

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

Injury No.: 03-145260

Employee: Dawn Shelly

Employer: Drury Inn, Inc.

Insurer: Self-Insured

This 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, read the briefs, 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 with this supplemental opinion.

Discussion

Accident

The administrative law judge denied employee's claim on a finding that she failed to meet her burden of proving she sustained an "accident" as that term is defined by the Missouri Workers' Compensation Law. The administrative law judge was persuaded by employer's argument that employee's testimony about the circumstances of the accident is not credible because the medical records recite a number of other non-work-related incidents as contributing to employee's low back pain. The version of § 287.020.2 RSMo applicable to this claim defines "accident" as follows:

The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.

Employee testified that on June 3, 2003, she bent down to pick up a big box of bananas at work and experienced pain when she stood back up that caused her to exclaim, "Ouch." Employee testified that her supervisor, Kara Coustry, heard employee and came into the room and asked her what happened. Employee told Kara Coustry what happened, told her she didn't want to seek medical treatment, and then left work fifteen minutes early because of low back pain. Employer did not present any contrary testimony.

Employee's Exhibit Y is an internal document of employer's titled "Incident Report." The document reflects an acknowledgement by Kara Coustry that employee told her about two lifting episodes at work that caused employee to experience pain in her back. The document reflects Kara Coustry identified the date of the lifting incidents as June 6, 2003, but we view this minor discrepancy as inconsequential. We view the document as substantially corroborative of employee's hearing testimony. Meanwhile, employer's

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Exhibit 7 corroborates employee's testimony that she left work fifteen minutes early on June 3, 2003.

Employee's hearing testimony is the only firsthand evidence of what occurred during her work shift on June 3, 2003. If her testimony is credible, she met her burden of proving she sustained an accident. *Clayton v. Langco Tool & Plastics, Inc.*, 221 S.W.3d 490, 492 (Mo. App. 2007). The administrative law judge did not identify any aspect of employee's presentation or demeanor at the hearing as a reason for discounting employee's testimony regarding the accident. Instead, the administrative law judge reasoned that if employee told treating doctors about a variety of incidents in which she hurt her back, she must not be credible about the lifting incident on June 3, 2003. We disagree with that reasoning. Employee testified that she did experience a number of incidents that caused her to experience low back pain. The fact that she experienced all of these incidents and reported them to different treatment providers does not logically lead to a conclusion that employee was dishonest when she testified at the hearing that she lifted a box of bananas at work and experienced low back pain on June 3, 2003. As will be seen below, we believe the issue of multiple causative incidents is more appropriately dealt with under a medical causation analysis.

In light of employee's Exhibit Y combined with employer's failure to present any firsthand testimony to rebut employee's testimony about what happened, we discern no reason to reject employee's testimony regarding the lifting incident on June 3, 2003. Instead, we find employee credible regarding the circumstances of the lifting incident. We find that on June 3, 2003, employee bent over to pick up a big box of bananas and experienced low back pain. Because these circumstances unquestionably satisfy the statutory definition, we conclude employee sustained an "accident" for purposes of § 287.020.2.

Given our findings and conclusions on the issue of accident, we do not adopt the administrative law judge's findings, analysis, or conclusions beginning under the heading "Rulings of Law" on page 16 of the award and continuing to page 18.

Medical causation

We have concluded employee sustained an "accident" for purposes of the Missouri Workers' Compensation Law. We turn now to the question of medical causation of employee's low back condition or disability. Section 287.020 RSMo sets forth the relevant statutory framework for our analysis, and provides, in relevant part, as follows:

2. ... An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

In addition to the accident employee sustained on June 3, 2003, employee identified no less than five other incidents from May 2003 to February 2004 in which she suffered a traumatic event resulting in low back pain. Specifically, employee (1) lifted a box of paper at work in May 2003 that caused her to suffer low back pain similar but not as severe as she experienced on June 3, 2003; (2) stood up from a couch while at home

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during the evening of June 3, 2003, and experienced pain so severe she had to go immediately to the emergency room; (3) was, at some point in June 2003, dragged to her knees when a dog jerked to the side while she was holding its collar, which made her low back pain worse; (4) was, at some point in October 2003, knocked down by her stepmother's dog, which exacerbated employee's low back pain to the extent she went to the emergency room; and (5) fell down some stairs at work on February 17, 2004, which changed her symptoms of low back pain from left sided to more right sided pain, and also caused employee to experience an electric shock sensation that goes up her leg and spine when she puts weight on her foot.

Given this history of so many different traumatic events that caused employee to experience low back pain, and in some cases changed her symptoms or made them worse, it would seem the key issue in this case is whether the medical experts who testified on employee's behalf were able to provide a convincing explanation why employee's work should be seen as a substantial factor in causing the medical condition or disability of the low back of which she now complains. Notably, however, both parties failed to brief the issue of medical causation.

Turning to the expert medical evidence of record, we discover that the treating physician Dr. Smith recorded employee's belief that lifting heavy boxes caused her pain, and when employee's counsel asked him for a causation opinion, he opined that employee's back pain "seemed to first occur after a lifting injury at work." In his letter, Dr. Smith did not specifically identify the June 2003 accident, nor did he distinguish (or even mention) the other potentially causative incidents between May 2003 and February 2004. In light of these failings, and because Dr. Smith's "seemed to" opinion does not strike us as very confident or persuasive, we find Dr. Smith's causation opinion lacking credibility.

Next, we turn to the evaluating physician Dr. Feinberg's testimony. Dr. Feinberg believes that employee's pain and need for a surgical consultation are "causally related" to the June 2003 accident, but the doctor also lumped into his causation opinion the February 2004 incident in which employee fell down some stairs, which he opined "reinjured and aggravated" employee's low back. Dr. Feinberg listed some diagnostic studies which he believed demonstrated the effects of the 2004 incident, but did not specifically identify what medical conditions or disabilities were caused by the June 2003 accident as opposed to the February 2004 incident, nor did he explain why work, as among the numerous other traumatic events employee suffered, should be deemed a substantial factor in causing such conditions. Owing to these deficiencies, we find Dr. Feinberg's causation opinion lacking credibility.

Finally, we observe that Dr. Raskas evaluated employee on November 7, 2008, recorded employee's history of lifting things in 2003 and falling down stairs in 2004, and offered the opinion that employee is totally disabled and needs surgery. But Dr. Raskas did not provide a causation opinion of any kind.

Meanwhile, employer advances testimony from Drs. Rende, Cantrell, and Chabot, each of whom agree that work was not a substantial factor in causing employee's low back

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complaints, citing the vague history, lack of documentation, and numerous intervening events and injuries.

Given the state of the expert medical evidence as described above, we ultimately find the testimony from Drs. Rende, Cantrell, and Chabot more credible than the testimony from Drs. Smith, Feinberg, and Raskas. We are persuaded that employee has failed to meet her burden of proving medical causation. We conclude that employee did not sustain a compensable injury because work was not a substantial factor in the cause of employee's low back condition or disability.

Clerical errors

The parties, in their briefs, have identified some factual errors in the administrative law judge's award. We have reviewed the record and determined that certain of the administrative law judge's findings are indeed somewhat inaccurate. We hereby correct the administrative law judge's errors as follows.

On page 7 of her award, the administrative law judge states: "The records of Three Rivers Healthcare (Exhibit A), dated 06-06-03, show a history on page three stating that Employee stood up and had sudden pain, causing tingling in her toes." The administrative law judge incorrectly recited the date of the record from Three Rivers Healthcare. The correct date is June 3, 2003, not June 6, 2003.

On page 8 of her award, the administrative law judge states: "Employee testified that she received a pain injection, and that it seemed to work, but not for long. Dr. Soeter's records from Employee's 07-10-03 visit state that Employee's low back pain was basically resolved. Employee's testimony was to the contrary." This finding provides an incomplete version of Dr. Soeter's note and identifies a contradiction with employee's testimony where it is not clear that one exists. Dr. Soeter's treatment note from July 10, 2003, indicates:

The patient returns to clinic today reporting good pain relief, but it was short lived. She reports the pain is basically resolved on her low back, but she still has some pain on her right hip and right behind her right hip area. Otherwise, patient reports no new pain. The character of the pain has been the same.

Transcript, page 221.

The treatment note is confusing in that it indicates employee said her low back pain was "basically resolved" but at the same time she still had pain "right behind her right hip area" and that "the character of the pain has been the same." But the treatment note does at least partially comport with employee's testimony that she experienced pain relief from the injection, and that it didn't last very long. Given these circumstances, we disclaim the administrative law judge's finding as quoted above identifying a contradiction between employee's testimony and Dr. Soeter's July 10, 2003, treatment note.

On page 10 of her award, the administrative law judge states: "Dr. Neighmond's handwritten office notes from 08-21-03 show a complaint of back pain. They also

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include the following: ‘Last week – Drury Inn – light duty – transferred-w/o restrictions. May 03 bent down to pick up purse.’” The parties dispute whether this handwritten treatment note from an unknown person in Dr. Neighmond’s office really says that employee picked up a “purse” or, as employee argues, “paper.” We are unable to read this handwriting sufficiently to discern either “purse” or “paper,” and, because we do not deem a stray handwritten comment in the treatment record to be particularly persuasive evidence concerning the issue of accident in this case, we wholly disclaim the above-quoted finding from the administrative law judge.

Finally, on page 13 of her award, the administrative law judge states: “Jefferson County Hospital had reported a bulging disc in September of 2003.” This finding is inaccurate. It appears the administrative law judge was referring to a Jefferson Memorial Hospital intake form dated October 9, 2003, whereon an unidentified person wrote “bulging disc.”

Conclusion

The Commission affirms and adopts the findings, conclusions, decision, and award of the administrative law judge to the extent they are not inconsistent with this supplemental opinion. We deny employee’s claim because she failed to meet her burden of proof as to the issue of medical causation.

All other issues are moot.

The award and decision of Administrative Law Judge Maureen Tilley, issued August 7, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 6th day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

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

Injury No.: 04-015738

Employee: Dawn Shelly
Employer: Drury Inn, Inc.
Insurer: Self-Insured
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. Having reviewed the evidence, read the briefs, 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 with this supplemental opinion.

Discussion

Medical causation

The administrative law judge denied employee's claim on a finding that employee failed to meet her burden of proof as to the issue of medical causation. The administrative law judge did not cite the relevant statutory provision and concluded that employee's "accident" (as opposed to her "work") was not a substantial factor in causing her medical condition or disability. The administrative law judge also rendered a number of factual findings that suggest she deemed the issue of employee's credibility (as opposed to the credibility of the medical experts) as determinative of the issue of medical causation. In light of these concerns, we ask whether the administrative law judge appropriately analyzed the issue of medical causation. We write this supplemental opinion in order to make clear that we have applied the appropriate statutory analysis.

The parties dispute whether employee suffered a compensable injury when she fell down some stairs at work on February 17, 2004. Section 287.020 RSMo provides, in relevant part, as follows:

2. ... An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

To answer the question whether employee's work was a substantial factor in the cause of her low back condition and disability, we look to the expert medical evidence. Employee, in her brief, misstates the record when she avers that Drs. Feinberg, Smith, and Raskas each opined that employee's February 2004 accident is responsible for a

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change in pathology as between a June 2003 and June 2004 MRI. In fact, none of these doctors so opined.

Dr. Smith did not even mention the 2004 accident, Dr. Raskas took a history of it but offered no causation opinion, and Dr. Feinberg merely offered the vague testimony that employee's 2004 accident "re-injured and aggravated" an earlier condition of employee's low back. Dr. Feinberg listed some diagnostic studies which he believed demonstrated a change in pathology, but he did not identify what medical conditions or disabilities were preexisting as opposed to those that were caused by the "re-injury and aggravation," nor did he explain why work, as among the numerous other traumatic events employee suffered, should be deemed a substantial factor in causing such conditions.

Meanwhile, employer advances testimony from Drs. Rende, Cantrell, and Chabot, each of whom agree that work was not a substantial factor in causing employee's low back complaints, citing the vague history, lack of documentation, and numerous intervening events and injuries.

We ultimately find employee's experts Drs. Smith, Feinberg, and Raskas lacking credibility on the question whether work was a substantial factor in causing her low back pain. We are persuaded that employee has failed to meet her burden of proving medical causation. We conclude that employee did not sustain a compensable injury because work was not a substantial factor in the cause of employee's low back condition or disability.

Clerical errors

The parties, in their briefs, have identified some factual errors in the administrative law judge's award. We have reviewed the record and determined that certain of the administrative law judge's findings are indeed somewhat inaccurate. We hereby correct the administrative law judge's errors as follows.

On page 7 of her award, the administrative law judge states: "The records of Three Rivers Healthcare (Exhibit A), dated 06-06-03, show a history on page three stating that Employee stood up and had sudden pain, causing tingling in her toes." The administrative law judge incorrectly recited the date of the record from Three Rivers Healthcare. The correct date is June 3, 2003, not June 6, 2003.

On page 8 of her award, the administrative law judge states: "Employee testified that she received a pain injection, and that it seemed to work, but not for long. Dr. Soeter's records from Employee's 07-10-03 visit state that Employee's low back pain was basically resolved. Employee's testimony was to the contrary." This finding provides an incomplete version of Dr. Soeter's note and identifies a contradiction with employee's testimony where it is not clear that one exists. Dr. Soeter's treatment note from July 10, 2003, indicates:

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Transcript, page 221.

The treatment note is confusing in that it indicates employee said her low back pain was “basically resolved” but at the same time she still had pain “right behind her right hip area” and that “the character of the pain has been the same.” But the treatment note does at least partially comport with employee’s testimony that she experienced pain relief from the injection, and that it didn’t last very long. Given these circumstances, we disclaim the administrative law judge’s finding as quoted above identifying a contradiction between employee’s testimony and Dr. Soeter’s July 10, 2003, treatment note.

On page 10 of her award, the administrative law judge states: “Dr. Neighmond’s handwritten office notes from 08-21-03 show a complaint of back pain. They also include the following: ‘Last week – Drury Inn – light duty – transferred-w/o restrictions. May 03 bent down to pick up purse.’” The parties dispute whether this handwritten treatment note from an unknown person in Dr. Neighmond’s office really says that employee picked up a “purse” or, as employee argues, “paper.” We are unable to read this handwriting sufficiently to discern either “purse” or “paper,” and, because we do not deem a stray handwritten comment in the treatment record to be particularly persuasive evidence concerning the issues involved in this case, we wholly disclaim the above-quoted finding from the administrative law judge.

On page 13 of her award, the administrative law judge states: “Jefferson County Hospital had reported a bulging disc in September of 2003.” This finding is inaccurate. It appears the administrative law judge was referring to a Jefferson Memorial Hospital intake form dated October 9, 2003, whereon an unidentified person wrote “bulging disc.”

Finally, we note that the administrative law judge’s award contains what appears to be a formatting error in that the text that appears at the end of page 18 does not logically or grammatically correspond to that which appears at the beginning of page 19. It appears that a recitation of the findings of Drs. Smith and Raskas have been omitted from the award as a result of this error. But the findings of these doctors are recounted elsewhere in the award that we have adopted, and because we have rendered our own findings and analysis herein as to the credibility of these doctors, there is no need for us to amend the award by filling in the (apparent) blanks in the administrative law judge’s analysis. Instead, we specifically disclaim the administrative law judge’s analysis beginning on page 18 with a bullet point and the words “On 11-18-08, Dr. Raskus (sic)...” and continuing to page 19 through the sentence that concludes “...is not the case in this patient’s case.”

Conclusion

The Commission affirms and adopts the findings, conclusions, decision, and award of the administrative law judge to the extent they are not inconsistent with this supplemental opinion. We deny employee’s claim because she failed to meet her burden of proof as to the issue of medical causation.

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All other issues are moot.

The award and decision of Administrative Law Judge Maureen Tilley, issued August 7, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 6th day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Dawn Shelly

Injury No. 03-145260 and 04-015738

Dependents: N/A

Employer: Drury Inn Inc.

Additional Party: Second Injury Fund for Injury No. 04-015738 (left open)

Insurer: Self Insured, TPA Gallagher Bassett Services

Hearing Date: May 21, 2012

Checked by: MT/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein?
03-145260: No.
04-015738: No.
2. Was the injury or occupational disease compensable under Chapter 287?
03-145260: No.
04-015738: No.
3. Was there an accident or incident of occupational disease under the Law?
03-145260: No.
04-015738: Yes.
4. Date of alleged accident or onset of occupational disease?
03-145260: 6-3-2003.
04-015738: 2-17-2004.
5. State location where alleged accident occurred or occupational disease contracted:
03-145260: Butler County, Missouri.
04-015738: Jefferson County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
03-145260: Yes.
04-015738: Yes.

7. Did employer receive proper notice?
03-145260: N/A (denied on accident)
04-015738: Yes.
8. Did accident or occupational disease arise out of and in the course of the employment?
03-145260: No.
04-015738: No.
9. Was claim for compensation filed within time required by law?
03-145260: Yes.
04-015738: Yes.
10. Was employer insured by above insurer?
03-145260: Yes.
04-015738: Yes.
11. Describe work employee was doing and how alleged accident happened or occupational disease contracted:
03-145260: Employee alleges that she injured her back while lifting a box of bananas while at work.
04-015738: Employee alleges that she injured her head, neck and low back when she fell down stairs while at work.
12. Did alleged accident or occupational disease cause death?
03-145260: 6-3-03.
04-015738: 2-17-04.
13. Parts of body injured by accident or occupational disease:
03-145260: Low back.
04-015738: Low back.
14. Nature and extent of any permanent disability:
03-145260: N/A
04-015738: None.
15. Compensation paid to-date for temporary total disability:
03-145260: None.
04-015738: None.
16. Value necessary medical aid paid to-date by employer-insurer:
03-145260: None.
04-015738: \$1,406.27

17. Value necessary medical aid not furnished by employer-insurer:
03-145260: None.
04-015738: None.
18. Employee's average weekly wage:
03-145260: N/A
04-015738: N/A
19. Weekly compensation rate:
03-145260: N/A
04-015738: N/A
20. Method wages computation:
03-145260: N/A
04-015738: N/A
21. Amount of compensation payable:
03-145260: N/A disputed but not ruled upon because case was denied
04-015738: N/A disputed but not ruled upon because case was denied
22. Second Injury Fund liability:
03-145260: N/A
04-015738: Left open.
23. Future requirements awarded:
03-145260: N/A
04-015738: N/A

FINDINGS OF FACT AND RULINGS OF LAW

On May 21, 2012 the employee, Dawn Shelly, appeared in person and with her attorney, John Schneider, for a hearing for a temporary award. The Second Injury Fund was left open on 04-015738. The employer was represented at hearing by its attorney, Mark Anson. In both cases, there was an issue requesting that if the Administrative law Judge does not find liability for the Employer-Insurer, then the temporary award would be converted to a final award. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

03-145260

1. Covered Employer: Employer was operating under and subject to the provisions of Missouri Workers' Compensation Act and they were self insured.
2. Covered Employee: On or about the date of the alleged accident or occupational disease the employee was an employee of Drury Inns Inc.
3. Statute of Limitations: Employee's claim was filed within the time allowed by law.
4. Medical aid furnished by Employer-Insurer: None.
5. Temporary disability paid by Employer-Insurer: None

04-015738

1. Covered Employer: Employer was operating under and subject to the provisions of Missouri Workers' Compensation Act and they were self-insured.
2. Covered Employee: On or about the date of the alleged accident or occupational disease the employee was an employee of Drury Inns Inc.
3. Accident: On or about February 17, 2004 the employee sustained an accident arising out of and in the course of her employment.
4. Notice: Employer had notice of employee's accident.
5. Statute of limitations: Employee's claim was filed within the time allowed by law.
6. Medical aid furnished by Employer-Insurer: Amount paid: \$1,406.27.
7. Temporary disability paid by Employer-Insurer: None.

ISSUES:

03-145260

1. Accident: On or about June 3, 2003, the employee sustained an accident or occupational disease arising out of and in the course of his employment.
2. Notice: Employer had notice of employee's accident.
3. Average weekly wage and rate. Employee is claiming the average weekly wage is \$290.00 and the rate is \$191.40. Employer-Insurer is claiming the average weekly wage is \$246.89 and the rate is \$164.43.
4. Medical causation: Whether Employee's injury was medically causally related to accident or occupational disease.

5. Employee's claim for previously incurred medical. The amount claimed was \$910.00 for purposes of this hearing, was \$910.00 for out-of-pocket expenses. The Employer-Insurer is disputing this claim based on authorization, reasonableness, necessity and casual relationship.
6. Employee's claim for additional or future medical aid.
7. Additional temporary total disability for the time periods of 6-3-03 through 2-17-04. This is for 20 weeks. The amount claimed was \$3,800.00.
8. Employee is requesting sanctions for failure to report the work injury as required by law including fees and costs under Missouri Revised Statute Section 287.560.
9. If the administrative law judge does not find liability, then it is requested that the temporary award be converted into a final award.

04-015738

1. Average weekly wage and rate. Employee is claiming the average weekly wage is \$300.00 and the rate is \$200.00. Employer-Insurer is claiming the average weekly wage is \$195.70 and the rate is \$130.47.
2. Medical causation: Whether Employee's injury was medically causally related to accident or occupational disease.
3. Employee's claim for previously incurred medical. The amount claimed is \$1,250.00 for medication and \$1,500.00 for payments to physicians. The total amount claimed is \$2,750.00. The Employer-Insurer is disputing this claim based on authorization, reasonableness, necessity and casual relationship.
4. Employee's claim for additional or future medical aid.
5. Additional temporary total disability for the time periods of 1-1-05 through date of hearing. The amount claimed was \$17,000.00.
6. If the administrative law judge does not find liability, then it is requested that the temporary award be converted into a final award.

EXHIBITS:

The following exhibits were offered and admitted into evidence for 03-145260 and 04-015738

Employee's Exhibits

- A. Three Rivers Healthcare
- B. Medical records
- C. Pain Management Center records
- D. Records of Ozark Physical Therapy
- E. Records of Cedar Hills Family Medicine
- F. Records of Dr. Michael Chabot
- G. Records of Jefferson Memorial Hospital
- H. Pain Management Services records
- I. Curriculum Vitae of Brian Douglass Smith
- J. Jefferson Memorial Hospital records
- K. Jefferson Memorial Hospital records

- L. Injury Specialists
- M. Jefferson Memorial Hospital records
- N. Pain Management Services records
- O. Injury Specialists-Dr. Feinberg report
- P. St. Louis Spine Center Alliance-Dr. Raskus report
- Q. Report of Injury
- R. Report of Injury
- S. Prescriptions
- T. Bill statement
- U. Drury Inn Hotel Safety Meeting Workers' Compensation quiz
- V. Letter from Drury Hotels
- W. Statement of Claim. Weekly indemnity instructions
- X. Epoch paperwork filled out by Employee
- Y. Letter from Mark Anson
- Z. Incident report
- AA. Letter from the law office of Mark Anson
- BB. Medical records release

Employer-Insurer's Exhibits

1. Separation form and letter to employee stating reason for removal from employment rolls
2. Job description
3. Acknowledgement of receipt of employment manual
4. Personnel action notices
5. Wage statements
6. "Check stubs" for wages
7. Attendance records
8. Statement of employer
9. Paperwork from 7-3-03 application for weekly indemnity benefits
10. Paperwork from 9-11-03 application for weekly indemnity benefits
11. Return to work slip for 12-15-03
12. List ("check stubs") of disability payments made for the first two periods of first-party disability payments
13. E-mail from Kara Coustry, dated 7-23-03
14. September 2003 FMLA request
15. Internal report of injury for injury of 2-17-04
16. Weekly benefit claim for the period beginning 3-16-04
17. Video Surveillance CD and paper report from May 2006
18. Reports from Dr. Cantrell and Dr. Rende
19. Deposition of Dr. Rende
20. Report of Dr. Chabot

On June 28, 2012, I received a letter from John Schneider, Employee's attorney, requesting additional records be added to Exhibit S. Employee's attorney stated in the letter that Employer-Insurer's attorney, Mark Anson, did not object. Furthermore, attorney Anson faxed a letter on

June 5, 2012, stating that he does not have an objection to adding the documentation to Exhibit S. The letter, along with the additional records were admitted and attached to Employee's Exhibit S.

The Employer-Insurer objected to the Employee's Addendum No 2 contained in Employee's purposed award. This objection was faxed to the Cape Girardeau Workers' Compensation office on July 6, 2012. I agree with Employee that Addendum No. 2 (referred to as appendix 2 in Employee's purposed award) is not evidence. It is simply a part of Employee's purposed award. Therefore, I over rule Employer-Insurer's motion to exclude this appendix/addendum. Therefore, I will review the purposed award. However, the purposed awards are not evidence and are not admitted into evidence.

FINDINGS OF FACT

Employee, Dawn Shelly, initially signed a claim for compensation, alleging that she had suffered a job-related injury on June 6, 2003. Employee later amended her claim, changing the date of the alleged injury to June 3, 2003. Employment records (Exhibit 7) showed that the Employee had not worked on June 6, 2003.

Employee testified that she had begun working for Drury Inn (Pear Tree) in Poplar Bluff, after moving to Poplar Bluff with her boyfriend. She stated that they had made the move based on the prospect of better employment for the boyfriend.

Employee testified that she was a full-time employee, and that full-time was 40 hours per week, and that she always or almost always worked 40-hour weeks. The employer's witnesses testified that in 2003 "full-time" for employees like the claimant was 32 hours per week. Exhibit 7 shows all days worked by Employee from June 1, 2003 through March 14, 2004. That exhibit shows that Employee worked a 40-hour week on only two of the 24 weeks listed (see Addendum 1).

The records of Three Rivers Healthcare (Exhibit A), dated 06-06-03, show a history on page three stating that Employee stood up and had sudden pain, causing tingling in her toes. The history also indicates "has been lifting things last two days". Below that the space for "location" of the incident is marked "home". Employee denied making that statement.

Employee explained the discrepancy by stating that an incident occurred at the Drury Inn, while she was picking up a box of bananas. She stated that she initially did not want to go to the hospital. Later in the day, she said she stood up from a couch and felt more pain, and then went to the hospital. The history taken at the hospital does not mention work, or a box of bananas.

Employee received follow-up care on 06-06-03. Exhibit B contains a history on page 1, which Employee interprets as saying "lifting boxes at work". It is not actually clear that the last word in the sentence is "work". The Employer-Insurer argues that it looks like "lifting boxes at home". After examining Exhibit B, I am unable to determine what the sentence states. The word in question does not appear to be "work" or "home."

Employee sought medical care on 06-09-03. The record states that she gave the additional history of the dog dragging her, causing additional pain, including radicular pain.

On 06-19-03, and 07-03-03, the diagnosis was “Chronic” low back pain.

Dr. Soeter’s record of 06-26-03: Employee saw Soeter for the first time on June 26, 2003 at The Pain Management Center at Three Rivers Healthcare. The initial evaluation stated that the pain began when Employee was “just picking up boxes.” The typewritten notes from 6-23-03 state that Employee gives a history of pain on the low back starting back in the middle of May when she was standing up from a dining table with a plate of in her hands. She felt pain right at her low back region, going all the way down to the front of her thighs. It was severe pain. She threw the plates on the floor and went to the emergency room. She started having problems since then. A month and a half ago, she had been moving and had been packing and unpacking boxes with a lot of lifting. She feels the pain gradually got worse during that period of time.” Employee denied making these statements to Dr. Soeter.

On 7-16-03, in support of a request by Employee for short-term disability payments for time off work from 06-06-03 to 07-03-03, Nurse Practitioner Dorothy Walker filled in and signed part of the form stating that Employee’s back pain started in May, when arising from the dining room table. It went on to state that later, the Employee was dragged by a dog, which made the pain worse. The question as to whether the incident was work-related was marked “no”. Employee denied making such a statement to the Nurse Practitioner.

Employee testified that she received a pain injection, and that it seemed to work, but not for long. Dr. Soeter’s records from Employee’s 07-10-03 visit state that Employee’s low back pain was basically resolved. Employee’s testimony was to the contrary.

Employee stated that Drury employee Kara Coustry was a witness to the fact that she suffered pain on the date of the alleged incident. She stated that thereafter, Ms. Coustry engaged in some sort of a campaign of trying to have the Employee use FMLA and short-term disability (STD) benefits. Employee stated that Ms. Coustry did this in order to get a bonus.

Employee had initially filled in and signed a request for short term disability, filling in both “illness” and “accident”; in response to the question of whether it was work related, filled in both “yes” and “no” (Exhibit 9). A home office employee of Drury noticed this discrepancy and stated that the claim could not be processed in this way (Exhibit 8). The home office employee quoted Ms. Coustry as stating that the injury was not work related, and asked that the claim be processed as an illness. This was confirmed by email on July 23 (Exhibit 13).

Witness Vercellino was the General Manager of the hotel at which Employee worked in June of 2003. Witness Karsten was the Assistant General Manager of the hotel at which Employee worked in February of 2004. Witness Vercellino and Witness Karsten testified that per Drury policy, only the employee could fill in the

employee's portion of the page. Consistent with that policy, the application was returned so that Employee could make whatever changes she wanted (Exhibit 9, page 3).

Employee testified that she actually signed two separate applications, one stating that the alleged incident was both work related and not work related, and one saying that it was not work related. Inspection of the exhibits shows that all words written by Employee in the two "front pages" are absolutely identical, in both size and form, except for changes to the two boxes referred to above. Similarly, all handwritten entries in the employer's portion of the front page of the application are exactly identical in both size and form.

There is one rear page only, for the application for short term disability, and that was the one signed by the Nurse Practitioner.

The amended application was sent on for processing (Exhibit 10, page 1). Employee received four weeks of short term disability benefits.

Witness Vercellino testified that Employee did not at any time report a work accident to her. Rather, when Employee talked about lower back pain, she mentioned an auto accident.

In response to questions as to whether the management employees received bonuses for keeping workers' compensation expenses down, Witness Vercellino and Witness Karsten both testified that there was a regular safety contest run at Drury hotels, to try to avoid serious lost time accidents. If a hotel avoided lost time accidents for six months, each employee, including management, would win a prize valued at approximately ten dollars. Witness Scott Harvey, risk manager for the Drury Hotel chain, said that the contest was run twice a year. Management employees and other employees would win exactly the same prize. There were no incentive payments or bonuses to management employees if there were no accidents whatsoever in any six month period.

As to Employee's Exhibit U, Witness Harvey testified that the document was an outline for use of managers at a safety meeting. The message was directed at employment safety and preventing accidents, and not at avoiding reporting of accidents, as the employee had contended. Witness Harvey confirmed what was written in paragraph 4 of the document, namely that the company was self-insured for three programs: workers' compensation, health insurance, and short-term disability. Whether the employee was injured on the job, or injured away from the job, the company would pay benefits.

Witness Harvey testified that if a person tried to convince an employee to use first-party benefits rather than workers' compensation, it would be improper;

however, he stated that there was no incentive for management employees to do so.

Exhibit D shows a history given by the employee on 07-02-03, that she had back pain for six weeks. The time frame given would be consistent with the date of injury being at some point in the third week of May.

The same record shows that the Employee underwent a series of epidural injections, with resultant relief. Employee's testimony was to the contrary.

Employee returned to work in early July of 2003. According to Dr. Davis, Employee was to return to work at light duty. Employee testified that she returned to work, but not at light duty.

In late July of 2003, the employee and her boyfriend moved to Jefferson County. Employee transferred to the Festus Drury location after working for two days in the Arnold location.

Dr. Neighmond's handwritten office notes from 08-21-03 show a complaint of back pain. They also include the following: "Last week – Drury Inn – light duty – transferred- w/o restrictions. May 03 bent down to pick up purse." The notes stated that the employee was still having severe back pain. In testimony, Employee denied making any of these statements. She agreed, however, with the typewritten notes from the same day, which state "She did have an injury in May 2003 at work at Drury Inn, where she was picking up a heavy box and immediately noticed some back pain."

The 08-21-03 notes of Dr. Neighmond also state that the employee was transferred from Poplar Bluff without restrictions. Dr. Neighmond's notes stated that the employee did well on light duty.

The 09-11-03 note from Dr. Neighmond stated that Employee said she "must have reinjured" her back because she was having a lot of pain in her back. The note does not say whether the new injury occurred on the job.

Employee filed a second request for FMLA leave on September 11, 2003. She checked in the box stating that she needed leave due to her own serious health condition. The doctor's accompanying note did not mention an accident or incident at work.

On the FMLA portion of the records for September of 2003, Dr. Neighmond stated that Employee should not return to work until she had been fully evaluated, and that surgery should be considered. Employee filled out her portions of the FMLA application, including the statement "back surgery, cannot return to work until the specialist releases me" (Exhibit 14).

Employee stated that she signed the FMLA application and Kara Coustry took care of the papers. Exhibit 10 shows that the employer's portion was filled out and signed by a Cheryl Johnson at the corporate office.

Employee also filed a request for short term disability pay on 09-11-03. She signed the employee's portion of the statement, saying that she was going to be off work due to an illness, not work related.

Dr. Neighmond filled out the medical portion of the application for short term disability benefits, stating that Employee had a back injury with radiculopathy, and checked in the box stating that the condition was work-related.

Employee received nearly three months of short term disability benefits, ending in December of 2003.

Dr. Neighmond wanted a consulting opinion. Dr. Neighmond referred Employee to Dr. Chabot. Dr. Chabot reported to Dr. Neighmond on 09-29-03. He stated that Employee has had back pain that has been present since June 2003. He stated that "She relates that she stood up from a couch and apparently experienced pain, which progressively worsened throughout the day."

On October 9, 2003, Employee went to the ER of Jefferson Memorial Hospital. The history shows that she was knocked down by her stepmother's dog. At the hearing, Employee said that she got better after that incident. On 10-17-03, however, Dr. Neighmond's notes state that Employee still needed to go to a pain specialist. The notes go on to say that her pain was exacerbated by the incident with the dog.

The 10-09-03 ER record also contained the notation that the employee had a bulging disc.

Employee first saw Dr. Smith on October 23, 2003. The history shows that the employee was lifting boxes in June and then developed severe pain getting out of bed. The history contains no reference to a work incident. Dr. Smith gave Employee a pain injection.

On 11-11-03, Dr. Smith's notes state that Employee had 4 days of very good pain relief, then return of usual back pain. He diagnosed a lumbar facet arthropathy. He ruled out bilateral sacroiliitis and discogenic pain. He provided bilateral sacroiliac joint injections.

On 12-01-03, Dr. Smith's notes state that Employee reported her pain was unchanged. The diagnosis was bilateral lumbar facet arthropathy and DDD at the lumbar spine. He provided bilateral radio frequency denervation to medial branch nerves that supply lumbar facet joints.

On 12-10-13, Dr. Smith released Employee to light duty as of 12-15-03. He said Employee should be on light duty for the first 2 weeks. There is no indication that Employee asked the employer for light duty, or that she notified her employer that she had been released to light duty.

On 01-02-04, Dr. Smith authorized further light duty, which he defined as no lifting greater than 5 pounds, and taking a 5 to 10 minute rest break every 3 hours if needed. There is no indication that Employee asked her employer for light duty or informed her employer of the restrictions. Dr. Smith had not released Employee from treatment at this time, nor had Dr. Neighmond.

Employee was not released for regular duty by Dr. Neighmond until 01-18-04. Dr. Smith's records do not contain a release to full duty during that time period. There is no indication that Employee asked the employer for light duty, or that she notified her employer that she had been released to light duty.

Employee described an incident on 02-17-04. While at work at the Festus location, Employee slipped as she was going down stairs. She went to the ER. X-rays were negative, and she was discharged in improved condition. No restrictions were noted.

Exhibit 7 shows that Employee's return to work date was 02-19-04, two days after the accident.

The medical records show that Employee did not seek further treatment for her back until April of 2004.

Employee testified that she continued to work 40 hours per week. Exhibit 7 and Addendum 1 show that Employee worked during only three weeks after the incident. During one of those weeks she worked four days. In the remaining two weeks, she worked three days per week. She did not work 40 hours during any of the three weeks.

On 3-14-2004, Employee went with a friend to "Pop's" night club. She felt sick and someone drove her and her friend home. She eventually realized that she, and possibly her friend, had been given GHB, a date rape drug, and that she had been raped. The next day, she said that she felt like cutting her wrist. She said that it took her a month to accept the incident.

Employee did not see or speak with to Dr. Neighmond between 01-18-04 and 04-09-04. The doctor's notes of 04-09-04 state that Employee called in to report the assault, and that Employee had spoken with a psychiatrist and an OB-GYN. Three days later, the doctor's notes contain the following: Raped 03-17-04. Given GHB. Attempted suicide the next day. Can't work because afraid to be alone. Works desk at night for Drury. "PTSD".

On 04-15-04, Dr. Neighmond wrote to a Mr. Reiss Davidson, stating that Employee was unable to work due to the assault. There was no mention of the back problem.

On 04-21-04, Dr. Smith's records contain the following: Reports 3 months of good pain relief, then recently developed recurrent low back pain. Impression: lumbar spondylosis with bilateral lumbar facet arthropathy. There was no mention of the assault incident. There was no notation that Employee gave the doctor a history of the February 2004 incident at Drury. There was no indication that Dr. Smith's light duty restrictions, given in January of 2004, had changed by this time.

On 05-17-04, Dr. Neighmond's notes include the statement that Employee cannot work nights, and that she has PTSD.

On 07-19-04, Dr. Neighmond filled out a Functional Capacities Evaluation form to Unum Corporation, for evaluation of a disability claim. The areas the doctor filled in were related to

psychiatric issues. On 09-20-04, the doctor certified to Unum Company that Employee had between mild and severe restrictions in certain functions related to stress, and interaction with others. This was in connection with Employee's application for short term disability. The doctor reported that the disability began on 03-16-04.

Dr. Neighmond's records do not contain any notation that disability due to PTSD has concluded.

On 08-04-04, Dr. Smith reported disc pathology. Jefferson County Hospital had reported a bulging disc in September of 2003. On 09-22-04, Dr. Smith reported that a discogram showed that Employee had discogenic pain at L5-S1.

On 01-12-05, in a letter, Dr. Smith stated that the employee suffered severe chronic low back pain due to degenerative disc disease.

On 05-31-05, the Employee was sent to Dr. Feinberg. Employee gave Dr. Feinberg a history of picking up a box of copier paper on 06-03-03. This was the first mention of copier paper in the medical records. Employee did not mention an incident with a box of bananas. Employee did not tell Dr. Feinberg of the incidents at home, nor of the two incidents involving a dog, nor of the interim injury mentioned in September of 2003 by Dr. Neighmond. Dr. Feinberg recommended a battery of tests and consideration of surgery.

On 09-14-05, in an independent medical report, Dr. Cantrell stated that the employee's lumbar complaints were not related to the alleged 2003 incident, given the discrepancy in medical records. On 09-19-05, after reviewing further records, Dr. Cantrell reported that he maintained his initial opinion.

On 11-28-05, Employee went to the ER and reported a fall. She claimed that she did not hurt her back, but that overall, the pain was greater than before.

On 01-30-06, Dr. Neighmond wrote a record describing the Employee's pain and suggesting some treatment. She wrote a letter to the Claimant's attorney mentioning a work-related incident. She did not include any summary of her handwritten notes from her initial exam. Those notes stated that the injury had occurred at home.

On 04-14-08 Dr. Smith's records note that Employee fell at home, on her back porch, and that the pain intensified.

On 06-10-08 Dr. Feinberg reported that the item lifted was a box of copy paper. Employee gave a history that she lifted a box of bananas when she had her June 2003 accident. Dr. Feinberg reviewed multiple records, and after reviewing them, asked Employee in detail about the history of accidents. Dr. Feinberg diagnosed Employee with lumbar radiculopathy, secondary to degenerative disc disease at L5-S1 with annular tear and chemical radiculopathy, mechanical pain syndrome with spondylosis without myelopathy, and musculoskeletal pain syndrome and sacroiliitis. He also opined that Employee's current pain and her need for surgical consultation as well as the treatment received for her lower back is causally related to the June 3, 2003 work

related injury when Employee lifted a heavy box at work in the employ of Drury Inn and reinjured and aggravated by the fall on 2-17-04 as demonstrated by the 6-30-04 MRI, 9-22-04 discogram and CT scan, and the June 20, 2008 lumbar MRI scan.

On 08-14-08, Dr. Chabot reported that after he had seen Employee at the request of Dr. Neighmond, he had the opportunity to review records. He stated that the records did not confirm Employee's assertion that an incident occurred at work. He also stated that based on what little care Employee had after the 2004 accident, the accident appeared to have had little effect on her back. He concluded that there was insufficient documentation to indicate that Employee's present symptoms were connected with either of the reported injuries. He also opined that Employee's chronic complaints are not associated with her alleged injuries of June 6, 2003 and February 17, 2004. He also opined that Employee's alleged injuries of June 6, 2003 and February 17, 2004 were not substantial factors in causing the need for additional use of medications that Employee will most likely continue to use. He also opined that Employee can return to work duties that do not require lifting in excess of 35 pounds. He stated that these limitations are based on her history of chronic back pain complaints and are not associated with her alleged injuries of June 6, 2003 or February 17, 2004.

At the hearing, Employee testified that she had suffered from consistent pain and limping, since 2004. She puts her weight on the front of the right foot, because she feels an electric shock when she puts the heel down first. She said that even though she experiences pain, she can walk normally. Employee is still taking pain medications.

On cross-examination the employee stated that she thought that Dr. Smith did not examine her or observe her walking the majority of the times that she was in the office.

Dr. Smith's records show, with some exceptions, that Employee walked with a normal gait. Notes of abnormal gait started on 09-20-07. After that date, on some occasions, the employee was noted to walk with a guarded gait or a limp. Prior to 09-20-07, the employee was noted to have normal gait and was seen to perform other actions and to have been subjected to range of motion and other tests, on 10-23-03, 11-11-03, 8-25-04, 9-22-04, 10-07-04, 12-16-04, 02-12-07, and 03-01-07. After 09-20-07, Employee was noted to have a normal gait and was seen to perform other actions, on 05-10-10, 01-03-11, and 01-05-12. The record of 01-05-12 refers to the Employee's gait as "steady"

In a letter to Employee's attorney on March 1, 2007, Dr. Smith states "As you know from my review of my previous office notes, I originally saw Mrs. Shelly as a patient on October 23, 2003. At that time she gave a history of lifting some heavy boxes at work and developing low back and bilateral hip pain. It is important to note that the notes from Employee's initial visit to Dr. Smith, both the written and typed office notes do not contain a history that states that Employee's injury occurred at work.

The 10-23-03 office note stated that the employee was able to perform both heel and toe walking. The note mentioned no complaints while the employee was doing heel or toe walking.

Employer's Exhibit 17 was an investigator's report and a short video showing the employee walking and climbing some stairs, with no visible limp, in 2006. However, it is important to note that the video was very brief and appears to be taken at a significant distance from Employee.

On 11-07-08, Dr. Raskus evaluated Employee. Under "history" he stated that Employee's symptoms began when she was lifting a box of bananas while at work. Dr. Raskus diagnosed Employee with central regional pain syndrome. Dr. Raskus also opined that it would be reasonable for Employee to "consider fusion of disc arthroplasty at the L5-S1 level." He also stated that Employee wishes to proceed with total disc replacement. He further stated that Employee is in need of this surgery and is permanently and totally disabled and has been disabled for the last four and a half years. He also stated that "a medical opinion that lack of atrophy indicates no disability is not consistent with the discogenic pain process and how it affects a patient from a neurological standpoint." He stated that Employee does have some decreased sensation; she does have significant deconditioning and intermuscular atrophy that is not asymmetric. He further stated that one would expect asymmetric atrophy if the patient had a neurologic compression syndrome but that is not the case in this patient's case.

At the hearing, Employee testified that she wanted surgery if it would do her any good. Her sister had recently moved into the house to help her.

Employee's sister testified that she helped the employee with several ADLs. On cross examination, Employee's sister testified that she did not do any of the paperwork for Employee, nor did she ever tell the doctors what her sister's symptoms were.

Employee's boy friend testified that there was an incident at home in 2003, but as he recalled it, the incident had occurred after some other incident at work.

Dr. Rende testified by deposition. On 11-08-10, the employee had given Dr. Rende a history involving both a box of copy paper and a box of bananas, and stated that the last incident was on 06-03-03. Employee did not describe a 2004 incident, or any incident at home. After describing some initial treatment, the employee's history became vague, according to the doctor (Rende deposition, Exhibit 1, Page 1).

In his report, Dr. Rende described six somewhat inconsistent histories contained in the medical records. Dr. Rende described his review of scans and other diagnostic tests, and then proceeded with an examination.

X-rays taken in June 2003 were within normal limits (Rende deposition, Pages 7 and 11). An MRI taken nine days after the alleged June 2003 accident showed minimal degeneration of discs, meaning that a degenerative process was going on, probably for a minimum of six months (Rende deposition, Pages 7-8). In the discogram, mild pain was noted at several levels. Dr. Rende said that the findings were discordant for two of the levels because if the disc had been producing the pain, the doctor would have noted pain at a pressure level of 30-40 milligrams of

mercury, but the patient did not report mild pain until the pressure reached a level between 90-100 milligrams of mercury (Rende deposition, Pages 9-10).

Employee was noted to walk without a limp. The sensory examination was entirely within normal limits (Rende deposition, Page 13). The doctor noted that the response to certain tests was inconsistent. For instance, Employee had a significant loss of motion while bending forward but had normal side-bending and normal rotation of the spine (Rende deposition, Pages 11-12). He found this to be a sign of symptom magnification (Rende deposition, Pages 11-12, 57-58). Heel and toe walking were normal, and straight leg raising was negative. Her sensory motor exam was entirely within normal limits. Reflexes were brisk. There was no note of a complaint of pain during heel and toe walking.

Dr. Rende concluded that a degenerated L5-S1 disc was responsible for Employee's condition and complaints ((Rende deposition, Pages 13-14). Employee's pain was not from disc herniation, but from disc degeneration (Rende deposition, Pages 13-14). The doctor found no evidence based on Employee's complaints or the findings of the physicians that the 02-17-04 incident caused a change in pathology (Rende deposition, Page 56). The doctor suggested surgery, but not a disc replacement. He did not believe that the work incidents, as reported by Employee, were related to the diagnosis. He found that Employee had moderate disability, but that the disability was not related to the incident.

RULINGS OF LAW

03-145260

Issue 1. Accident and Issue. 9. Convert Temporary Award into Final Award.

Employer-Insurer is disputing accident in this case. Employee's initial healthcare records from various sources are inconsistent with Employee's testimony.

An administrative law judge does not have to accept as true an employee's testimony regarding her alleged accident or injury, especially where there is a substantial basis, from all the evidence in the record, for finding her testimony to be untrue. *Deffendoll v. Stupp Brothers*, 415 S.W.2d 32, 36 (Mo.App.E.D.1967). Where a conflict exists between an employee's trial testimony regarding the alleged accident and injury and various unsworn accounts given by the employee regarding the mechanism of her injury or nature of her complaints, the administrative law judge is free to reject Employee's testimony about how the alleged work injury occurred, and deny Employee's claim. *Walker v. Skaggs Community Hospital*, 935 S.W.2d 370, 373 (Mo.App.S.D.1996)

The following are various accounts given by Employee regarding the mechanism of injury:

- The records of Three Rivers Healthcare (Exhibit A), dated 06-06-03, show a history on page three, stating that the employee stood up and had sudden pain, causing tingling in her toes. The history also indicates "has been lifting things last two days". Below that

the space for “location” of the incident is marked “home”. Employee denied making that statement. Employee explained the discrepancy by stating that an incident occurred at the Drury Inn while she was picking up a box of bananas. She stated that she initially did not want to go to the hospital. Later in the day, she said she stood up from a couch and felt more pain, and then went to the hospital. The history taken at the hospital does not mention work, or a box of bananas.

- Dr. Soeter’s record of 06-26-03 Employee saw Soeter for the first time on June 26, 2003 at The Pain Management Center at Three Rivers Healthcare. The initial evaluation stated that the pain began when Employee was “just picking up boxes.” The typewritten notes from 6-23-03 state that Employee gives a history of pain on the low back starting back in the middle of May when she was standing up from a dining table with a plate of in her hands. She felt pain right at her low back region, going all the way down to the front of her thighs. It was severe pain. She threw the plates on the floor and went to the emergency room. She started having problems since then. A month and a half ago, she had been moving and had been packing and unpacking boxes with a lot of lifting. She feels the pain gradually got worse during that period of time.” Employee denied making these statements to Dr. Soeter.
- On 7-16-03, in support of a request by Employee for short-term disability payments for time off work from 06-06-03 to 07-03-03, Nurse Practitioner Dorothy Walker filled in and signed part of the form stating that the employee’s back pain started in May when arising from the dining room table. It went on to state that later, the Employee was dragged by a dog, which made the pain worse. The question as to whether the incident was work-related was marked “no”. Employee denied making such a statement to the Nurse Practitioner.
- Dr. Neighmond’s handwritten office notes from 08-21-03 show a complaint of back pain. They also include the following: “Last week – Drury Inn – light duty – transferred- w/o restrictions. May 03 bent down to pick up purse.” The notes stated that the employee was still having severe back pain. In testimony, Employee denied making any of these statements. She agreed, however, with the typewritten notes from the same day, which state “She did have an injury in May 2003 at work at Drury Inn where she was picking up a heavy box and immediately noticed some back pain.”
- Dr. Neighmond wanted a consulting opinion. Dr. Neighmond referred Employee to Dr. Chabot. Dr. Chabot reported to Dr. Neighmond on 09-29-03. He stated that Employee has had back pain that has been present since June 2003. He stated that “She relates that she stood up from a couch and apparently experienced pain, which progressively worsened throughout the day.”
- On 06-10-08 Dr. Feinberg reported that the item lifted was a box of copy paper. Employee gave a history that she lifted a box of bananas when she had her June 2003 accident.

- Employee first saw Dr. Smith on October 23, 2003. The history shows that the employee was lifting boxes in June, and then developed severe pain getting out of bed. The history contains no reference to a work incident. In a letter to Employee's attorney on March 1, 2007, Dr. Smith states "As you know from my review of my previous office notes, I originally saw Mrs. Shelly as a patient on October 23, 2003. At that time she gave a history of lifting some heavy boxes at work and developing low back and bilateral hip pain. At that time she gave a history of lifting some heavy boxes at work and developing low back and bilateral hip pain. It is important to note that the notes from Employee's initial visit to Dr. Smith, both the written and typed office notes do not contain a history that states that Employee's injury occurred at work.

The medical records and Employee's testimony have differing and various accounts regarding the mechanism of Employee's injury. Based on all of the evidence presented, including all of the medical records and all of the live witness testimony, I find that Employee was not a credible witness on the issue of accident. I find that on or about June 3, 2003 Employee did not sustain an accident arising out of and in the course of her employment. Therefore, I find Employee did not meet her burden of proof on the issue of accident. Based on the denial of accident, all other issues, other than issue 9, will not be ruled upon. Issue 9 is a request to turn the temporary award into a final award if there is finding of no liability. This request is granted and this temporary award is therefore converted into a final award.

04-015738

Issue 1. Causation; and Issue 6. Convert Temporary Award into Final Award.

The Employer-Insurer disputed causation in this case.

The Employee relied on the following causation opinions:

- On 06-10-08 Dr. Feinberg reported that the item lifted was a box of copy paper. Employee gave a history that she lifted a box of bananas when she had her June 2003 accident. Dr. Feinberg reviewed multiple records, and after reviewing them, asked Employee in detail about the history of accidents. Dr. Feinberg diagnosed Employee with lumbar radiculopathy, secondary to degenerative disc disease at L5-S1 with annular tear and chemical radiculopathy, mechanical pain syndrome with spondylosis without myelopathy, and musculoskeletal pain syndrome and sacroiliitis. He also opined that Employee's current pain and her need for surgical consultation as well as the treatment received for her lower back is causally related to the June 3, 2003, work related injury when Employee lifted a heavy box at work in the employ of Drury Inn and reinjured and aggravated by the fall on 2-17-04 as demonstrated by the 6-30-04 MRI, 9-22-04 discogram and CT scan, and the June 20, 2008 lumbar MRI scan.
- On 11-07-08, Dr. Raskus evaluated Employee. Under "history" he stated that Employee's symptoms began when she was lifting a box of bananas while at work. Dr. Raskus diagnosed Employee with central regional pain syndrome. Dr. Raskus also

opined that it would be reasonable for “Employee to consider fusion of disc arthroplasty at the L5-S1 level.” He also stated that Employee wishes to proceed with total disc replacement. He further stated that Employee is in need of this surgery and is permanently and totally disabled and has been disabled for the last four and a half years. He also stated that a “medical opinion that lack of atrophy indicates no disability is not consistent with the discogenic pain process and how it affects a patient from a neurological standpoint.” He stated that Employee does have some decreased sensation; she does have significant deconditioning and intermuscular atrophy that is not asymmetric. He further stated that one would expect asymmetric atrophy if the patient had a neurologic compression syndrome but that is not the case in this patient’s case.

The Employer-Insurer relied on the following causation opinions to deny the case based on medical causation:

- Dr. Rende concluded that a degenerated L5-S1 disc was responsible for Employee’s condition and complaints. He stated that Employee’s pain was not from disc herniation, but from disc degeneration. He found no evidence based on Employee’s complaints or the findings of the physicians that the 02-17-04 incident caused a change in pathology. He suggested surgery, but not a disc replacement. He did not believe that the work incidents, as reported by Employee, were related to the diagnosis. He found that Employee had moderate disability, but that the disability was not related to the incident.
- On 08-14-08, Dr. Chabot reported that after he had seen Employee at the request of Dr. Neighmond, he had the opportunity to review records. He stated that the records did not confirm Employee’s assertion that an incident occurred at work. He also stated that based on what little care Employee had after the 2004 accident, the accident appeared to have had little effect on her back. He concluded that there was insufficient documentation to indicate that Employee’s present symptoms were connected with either of the reported injuries. He also opined that Employee’s chronic complaints are not associated with her alleged injuries of June 6, 2003 and February 17, 2004. He also opined that Employee’s alleged injuries of June 6, 2003 and February 17, 2004 were not substantial factors in causing the need for additional use of medications that Employee will most likely continue to use. He also opined that Employee can return to work duties that do not require lifting in excess of 35 pounds. He stated that these limitations are based on her history of chronic back pain complaints and are not associated with her alleged injuries of June 6, 2003 or February 17, 2004.
- On 09-14-05, in an independent medical report, Dr. Cantrell stated that the employee’s lumbar complaints were not related to the alleged 2003 incident, given the discrepancy in medical records. On 09-19-05, after reviewing further records, Dr. Cantrell reported that he maintained his initial opinion.

Based on all of the evidence presented, including all of the medical evidence presented and the live witness testimony, I find that the opinions of Dr. Cantrell, Dr. Rende, and Dr. Chabot are more credible than the opinions of Dr. Feinberg and Dr. Ranskus on the issue of medical

causation. Based on that finding, I find that Employee's medical condition of her back is not medically causally related to her accident on February 17, 2004. Furthermore, I find that the employee's accident was not a substantial factor in causing Employee's medical condition of her back. Based on this denial of causation, all other issues, other than issue 9, will not be ruled upon. Issue 6 is a request to turn the temporary award into a final award if there is finding of no liability. This request is granted and this temporary award is therefore converted into a final award.

Employee: Dawn Shelly

Injury Number 03-145260
04-015738

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation