

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

Injury No.: 06-036346

Employee: Sherry Shamel
Employer: Laclede County
Insurer: Missouri Association of Counties

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 20, 2013, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Margaret Ellis Holden, issued February 20, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 12th day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Sherry Shamel

Injury No. 06-036346

Dependents: N/A

Employer: Laclede County

Additional Party: N/A

Insurer: Missouri Association of Counties

Hearing Date: 11/19/12

Checked by: MEH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? NO
2. Was the injury or occupational disease compensable under Chapter 287? NO
3. Was there an accident or incident of occupational disease under the Law? N/A
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? NO
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
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:
ALLEGED TRIP AND FALL INJURING BACK.
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: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: 0
16. Value necessary medical aid paid to date by employer/insurer? 0

Employee: Sherry Shamel

Injury No. 06-036346.

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$865.00
- 19. Weekly compensation rate: \$696.97/\$365.08
- 20. Method wages computation: BY AGREEMENT

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:0

0 weeks of temporary total disability (or temporary partial disability)

0 weeks of permanent partial disability from Employer

0 weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning N/A, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes No Open

0 weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits: N/A

Permanent total disability benefits from Second Injury Fund:
weekly differential (0) payable by SIF for 0weeks, beginning N/A
and, thereafter, for Claimant's lifetime

TOTAL: SEE AWARD

- 23. Future requirements awarded:

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

CHRISTINE HUTSON

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Sherry Shamel Injury No. 06-036346
 Dependents: N/A
 Employer: Laclede County
 Additional Party: N/A
 Insurer: Missouri Association of Counties
 Hearing Date: 11/19/12 Checked by: MEH

The parties appeared before the undersigned administrative law judge on November 19, 2012 for a final hearing. The claimant appeared in person represented by Christine Hutson. The employer and insurer appeared represented by Henry Herschel.

The parties stipulated to the following facts: On or about February 11, 2006, Laclede County was an employer operating subject to the Missouri Workers' Compensation Law. The employer's liability was fully insured by Missouri Association of Counties. On the alleged injury date of February 11, 2006, Sherry Shamel was an employee of the employer. The claimant was working subject to the Missouri Workers' Compensation Law. The employment occurred in Laclede County, Missouri. The claimant's claim for compensation was filed within the time prescribed by Section 287.430 RSMo. At the time of the alleged accident, the claimant's average weekly wage was \$865.00, which is sufficient to allow a compensation rate of \$696.97 for temporary total disability compensation, and a compensation rate of \$365.08 for permanent partial disability compensation. No temporary disability benefits have been paid to the claimant. The employer and insurer have paid no medical benefits. The attorney fee being sought is 25%.

ISSUES:

1. Whether the claimant sustained an accident which arose out of the course and scope of employment.

2. Whether the claimant gave the employer proper notice.
3. Whether the accident caused the injuries and disabilities for which benefits are being claimed.
4. Whether the employer is obligated to pay past medical expenses.
5. Whether the claimant has sustained injuries that will require future medical care in order to cure and relieve the claimant of the effects of the injuries.
6. Any temporary total benefits owed to the claimant.
7. The nature and extent of permanent disabilities.
8. Whether costs should be assessed pursuant to Section 287.560 RSMo.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The claimant is the Public Administrator for Laclede County. As such she serves as the guardian and conservator of individuals who are unable to care for themselves. This is an elected position and she is beginning her fourth term. She has a staff of four at this time. In 2006 she had one full time and one part-time staff person. While she works with the other elected county officials, she does not report to any of them. She considers herself her own employer.

Prior to February 2006, claimant had relevant pre-existing treatment to her low back. On March 21, 2001, the claimant saw Dr. Scott with several complaints including “intermittent back pain” for which she had been taking Ultram. His impression was chronic back pain. Claimant continues to treat with him for scapula and neck pain. It does not give any details on what area of her back. Dr. Scott’s records contain an x-ray report dated October 30, 2003, which shows degenerative disc disease at L4-5. On August 8, 2005, claimant had visited Dr. Scott complaining of hip and leg pain. A radiology report shows AP Pelvis and right hip; two views were unremarkable. Claimant received epidural injections.

On February 11, 2006, she was preparing an inventory of a woman who had died. She was accompanied by Deputy Debbie Green. While at the home of the deceased she was waiting

for the daughter of the woman to unlock a shed in the yard. It was snowing lightly. The claimant stepped back and tripped over a root. She fell onto her right buttock and skinned her left elbow.

Claimant testified that she felt pain like being kicked in her buttock. She chose not to go to the doctor because she thought it was just a bruise and that she was not hurt that bad. The next day she felt sore. She said her symptoms progressively worsened and would wax and wane from day to day.

Claimant did not notify anyone with the county or insurer of her injury. She testified that she did not think that workers' compensation applied to the elected officials, and she therefore did not think she was covered under the workers' compensation law.

Claimant went to her personal physician, Michael Scott, on February 26, 2006. She testified that she thought she was having heart attack symptoms. Dr. Scott's records reflect a history of "The patient is complaining of chest discomfort. She had one episode of chest heaviness that occurred after a meal. It radiated to her neck, left shoulder and associated with back pain. No shortness of breath, diaphoresis or nausea. Symptoms cleared after 10 to 15 minutes. She has also had approximately 6 episodes a week of a chest heaviness that occurs unpredictably. She feels extremely fatigued during this time and afterwards. Denies reflux symptoms. No tachycardia. Has palpitations at night which when they clear she will often have a 'head rush' symptoms and some chest pressure, as well. She has chronic right-sided back pain secondary to trigger point area. This pain has responded to steroids in the past and has redeveloped, but is intermittent and not too severe. She also has an area on her back that was treated in the past with liquid nitrogen. It redeveloped." There is no mention of a fall or other injury in her history.

Claimant testified that by mid March 2006 she was having more back pain. She recalled going to a funeral and when she got up her back and right leg hurt. She had trouble getting out of

a chair after the funeral. She recalled that on March 12 her back and hip were hurting and she was walking with a limp. On March 23, 2006, she felt she could not take it anymore and called her personal physician the next day for an appointment. She was prescribed physical therapy and completed six sessions. Her pain continued to worsen.

In April 2006 the claimant attended the Missouri Association of Counties Legislative Session. She had previously been president of this organization. While there she spoke with Rodney Miller who was speaking on workers' compensation. She learned that elected officials did fall under the workers' compensation law. Mr. Miller advised the claimant to file a claim, and called the county clerk to report the injury.

An MRI of the lumbar spine without contrast was performed on April 18, 2006. It showed a herniated disc at right L5-S1.

On May 2, 2006, Diane Bauer, an adjuster for the insurer, contacted the claimant and took her recorded statement. The claimant told Ms. Bower that around March 10th she "had another doctor appointment with a dermatologist and I noticed that day it was really hard to sit in his examining chair for some reason. I had to stand up and wait for him to come in there, cause it was just was getting more and more and more uncomfortable to sit, and I'm thinking oh you know, this is kind of strange. You know why is this all the sudden giving me all this problems." She told her that she then started taking some Darvocet she had left over from a dentist appointment.

In her statement, claimant continued to tell Ms. Bauer that on March 18, 2006, she "noticed her right leg and foot going numb. And I was a little concerned about that, but you know just this was really weird stuff going on here." She said that she then called her doctor and reported that she was "starting to get some numbness in my leg, and I'm starting to get this really bad pain in my bottom...The sciatic nerve was actually on the 11th is when the sciatic nerve just

really started giving me fits and that's when I started taking the Darvocet." In response to Ms. Bauer asking her if she had "ever had a similar type of injury, have you ever had back problems or hip problems before?" She answered, "I did go and see the doctor oh I can't remember when it was, probably about three years ago, with something similar to the sciatic pain...And they told me I had degenerative disc disease."

The next day, on May 3, 2006, the claimant saw Dr. Bassem Hadi, a neurosurgeon. In the history there is an indication of low back pain for three years. She rated her pain on that date as a 10/10 and said it was gradual onset following an injury on February 11, 2006. He wrote a letter that date to Dr. Scott reporting that her pain was concurrent with a right L5-S1 disc herniation, and recommended a discectomy. He said he would like to do this sooner than later. He also said she had some degenerative disc disease at L4-5 and L5-S1. He does not address any cause or any injury. He did not feel a fusion was necessary at that time but could be later.

Diane Bauer made the claimant a doctor's appointment for May 31, 2006. Claimant felt she could not wait that long, and the appointment was changed to May 15. On May 4, 2006, Ms. Bauer faxed a letter to claimant's attorney stating that an appointment was scheduled with Dr. Ted Lennard on May 16, 2006 at 9:00 a.m. The letter also states "**Dr. Ted Lennard is the only authorized treating physician at this time. We have not authorized any other physician. Therefore, if your client has treated with any other physicians in regard to her injury of 02/11/06, it will not be authorized.**" (emphasis not added.)

The claimant testified that an appointment had already been made for surgery on May 8, 2006. She felt Dr. Hadi was insistent that she have surgery as soon as possible. She decided to go forward with the surgery with Dr. Hadi. On May 8, 2006, Dr. Hadi performed a right L5-S1 microdiscectomy.

Dr. Ted Lennard examined the claimant on June 20, 2006, after her surgery. Dr. Lennard testified by deposition. He said that she gave him a history of falling on February 11, 2006, and had immediate pain in her right hip and low back. She also told him that she never reported the injury saying "I kept thinking it would get better. It would get better." She identified specifically March 11, 2006, as the date that she began having leg pain. When asked about her prior diagnosis of degenerative disc disease, he said that she was diagnosed in February 2006 with spondylosis, which he explained means degenerative changes adjacent to the vertebra. When questioned regarding causation, he felt the work injury of February 11, 2006 was not the prevailing factor. When asked for his reasoning he said, "There was no comment about her injury in the ---her treating physician's records immediately following this incident, and from what she told me and what the records noted that her leg complaints didn't start until a month after the 2/11/06 incident, which would indicate at that time the effect on the nerve root itself." He later continued to say "Well, radiculopathy presents itself with lower extremity symptoms of some sort, radiating pain, radiating numbness, or tingling down the extremity, and the history that I got from Ms. Shamel is that that was not present for about a month after this incident. Q: Okay. And if there would have been disk pathology or a herniated disk at L5-S1 that had radicular symptoms, would that have been something that would have definitely been noticed by a patient with that kind of diagnosis? A: Yes. With some traumatic event, she should have noticed that almost immediately, if not within a few days, maybe up to a week, by typically wouldn't start a month after the incident."

Dr. Scott saw her on October 2, 2006, for right hip and back pain after her surgery. He recommended Aleve and stretching exercises.

Dr. Shane Bennoch examined the claimant on November 21, 2007. In his report it was Dr. Bennoch's opinion "that the slip and fall that occurred on 2/11/2006 was the prevailing factor

in causing the large herniated disc at L5-S1 and resulting surgery and resulting impairment.” Regarding pre-existing low back pain he also noted that she had back pain that appeared musculoligamentous and resolved with anti-inflammatories and allocated no disability for it.

After carefully considering all of the evidence, I make the following rulings:

Section 287.420 RSMo., states: “No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.” The workers’ compensation law is to be strictly construed pursuant to Section 287.800 RSMo. The only exception to the notice requirement is if the employer was not prejudiced as a result of the lack of notice.

Section 287.020.1 RSMo. defines an employee as “every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations.” In defining who is an employer, Section 287.030.2 RSMo. includes government entities, specifically, “The state, county, municipal corporation, township, school....” Based on the definitions provided in the statute, claimant’s belief that she is self-employed as an elected official, Public Administrator for Laclede County, is misplaced. The statute specifically defines employees to include those under appointment or election and employers to include counties. So the fact that she had actual knowledge of her own injury is not sufficient to impute actual knowledge to the employer.

The claimant herself testified that she did not tell anyone associated with the county or Missouri Association of Counties about her fall until at least sometime in April when she was at the meeting and spoke to Rodney Miller. This is clearly outside the 30 day requirement. There

is no evidence of actual notice. Furthermore, I find that the county and the insurer were prejudiced by the lack of notice and the fact that the claimant made an appointment on her own and chose to seek and obtain unauthorized treatment after she was clearly notified that it was unauthorized, thereby preventing a physician to examine her before the surgery.

Even if the claimant could have overcome the notice requirement, I would have been compelled by the weight of the evidence to find that the herniated disc and the need for surgery were not caused by any work related injury, and specifically not the fall of February 11, 2006.

Dr. Lennard testified that the claimant’s fall on February 11, 2006 was not the prevailing factor in claimant’s condition. He based this on the lack of history given to Dr. Scott shortly after the injury, but most importantly, her leg complaints did not start for a month after the fall. He said that radiculopathy present “with lower extremity symptoms of some sort, radiating pain, radiating numbness, or tingling down the extremity, and the history that I got from Ms. Shamel is that that was not present for about a month after this incident.... With some traumatic event, she should have noticed that almost immediately, if not within a few days, maybe up to a week, by typically wouldn’t start a month after the incident.”

Based on Dr. Lennard’s testimony along with the history of prior degenerative disease in the low back, the lack of a history given to Dr. Scott on February 26, 2006, and the claimant’s statements that she had no leg pain until after March 11, 2006, I would find the claimant’s low back condition is not compensable.

As a result of this ruling, all other issues are moot.

Made by: _____
 Margaret Ellis Holden
Administrative Law Judge
Division of Workers' Compensation