

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

Injury No. 10-006646

Employee: Patricia Scheidt
Employer: Missouri Department of Elementary and Secondary Education
Insurer: Missouri Office of Administration
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. We have considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. 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.

Background

The parties asked the administrative law judge to determine the sole issue whether employer/insurer is responsible for future medical treatment to cure and relieve the effects of employee's work injury of February 3, 2010.

The administrative law judge determined that there is not a reasonable probability that future medical treatment will be needed to cure and relieve the effects of employee's work injury.

On January 20, 2016, employee filed an application for review with the Commission alleging the administrative law judge erred because both parties submitted a consent award indicating an agreement that employee suffered a 35% permanent partial disability of the right shoulder, but that owing to a typographical error, the administrative law judge's award erroneously reflects the parties agreed to only a 30% permanent partial disability of the right shoulder.

On March 24, 2016, the Commission issued an order concluding that the Commission has jurisdiction to consider employee's application for review.

On March 31, 2016, the Commission received correspondence from employer/insurer agreeing that the parties stipulated that employee suffered a 35% permanent partial disability referable to the right shoulder, and that the administrative law judge's award to the contrary is the result of a clerical error. Employer/insurer joins in employee's request that the Commission correct the administrative law judge's award and enter an award in favor of employee of \$34,345.16 in permanent partial disability benefits, consistent with the parties' stipulation as to the nature and extent of permanent disability employee suffered as a result of the compensable work injury.

Employee: Patricia Scheidt

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Award

Consistent with the parties' agreement that the administrative law judge's award stands in need of correction, we modify the administrative law judge's award accordingly.

Employee sustained a 35% permanent partial disability of the right shoulder as a result of her February 3, 2010, compensable work injury. Employer/insurer is liable for \$34,345.16 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Lee B. Schaefer, issued December 15, 2015, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 15th day of April 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Claimant: Patricia Scheidt

Injury No.: 10-006646

Dependents: N/A

Employer: Missouri Department of Elementary and Secondary Education

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Missouri Office of Administration

Hearing Date: December 1, 2015

Checked by: LBS

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: February 3, 2010
5. State location where accident occurred or occupational disease was contracted: Cole County, Missouri (while Claimant was travelling for business.) Claimant's Office was located in St. Louis, Missouri.
6. Was above Claimant 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 Claimant was doing and how accident occurred or occupational disease contracted: Claimant was injured when she struck her foot on a step and fell forward.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: 30% PPD of the right shoulder
15. Compensation paid to-date for temporary disability: \$2,456.90
16. Value necessary medical aid paid to date by employer/insurer? \$41,816.68
17. Value necessary medical aid not furnished by employer/insurer? None

- 18. Claimant's average weekly wages: \$737.08
- 19. Weekly compensation rate: \$491.39/\$422.97
- 20. Method wages computation: By agreement and using the table

COMPENSATION PAYABLE

- 21. Amount of compensation payable

30% of the right shoulder:

\$ 29,438.71

TOTAL: \$ 29,438.71

- 22. Second Injury Fund liability: Left open
- 23. Future requirements awarded: None

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 in favor of the following attorney for necessary legal services rendered to the claimant: Mark Floyd

FINDINGS OF FACT and RULINGS OF LAW:

Claimant:	Patricia Scheidt	Injury No.:	10-006646
Dependents:	N/A		
Employer:	Missouri Department of Elementary and Secondary Education		Before the Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	N/A		
Insurer:	Missouri Office of Administration		
Hearing Date:	December 1, 2015		

An evidentiary hearing was held in the above-referenced matter on December 1, 2015. Patricia Scheidt (“Claimant”) did not appear in person, but she was represented by counsel, Mark Floyd. Missouri Department of Elementary and Secondary Education (“Employer”), and its insurer, Missouri Office of Administration (“Insurer”), were represented by counsel, David Drescher. The Second Injury Fund (“Fund”) is a party to this matter, but is being left open at this time.

STIPLULATIONS

The parties stipulated to the following facts:

1. Claimant sustained an accident and injury on February 3, 2010, that arose out of and in the course of her employment;
2. Claimant’s accident and injury occurred in Cole County Missouri, where she was attending training, her office is located in St. Louis, Missouri;
3. Claimant and the Employer/Insurer were subject to the Missouri Workers’ Compensation Act and Claimant was an “employee” within the meaning of the Act;
4. Venue is proper in the City of St. Louis;
5. Claimant provided timely notice of the accident and injury to Employer;
6. Claimant filed her Claim for Compensation in a timely manner;
7. Claimant’s Average Weekly Wage was \$737.08 resulting in a temporary total disability rate of \$491.38 and a permanent partial disability rate of \$422.97;
8. Claimant was paid temporary total disability in the amount of \$2,456.90 for a total of five (5) weeks;
9. Employer paid medical benefits in the amount of \$41,816.68;
10. As a direct result of the February 3, 2010 work accident, Claimant sustained 30% permanent partial disability of the right shoulder;
11. Parties have agreed that Claimant is entitled to permanent partial disability in the amount of \$29,438.71 for the injury to her right shoulder;
12. Claimant’s work accident was the prevailing factor in causing the injury to her right shoulder.

ISSUE

Is Employer/Insurer responsible for future medical treatment to cure and relieve the effects of Claimant's work injury of February 3, 2010?

EXHIBITS

Claimant offered, and had admitted into evidence, the following Exhibits:

1. IME Report of Dr. Jacques Van Ryn
2. IME Report of Dr. Shawn Berkin

Employer/Insurer offered, and had admitted into evidence the following Exhibits:

- A. Medical Records of Esse Health (Medical Records of Dr. John Tessier)
- B. Medical Records of Orthopedic Associates (Medical Records of Dr. Herbert A. Haupt and Medical Records and Rating Report of Dr. Richard E. Hulsey)
- C. Medical Records of Missouri Baptist Medical Center

FINDINGS OF FACT

On February 3, 2010, Claimant sustained an accident arising out of and in the course and scope of her employment while on property controlled by Employer. As a result of her accident, Claimant sustained a comminuted fracture of the proximal humerus in her right shoulder.

Claimant initially received treatment at Central Region Medical Center. (Exhibit A) On February 4, 2010 she followed up with Dr. John Tessier. Dr. Tessier reviewed x-rays taken at Central Region Medical Center and diagnosed a comminuted, head-splitting fracture of the proximal humerus. Dr. Tessier discussed possible options with Claimant and indicated that her shoulder would require reconstruction with a humeral head replacement.

On February 8, 2010, Claimant was referred by Employer for an evaluation with Dr. Herbert A. Haupt. (Exhibit B) Dr. Haupt took x-rays and noted that they strongly suggested at least a two-part, perhaps a three-part, proximal humeral fracture involving the humeral head. Dr. Haupt then scheduled Claimant for an immediate CT scan. On February 10, 2010, Dr. Haupt reviewed the CT scan and agreed with the radiologist's conclusion that Claimant had sustained a multi-part, proximal, humerus fracture. Dr. Haupt then referred Claimant to Dr. Richard E. Hulsey for further treatment.

On February 10, 2010, Dr. Hulsey saw Claimant for the first time. After a physical examination and a review of x-rays, Dr. Hulsey diagnosed Claimant with a comminuted humeral neck fracture and tuberosity fractures. Dr. Hulsey recommended that Claimant undergo a hemiarthroplasty with repair of tuberosities.

On February 15, 2010, Dr. Hulsey performed a hemiarthroplasty on Claimant's right shoulder with reconstruction of tuberosities and a biceps tenodesis. (Exhibit C)

On February 24, 2010, Claimant followed up with Dr. Hulsey, who observed that Claimant was doing well. (Exhibit B) Dr. Hulsey noted that the alignment of the hemiarthroplasty was good and that the tuberosities were sitting anatomically. Dr. Hulsey recommended that Claimant continue to use the abduction sling on a full-time basis. He also instructed Claimant on gentle pendulum exercises and passive flexion.

On March 10, 2010, Claimant returned to Dr. Hulsey for a follow-up visit. Dr. Hulsey observed that Claimant was doing well and switched her to a regular sling for the following two weeks. Dr. Hulsey also started Claimant on a physical therapy program. Dr. Hulsey restricted Claimant from lifting, driving before the next office visit, and being around individuals who could be physically abusive.

Claimant returned to Dr. Hulsey on March 31, 2010. At that time, Dr. Hulsey noted that Claimant was progressing as expected. He recommended that she wean herself from the sling over the following two weeks.

Dr. Hulsey again evaluated Claimant's progress on April 21, 2010. Dr. Hulsey observed that Claimant's passive range of motion was returning and recommended that she begin more aggressive exercises; as well as continuing physical therapy. Dr. Hulsey stated that Claimant should continue on limited duty with no significant lifting on the right side, avoiding reaching-out or overhead movements with the right arm, and avoiding physically abusive clients.

On May 19, 2010, Claimant followed up with Dr. Hulsey, at which time he found that the hemiarthroplasty was in excellent position. However, he did find that Claimant's active range of motion was less than he had expected. Dr. Hulsey restricted Claimant from lifting more than two to three pounds with her right arm and from engaging in movements above shoulder level.

Claimant was next seen by Dr. Hulsey on June 16, 2010. At that time, Dr. Hulsey recommended that Claimant increase her activity and strengthening exercises. Dr. Hulsey also allowed Claimant to begin lifting weight of up to 10 pounds with her right arm.

On July 17, 2010, Dr. Hulsey noted that Claimant reported a great deal of improvement in her shoulder. He recommended that Claimant continue physical therapy three to four times per week. Dr. Hulsey continued to restrict Claimant from lifting above shoulder level, but did allow her to lift up to 20 pounds with her right arm.

On September 22, 2010, Dr. Hulsey examined Claimant and observed that the hemiarthroplasty was in very good position. Dr. Hulsey believed that Claimant's progress had begun to plateau, therefore, he emphasized the importance of long-term home exercise. Dr. Hulsey also reduced Claimant's physical therapy to one session a week, with the intent of terminating it in six weeks. Dr. Hulsey noted that he expected Claimant to be at maximum medical improvement at her next visit.

On December 1, 2010, Dr. Hulsey examined Claimant for the last time. Claimant had completed her physical therapy program and had not noted much improvement since her last visit. Dr. Hulsey placed Claimant at maximum medical improvement and encouraged her to continue her home exercise program indefinitely. Dr. Hulsey did not believe Claimant would regain much overhead strength in her right arm. He recommended that Claimant not engage in

over the shoulder use of the right arm. Dr. Hulsey also noted that prolonged driving might be difficult because of loss of endurance and pain with turning the steering wheel. Last, Dr. Hulsey recommended that Claimant limit her exposure to physically abusive clients because of her lack of strength.

On December 22, 2010, Dr. Hulsey found that Claimant had sustained 20% permanent partial disability of the right shoulder as a result of her injury and subsequent surgery. He did not believe she would require further surgical treatment.

On November 4, 2010, Dr. Jacques Van Ryn, performed an Independent Medical Evaluation of Claimant at the request of her attorney. (Exhibit 1) Dr. Van Ryn believed that Claimant's shoulder had reached maximum medical improvement. While he did not believe that Claimant would require further surgical treatment, he did recommend that she continue her home exercise program. He also recommended permanent restrictions of: no lifting over 20 pounds, no lifting over two pounds with the right arm, no work above shoulder height, and, no work that requires repetitive rotation of the shoulder.

On August 6, 2014, Dr. Shawn Berkin performed an Independent Medical Evaluation of the Claimant. (Exhibit 2) As a result of this evaluation, Dr. Berkin determined that Claimant had sustained a 45% permanent partial disability to the right shoulder. He further recommended that: Claimant restrict lifting with the right arm to five pounds, Claimant continue to participate in a home exercise program, and Claimant not work above shoulder level. Dr. Berkin also recommended the use of analgesics for control of pain and other symptoms in her right shoulder, hips, knees and multiple joints.

RULINGS OF LAW

The evidence at Hearing supports the conclusion that there is not a reasonable probability that future medical treatment will be needed to cure and relieve the effects of Claimant's work injury.

Pursuant to the Missouri Workers' Compensation statute, an employer is required to provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines as may be reasonably required after the injury or disability, to cure and relieve the effects of the injury. R.S.Mo § 287.140.1 (2007). In order to obtain entitlement to future medical care, Claimant must show by a "reasonable probability" that future medical care is needed by reason of his work-related injury. *Tilley v. USF Holland, Inc.*, 325 S.W.3d 487, 494 (Mo.Ct.App. 2010). "Probable" means founded on reason and experience which inclines the mind to believe but leave room for doubt. *Fitzwater v. Department of Public Safety*, 198 S.W.3d 623, 628 (Mo.Ct.App. 2006). Where future medical benefits are awarded, the medical care must flow from the accident before the employer is to be held responsible. *Cochran v. Industrial Fuels & Resources, Inc.*, 995 S.W.3d 489 (Mo.Ct.App. 1999) (citing *Landers v. Chrysler Corporation*, 963 S.W.2d 275, 284 (Mo.Ct.App. 1997)). An employee may not be entitled to future medical aid involving a work-related injury when the need for the aid is caused by a condition that is not related to the employee's work. *Fitzwater v. Department of Public Safety*, 198 S.W.3d 623 (Mo.Ct.App. 2006).

Following the work accident, Claimant underwent extensive evaluation, surgery, and rehabilitation to cure and relieve the effects of the comminuted fracture of the right proximal humerus. The surgery consisted of a hemiarthroplasty of the right shoulder with reconstruction of tuberosities and a biceps tenodesis. Following surgery, the records reflect that Claimant's right shoulder steadily improved during a course of physical therapy and a home exercise program.

Claimant was examined by three doctors who assessed both her permanent disability and her future medical needs. Dr. Hulsey is an orthopedic specialist who was retained by Employer. He performed Claimant's surgery and treated her for almost a year following that surgery. When Dr. Hulsey placed Claimant at maximum medical improvement (MMI) on December 1, 2010, he indicated that Claimant would not require any further surgery on her shoulder.

Dr. Jacques Van Ryn is an orthopedic specialist retained by the Claimant for an independent medical examination. He examined Claimant on only one occasion. He imposed substantial restrictions on Claimant but agreed that further surgery for this injury was not necessary. Dr. Van Ryn assessed a 50% permanent partial disability to the right shoulder as a result of her injury and subsequent surgery.

Dr. Shawn Berkin was also retained by Claimant for an independent medical examination. Dr. Berkin did not treat Claimant and is not an orthopedic specialist. He examined Claimant on only one occasion, almost four years after she was released by Dr. Hulsey. Dr. Berkin found that, as a result of her work injury, Claimant sustained 45% permanent partial disability of the right shoulder. Dr. Berkin did not address the need for future surgery; therefore, it is reasonable to conclude that he did not believe it would be necessary. He did recommend the use of analgesics for control of pain in Claimant's right shoulder, hips, knees and other joints. Given the array of symptoms for which Dr. Berkin recommended analgesics, their use cannot be attributed to this accident alone.

While there is a divergence of opinions among the experts regarding the degree to which Claimant's shoulder is disabled, that is not at issue in this case. The parties have come to an agreement concerning the nature and extent of permanent partial disability to the shoulder. The only matter at issue is the need for future medical care.

Dr. Hulsey and Dr. Van Ryn, both of whom are orthopedic specialists, are in agreement that Claimant does not need any further treatment for her work injury. The only treatment recommended by Dr. Berkin was the use of analgesics for a myriad of joint and pain complaints.

Therefore, after weighing all of the evidence, I find that the opinions of Drs. Hulsey and Van Ryn are more persuasive regarding Claimant's need for future medical care. Further, as Dr. Berkin's only recommendation for further treatment was directed to a myriad of symptoms and complaints, most of which are not due to this work accident, I find that there are not any recommendations for future medical treatment specifically related to Claimant's work injury.

I do find that the evidence supports that, as a result of her February 3, 2010 work accident, Claimant sustained permanent partial disability of 30% of the right shoulder. Therefore, Claimant is entitled to a payment of \$29,438.71 for her permanent partial disability.

Attorney Mark Floyd is awarded an attorney's fee of 25% of the total Award in this matter, as well as his costs and fees incurred in pursuing this matter.

Made by: _____
LEE B. SCHAEFER
Administrative Law Judge
Division of Workers' Compensation