

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

Injury No.: 03-124917

Employee: Rachel Roesler
Employer: Gordman's
Insurer: St. Paul Fire and Marine Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: December 10, 2003
Place and County of Accident: St. Charles County, Missouri

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 14, 2006. The award and decision of Administrative Law Judge Kevin Dinwiddie, issued April 14, 2006, is attached and incorporated by this reference.

On July 3, 2006 the employee filed a Motion to Submit Additional Evidence. On July 7, 2006 the employer/insurer filed an Answer and Objections to Motion to Submit Additional Evidence. This Motion and Objection were taken with the case. The Motion to Submit Additional Evidence is denied.

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 4th day of August 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

AWARD

Employee: Rachel Roesler

Injury No. 03-124917

Dependents: N/A

Before the
DIVISION OF WORKERS'

Employer: Gordmans

COMPENSATION

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

Additional Party:N/A

Insurer: St. Paul Fire and Marine Insurance

Hearing Date: Monday, January 23, 2006; formally submitted February 14, 2006

Checked by: KD/lsn

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: 12/10/03
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
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:
Employee suffered low back injury while lifting a box
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: low back
14. Nature and extent of any permanent disability: 25% permanent partial disability of the body as a whole, referable to the low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$13,598.31
17. Value necessary medical aid not furnished by employer/insurer? See award as to future medical
18. Employee's average weekly wages: \$192.46
19. Weekly compensation rate: \$128.31/\$145.00
20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:
100 weeks of permanent partial disability from Employer, at \$145.00 per week\$14,500.00

TOTAL:\$14,500.00

23. Future requirements awarded: Employer to provide future medical care. See award.

Said payments to begin as of the date of this 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Jill S. Bollwerk

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Rachel Roesler

Injury No: 03-124917

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: Gordmans

Additional Party N/A

Insurer: St. Paul Fire and Marine Insurance

Checked by: KD/lsn

The claimant, Ms. Rachel Roesler, and the employer and insurer, Gordmans and St. Paul Fire and Marine Insurance, appeared at hearing by and through their counsel and entered into certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation. No claim had been filed by the claimant as against the State Treasurer as Custodian of the Second Injury Fund.

The parties stipulated that on or about 12/10/03, Ms. Roesler suffered an injury by accident arising out of and in the course of employment. The parties further agreed that the issues to be resolved at hearing are need for future medical care, and as to nature and extent of permanent partial disability.

Ms. Rachel Roesler appeared at hearing and testified on her own behalf. The claimant further submitted the deposition testimony of Fredric M. Simowitz, M.D. The employer and insurer submitted the deposition testimony of David S. Raskas, M.D.

EXHIBITS

The following exhibits were offered and received in evidence:

Claimant's Exhibits

- A. Certified records of Heritage Physical Therapy
- B. Certified medical records of Missouri Baptist Medical Center (MRI report, 1 page, dated 3/19/04)
- C. Certified medical records of SSM Corporate Health
- D. Certified medical records of Spine Care Alliance
- E. Deposition of Fredric Simowitz, M.D., taken on 9/02/05
- F. Certified medical records of Missouri Baptist Medical Center (patient admission dated 11/22/04)
- G. Certified medical records of Barnes-Jewish St. Peters Hospital

Employer and Insurer's Exhibits

- 1. Deposition of David Raskas, M.D., dated 11/7/05

FINDINGS OF FACT AND RULINGS OF LAW

Claimant began her employment with Gordmans in October of 2003, and her duties included working as a cashier, and stocking items in the fashion accessories section of the store. Claimant would stock such items as perfumes, pajamas, purses, and so on. On 12/10/03 Ms. Roesler was unloading boxes of merchandise that were loaded into a shopping cart. When in the course of reaching into the cart to lift out a box, Ms. Roesler suffered a "pop" in her back and an immediate onset of pain as she lifted and twisted while removing the box from the cart. Ms. Roesler experienced right-sided low back pain with pain extending down into her calf.

Dr. Richard Covert prescribed physical therapy for what he believed to be a lumbar strain. Physical therapy records from SSM Corporate Health (Claimant's Exhibit C) reveal that the claimant received therapy through December of 2003 for an acute lumbar strain with right radicular symptoms. Dr. Covert documented in his notes that Ms. Roesler was suffering from pain traveling down right leg to mid-calf.

Physical therapy did not alleviate back pain, and the claimant suffered a worsening of leg pain. Ms. Roesler was then referred to Dr. Raskas, and an MRI of the lumbar spine taken on 3/19/04 (See Claimant's Exhibit B) revealed a large central disk herniation at L5-S1, lateralizing to the right and left at midline. Claimant was also found to have evidence of degenerative disc disease. Dr. Raskas referred the claimant for further therapy, which she had at Heritage Physical Therapy from 4/1/04 through 4/22/04 (See Claimant's Exhibit A).

On 4/23/04 Dr. Raskas determined that the claimant was not a surgical candidate; that further physical therapy was not likely to change her overall condition; recommended that claimant continue her home exercise program; advised the claimant to avoid heavy manual labor; and concluded that claimant was at maximum medical improvement (see Claimant's Exhibit D).

On July 23, 2004, Ms. Roesler, at the suggestion of her legal counsel, met with Dr. Fredric M. Simowitz for an independent medical evaluation. Dr. Simowitz elicited from the claimant the history as to back injury, elicited the claimant's complaints, reviewed certain medical records, and performed a physical examination. Dr. Simowitz opined that there was a medical causal relationship between the injury at work and the claimant's L5-S1 disk herniation. Dr. Simowitz did not believe the claimant to be a surgical candidate, but nonetheless did not believe the claimant to be at maximum medical improvement. Dr. Simowitz recommended that the claimant have further conservative treatment, without providing any specifics as to what he would recommend.

In November of 2004 Ms. Roesler suffered from further complaints of severe low back pain as a result of bending over to open a dryer door. Ms. Roesler sought medical attention at the emergency room of Missouri Baptist Medical Center (See Claimant's Exhibit F). Claimant was given pain medication, including a medrol dosepak, for what was believed to be an exacerbation of her prior low back complaints. The claimant visited with Dr. Raskas, who ordered the lumbar spine MRI taken on 11/30/04 at Professional Imaging. Dr. Raskas reviewed the MRI, and referred Ms. Roesler to Dr. Hurford, who provided the claimant with epidural steroid injection on 12/9/04 and again on 12/21/04.

Claimant returned to Dr. Raskas on 1/03/05 for further evaluation post the two epidural steroid injections. Although there are no further physical therapy records in evidence to document a third round of physical therapy, the testimony of Ms. Roesler, in conjunction with both the treatment records of Dr. Raskas and his deposition testimony, persuade that the claimant received therapy in the form of strengthening exercises. On 3/18/05 Dr. Raskas met with Ms. Roesler, performed a physical examination, and concluded that the claimant had reached maximum medical improvement. Dr. Raskas concluded that the neurologic exam was within normal limits; that her range of motion at the lumbar spine was good; that the claimant should be proscribed from any lifting, pushing, or pulling over 50 pounds, and from repetitive lifting, pushing, or pulling, bending, stooping, or twisting at the waist.

Ms. Roesler met with Dr. Simowitz on 6/28/05 for a second evaluation. Dr. Simowitz read the most recent records, including as to epidural steroid injection and the second lumbar spine MRI report. He further elicited a treatment history from Ms. Roesler; noted her physical complaints; and performed a physical examination. Dr. Simowitz noted that the condition was the same; disk herniation at L5-S1 and degenerative joint disease of the lumbosacral spine; agreed with the restrictions imposed by Dr. Raskas; agreed with Dr. Raskas to the extent that the claimant would not currently benefit from any further medical treatment; but disagreed with Dr. Raskas to the extent that Dr. Simowitz was convinced that Ms. Roesler would need a back surgery in the future. (Claimant's Exhibit E, at page 22).

PERMANENT PARTIAL DISABILITY

Drs. Raskas and Simowitz agree that the claimant suffers from both a degenerative disk disease and a large central disk herniation at L5-S1. The doctors further agree that the disk herniation is related to her work injury on 12/10/03, and that the claimant is not in need for further medical care at the present. Both doctors have opined as to permanent and partial disability, and while they agree that the claimant has suffered a permanent disability, and further agree as to physical restrictions they would recommend, they nonetheless disagree as to the extent of the permanent disability.

Claimant presents with no history of chronic back complaint prior to her work injury on 12/10/03. The evidence at hearing persuades that the claimant suffered a prior degenerative condition of her low back that did not impede her day-to-day functioning in any way, and was not permanently disabling.

Ms. Roesler was 25 years old as of the date of hearing in the matter. Claimant currently works 4 hours a day as a cashier at her mother's antique and crafts shop. Ms. Roesler testified that she was eventually laid off from her employment with Gordmans, and that thereafter she worked for about three months at a Schnuck's Deli, and for three months after that as a telephone operator at Verizon, before starting at her mother's store when it opened in May of 2005.

There is nothing in any of the treatment records to undermine the credibility of Ms. Roesler with respect to her complaints of ill being related to her work injury on 12/10/03. In fact the records support the conclusion that the claimant suffers from ongoing pain in her right lower back and into her right lower extremity, made worse from activity such as sitting or standing for too long at a time. Her testimony further suggests that she received only temporary relief of her complaints as a result of the epidural steroid injections administered by Dr. Hurford. The medical further supports the conclusion that as a result of her work injury the claimant has been precluded from performing any activity that involves lifting of over 50 pounds, or any kind of repetitive lifting, bending, pushing, pulling, or twisting. The testimony further persuades that the claimant's back condition is such that even the simplest task such as bending over to open a dryer door can cause her to suffer a severe aggravation of her symptoms.

From all of the evidence, the claimant is found to have suffered a work related disk herniation in her lumbar spine at L5-S1, and suffers as a consequence a permanent partial disability equivalent to 25% of the body as a whole, referable to the low back. At the stipulated rate of \$145.00 per week, the total due for permanent partial disability is for 100 weeks, or \$14,500.00.

FUTURE MEDICAL CARE

Section 287.140.1 RSMo, provides, in part, as follows: "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."

An award of future care to cure or relieve, per section 287.140 RSMo, is not necessarily inconsistent with a finding that the claimant may have achieved maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo.App. S.D. 1996). Further, the claimant is not obliged to present evidence of specific medical treatment or procedures that would be necessary in the future in order to receive an award for medical care. Bradshaw v. Brown Shoe Co., 660 S.W.2d 390 (Mo.App.1983). It is sufficient to show "by reasonable probability" the need for additional medical treatment as a result of the work injury. Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823,828 (Mo.App. S.D. 1995).

Dr. Raskas opined that whether the claimant would need a surgery in the future is unknown. He further made it clear that while he could not be reasonably certain that Ms. Roesler would need a surgery in the future, he nonetheless agreed that in the event the claimant did have a surgery to the L5-S1 disc in the future, that surgery would be related to the work injury (Employer and Insurer's Exhibit No.1, at page 27).

Dr. Simowitz acknowledges that Dr. Raskas has an excellent reputation, which would be consistent with the great wealth of experience had by Dr. Raskas as a back surgeon. Dr. Simowitz acknowledges that as a neurologist he has never operated on a spine, and further acknowledges that he would defer to Dr. Raskas about when and if surgery was indicated (Claimant's Exhibit E, at pages 32 and 33).

Dr. Raskas believes that the need for a future surgery is unknown, as a matter of a reasonable certainty, but agrees that any future surgery at L5-S1 would be related to the work injury. The standard for an award of future medical care is not proof as a matter of reasonable certainty, but rather as a matter of "reasonable probability". "Probable" means founded on

reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986).

The testimony of Dr. Simowitz persuades, as a matter of a reasonable probability, that the claimant is in need of such further medical care as is necessary to cure and relieve of the effects of the work injury. The testimony of Dr. Raskas further persuades that, in the event the claimant is in need of a surgery to the L5-S1 disk in the future, that surgery will be causally related to the work injury. The employer and insurer are to provide future medical care consistent with the expert medical opinion of both Drs. Simowitz and Raskas.

This award is subject to a lien in favor of Jill S. Bollwerk, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: April 20, 2006

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation