide future medical treatment consistent with the administrative law judge's award.

This does not mean that employee is without a remedy, however. If employer ignores its obligations under the award, employee may obtain reasonably required medical care from providers of his own choosing and later hold employer liable for the costs thereof. *Martin v. Town and Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007). And, if the requirement to provide medical treatment is furnished in such a manner as to

Employee: Robert Rickerson

- 2 -

endanger the employee's life, health, or recovery, we are authorized to order a change in the physician, surgeon, hospital or other requirement under § 287.140.2 RSMo.

Conclusion

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

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued October 17, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

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 19th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Robert Rickerson

Injury No.: 10-020677

Dependents: N/A

Employer: Camdenton R-III School District

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: MUSIC

Hearing Date: August 13, 2014

Checked by: HDF/scb

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: March 23, 2010
5. State location where accident occurred or occupational disease was contracted: Camden 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 insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See award
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: Permanent and total disability
15. Compensation paid to-date for temporary disability: \$3,677.98
16. Value necessary medical aid paid to date by employer/insurer? \$11,522.66

Employee: Robert Rickerson

Injury No. 10-020677

17. Value necessary medical aid not furnished by employer/insurer? \$917.89
18. Employee's average weekly wages: \$544.47
19. Weekly compensation rate: \$362.62 for all benefits
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: Permanent and total disability benefits as of June 3, 2010
22. Second Injury Fund liability: No.
23. Future Requirements Awarded: Yes. See award.

Said payments to begin immediately 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 (excluding future medical) in favor of the following attorney for necessary legal services rendered to the claimant:
David Sullivan.

Employee: Robert Rickerson

Injury No. 10-020677

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Rickerson

Injury No: 10-020677

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Camdenton R-III School District

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

Insurer: MUSIC

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on August 13, 2014. Memoranda were received by September 5, 2014.

The parties stipulated that on or about March 23, 2010, the claimant, Robert Rickerson, was employed by the Camdenton RIII School District. Mr. Rickerson sustained an injury by accident; the accident arose out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was self-insured with administration through MUSIC. The employer had notice of the injury. A claim for compensation was timely filed. Mr. Rickerson's average weekly wage was \$544.47, resulting in a compensation rate of \$362.62 per week.

Temporary disability benefits have been paid to the claimant to date in the amount of \$3,677.98, reflecting 10 and 1/7 weeks of benefits paid through June 2, 2010. Medical aid has been provided in the amount of \$11,522.66.

The issues to be resolved by hearing include 1) the nature and extent of disability, 2) the date of maximum medical improvement, 3) the liability of the employer/insurer for additional temporary total disability benefits after June 2, 2010 through January 20, 2011, 4) the liability of the employer/insurer for past medical care in the amount of \$1,355.81, 5) the liability of the employer/insurer for future medical care, 6) the liability of the employer/insurer for costs pursuant to section 287.560, and 7) the liability of the Second Injury Fund. Permanent total disability is alleged.

FACTS

The claimant, Robert Rickerson, testified that he was 55 years old as of the date of hearing. Mr. Rickerson completed his formal education at the conclusion of the 9th grade and testified that he has no learning disability and is able to read and write.

Employee: Robert Rickerson

Injury No. 10-020677

Mr. Rickerson began his employment as a full time custodian with the Camdenton RIII School District in 1991. On March 23, 2010, Mr. Rickerson fell while vacuuming steps at school when his foot got caught on a plastic runner; Mr. Rickerson hit his right shoulder and right buttock area on the hard surface of the floor when he fell. Mr. Rickerson was then taken by ambulance to Lake Ozark General Hospital. Mr. Rickerson had immediate pain in his right hip and lower back. Mr. Rickerson continues to have pain in the same areas, although it is less intense. Within a few weeks Mr. Rickerson also developed pain in his right thigh. Mr. Rickerson's right shoulder complaints resolved within days of the injury and are not at issue. Mr. Rickerson attempted to return to work for two days in June of 2010, but felt that he was unable to complete his work responsibilities and voluntarily quit work. Mr. Rickerson has not looked for other employment.

Mr. Rickerson saw Dr. Abbott on March 25, 2010, for right hip and thigh pain. Dr. Abbott had an MRI done which revealed diffuse bulging at the L4-5 level as well as an annular tear at L5-S1. Dr. Abbott referred Mr. Rickerson to Dr. Rahman on April 15, 2010. Mr. Rickerson testified that when he saw Dr. Rahman at the Springfield Neurology and Spine Institute, Dr. Rahman recommended no surgery for him.

Dr. Rahman referred Mr. Rickerson to Dr. Woodward. Dr. Woodward recommended physical therapy and a TENS unit, both of which Mr. Rickerson received. Dr. Woodward also prescribed several medications for Mr. Rickerson, including Darvocet. Dr. Woodward also prescribed two epidural steroid injections for Mr. Rickerson, both of which Mr. Rickerson received without any lasting benefit. Dr. Woodward released Mr. Rickerson from treatment in July of 2010. On September 13, 2010, Dr. Woodward opined that Mr. Rickerson has a four percent disability of the body attributable to the March 23, 2010 accident and injury as well as a four percent disability preexisting March 23, 2010. Dr. Woodson returned Mr. Rickerson to "regular duty full time" and anticipated no future medical care related to the March 23, 2010 work injury. (9.23.10 Woodward record)

In October of 2010 Mr. Rickerson went to Dr. Franklin, his primary care physician at the time, who suggested that Mr. Rickerson obtain an orthopedic consult with the Missouri Orthopedic Institute.

On January 20, 2011, as a referral from Dr. Franklin, Mr. Rickerson saw physician's assistant Prudence Baugher and Dr. Dale Vaslow at the Missouri Orthopedic Institute, but received no additional treatment there. Physician's assistant Baugher found "low back pain since a fall in March. [Mr. Rickerson] does have arthritis of his lumbar spine. A long discussion was had with him regarding the natural progression of arthritis. He does have some disk bulges, but no significant stenosis. He has mechanical back pain. We will send him to Dr. Varghese." (1.20.11 Baugher record)

In April of 2012, Mr. Rickerson began receiving social security disability benefits dating back to March 23, 2010. In his application for social security benefits in May of 2010, Mr. Rickerson alleged back pain and high blood pressure as his impediments to employment. Mr. Rickerson is Medicare eligible.

Employee: Robert Rickerson

Injury No. 10-020677

Mr. Rickerson has been seeing his primary care physicians, Dr. Hettinger and Dr. Franklin, at his own expense.

Currently, Mr. Rickerson has back pain which varies in intensity, as well as numbness in his right leg which extends from the top of his thigh into his three smallest toes. Mr. Rickerson sits twisted to the left and changes positions every 15 to 30 minutes in an effort to be comfortable. Mr. Rickerson can drive up to about 45 minutes comfortably. Mr. Rickerson sleeps four to five hours a night and his sleep is interrupted after about one and one half to two hours by pain or numbness. Mr. Rickerson can dress himself with the assistance of a grabber to pull on his socks and he must tie his shoes before slipping them on. Mr. Rickerson no longer gardens as he did prior to the March 23, 2010 accident.

Mr. Rickerson has had manual labor type jobs since he left school, including work in a sawmill, a gas station, making homes more energy efficient through home improvements, city street maintenance, a hardware store, concrete sales and delivery, and, finally, Camdenton RIII School District custodial work. Mr. Rickerson described these jobs as including manual labor and heavy lifting type positions. Mr. Rickerson specifically testified that he could lift up to 100 pounds while working for the Camdenton RIII School District prior to his March 23, 2010 accident.

In 1975 or 1976 Mr. Rickerson had back surgery performed at Cox Medical Center. Mr. Rickerson testified to not working for approximately a year to a year and a half as the result of the back surgery. Mr. Rickerson said that he fully recovered and had no difficulty with manual labor after that surgery and his recovery there from. In 1996, Mr. Rickerson twisted his right knee but has had no treatment or ongoing difficulty with his knee. In 2007, Mr. Rickerson said that he had left hip and leg pain, but that his complaints ceased when he took a different cholesterol lowering medication. Mr. Rickerson suffers from high blood pressure and has been taking medication to control his blood pressure since about the 1990s or 2000. When Mr. Rickerson was asked about seeing Dr. Franklin in 2004, 2005, and 2006 for back pain and osteoarthritis, he again mentioned the change in cholesterol lowering medication as relieving his back pain.

Mr. Rickerson takes oxycodone for his back; this was originally prescribed by Dr. Abbott after the accident and is now prescribed by Dr. Hettinger. Mr. Rickerson testified that he also takes naproxen and gabapentin for his back pain, prescribed by Dr. Hettinger.

Mr. Rickerson testified that his out of pocket expenses of \$1,355.81 include his treatment with Dr. Hettinger and Dr. Franklin as well as expenses incurred at the Missouri Orthopedic Institute (physician assistant Baugher) and prescription expenses.

Mr. Rickerson's sister, Roberta Greer, testified to Mr. Rickerson's deterioration in physical health since the March 23, 2010 accident and the discomfort that Mr. Rickerson experiences in sitting and sleeping as the result of his back pain. Ms. Greer testified that she did not believe that Mr. Rickerson had any back pain prior to the March 23, 2010 accident after he recovered from the back injury in the 1970s.

Dr. Koprivica testified by deposition that he evaluated Mr. Rickerson on August 3, 2012. Dr. Koprivica found Mr. Rickerson to have an aggravating injury to the lumbar spine, including

Employee: Robert Rickerson

Injury No. 10-020677

an annular tear at L5-S1 along with development of discogenic pain, as a result of the March 23, 2010 accident. Dr. Koprivica described the effect of this tear and discogenic pain as compromising the ability of the disc within the anulus to absorb force between the vertebral bodies. Dr. Koprivica opined that Mr. Rickerson achieved maximum medical improvement on January 20, 2011 rather than in September of 2010 because he “just thought you have to make sure that there isn’t (sic) surgical options, and [he] thought that was a more appropriate date.” (Koprivica depo p34-35) Dr. Koprivica opined that Mr. Rickerson’s treatment that he received on his own after July of 2010 with Dr. Franklin and Dr. Hettinger “is an attempt to try to relieve the symptoms that are attributable to that March 23, 2010, injury.” (Koprivica depo p35) Dr. Koprivica opined that in light of Mr. Rickerson’s vocational profile, Mr. Rickerson is permanently and totally disabled; however, Dr. Koprivica also found Mr. Rickerson to have a permanent disability of 30 percent of the body attributable to the March 23, 2010 injury in isolation. Dr. Koprivica expressed concern regarding Mr. Rickerson’s ongoing use of narcotic medication and suggested pain management to deal with Mr. Rickerson’s pain and medication issues. Dr. Koprivica also opined that a psychologist or psychiatrist should be managing Mr. Rickerson’s psychological response to his chronic pain. Dr. Koprivica admitted that when he saw Mr. Rickerson that he showed no signs of psychological distress and that he “was just projecting that as a potential.” (Koprivica depo p68) Dr. Koprivica found no Second Injury Fund liability. Dr. Koprivica noted that Mr. Rickerson had a consult with Dr. Vaslow after Dr. Woodward declared Mr. Rickerson to be at maximum medical improvement in July of 2010 and that Dr. Vaslow recommended no surgery for Mr. Rickerson, essentially agreeing with Dr. Rahman. Dr. Koprivica noted that the only restrictions that he placed on Mr. Rickerson were “to avoid frequent or constant bending at the waist, pushing, pulling, or twisting ... plus avoiding sustained or awkward postures of the low back ...” (Koprivica depo p 63) Dr. Koprivica went on to note that Mr. Rickerson’s restrictions would put him in the medium physical demand level. Dr. Koprivica admitted that he would recommend a vocational evaluation to determine Mr. Rickerson’s status as permanently and totally disabled whereas he has evaluated other claimants and found them to be permanently and totally disabled without a recommendation for vocational evaluation.

Wilbur Swearingin, certified rehabilitation consultant, testified by deposition that he evaluated Mr. Rickerson on December 19, 2012, and issued a report based thereon on January 23, 2013. Mr. Swearingin determined that in reviewing the restrictions imposed on Mr. Rickerson by Dr. Koprivica and his treating physicians that Mr. Rickerson is permanently and totally disabled and is neither placeable nor employable in the open labor market.

Dr. Lennard testified by deposition that he evaluated Mr. Rickerson on February 27, 2014, and issued a report pertaining thereto on August 8, 2014. Dr. Lennard opined that Mr. Rickerson has achieved maximum medical improvement and that his permanent disability is 20 percent of the body with eight percent attributable to the March 23, 2010 work injury and 12 percent attributable to his preexisting lumbar surgery and degenerative joint disease. Dr. Lennard restricted lifting to 40 pounds or less and avoidance of activities requiring frequent bending. Dr. Lennard imposed no restrictions on sitting, standing, or walking. Dr. Lennard recommended use of Naproxen or Advil or Tylenol or other anti-inflammatory medication for Mr. Rickerson but said that opioid medications, spinal injections, or surgery were not necessary. Dr. Lennard specifically testified that it was reasonable and necessary for Mr. Rickerson to see his primary

Employee: Robert Rickerson

Injury No. 10-020677

care physicians, Dr. Hettinger and Dr. Franklin, to monitor his medications necessary as the result of the March 23, 2010 injury.

James England, rehabilitation counselor, testified by deposition that he evaluated Mr. Rickerson on July 28, 2014. Mr. England opined that depending on the restrictions given to Mr. Rickerson by the various treating and evaluating physicians, Mr. Rickerson would be capable of anywhere from a full return to past work to being unable to work at all given his need to recline. Mr. England said that Dr. Hettinger's restrictions were greater than those of Dr. Koprivica and would prohibit Mr. Rickerson from employment.

APPLICABLE LAW

RSMo Section 287.140.1. In addition to all other compensation paid to the employee under this section, 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. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

RSMo Section 287.020.6. 6. The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

Employee: Robert Rickerson

Injury No. 10-020677

AWARD

The claimant, Robert Rickerson, has sustained his burden of proof that he is permanently and totally disabled as the result of his accident and injury of March 23, 2010. Mr. Rickerson has testified credibly with regard to his limitations, and the testimonies of Dr. Koprivica as well as Mr. Swearingin support the award of permanent and total disability benefits. In light of this finding, a determination of date of maximum medical improvement is found to be unnecessary as is an award of past temporary total disability benefits. Liability for permanent and total disability commences on June 3, 2010, the date on which temporary total disability benefits ceased. In light of the finding of permanent and total disability against the employer/insurer, there is no finding of liability on the part of the Second Injury Fund.

Mr. Rickerson has failed to sustain his burden of proof that he is entitled to reimbursement for past medical expenses for the January 20, 2011 office visit with physician assistant Baugher. Ms. Baugher confirmed the diagnosis given by Mr. Rickerson's treating physicians and no treatment was rendered by Ms. Baugher (\$251.75). In addition, the prescription expenses of February 4, 2014, March 2014, and August 5, 2014 are disallowed where the medical records to support the requested reimbursements are not in evidence (\$186.17) Other prescription expenses are allowed where they correlate, however loosely, with what appear to be Dr. Hettinger's prescriptions for medications Dr. Hettinger has prescribed in the past for back pain. The total disallowed is \$437.92. Mr. Rickerson has, however, sustained his burden of proof that the remaining reimbursements requested are reasonable and necessary to cure or relieve Mr. Rickerson of the effects of his March 23, 2010 accident and injury. The employer's own examining physician, Dr. Lennard, agreed that the treatment being provided by Mr. Rickerson's physicians to provide him with pain medication was appropriate.

Mr. Rickerson has sustained his burden of proof that he is entitled to future medical treatment in the form of prescription medication to cure and relieve him from the effects of his injury. All of the physicians who treated or evaluated Mr. Rickerson with the apparent exception of Dr. Woodward opined that Mr. Rickerson is in need of pain medication. The underlying medical visits to support the medications are also awarded as part of Mr. Rickerson's future medical treatment. Psychiatric and psychological treatment are not awarded as there is no evidence that Mr. Rickerson currently needs such treatment and a need for such treatment in the future is purely speculative.

Costs pursuant to section 287.560 are not awarded where approximately a third of the amount requested in reimbursement was not substantiated as medical treatment necessary to cure and relieve Mr. Rickerson of the effects of his injury and there was no evidence of costs or fees incurred.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation