

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

Injury No.: 09-080077

Employee: Barbara Shupe
Employer: St. Johns Mercy Health Systems
Insurer: Mercy Hospitals East Communities
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge with this supplemental opinion. The Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent they are not inconsistent with the supplemental opinion set forth below.

Discussion

Medical causation

Employer appeals the issue of medical causation. We note that the administrative law judge passed over this issue without performing the statutory analysis. Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

We conclude that employee has met her burden on the issue of medical causation. We disclaim the administrative law judge's comments suggesting that Dr. deGrange agreed with Dr. Musich on the issue of medical causation. We understand that the experts have advanced competing testimony on this issue. We find credible the testimony from Dr. Musich that the accident on August 31, 2009, was the prevailing factor causing employee to suffer an acute lumbar trauma, namely, a herniated disc at L4-5 and symptomatic right piriformis syndrome, and disability in the form of chronic acute midline lower back pain and occasional right lower extremity radiculopathy. Employer is liable for permanent partial disability benefits.

Temporary total disability

Employer appeals the issue of temporary total disability. Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether,

Employee: Barbara Shupe

- 2 -

given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ her during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). Accordingly, we look to the evidence of employee's physical condition in the two weeks she was off work following the work injury.

At the hearing, employee's attorney asked her why she needed two weeks off work following the injury on August 31, 2009. Employee testified she was in unbearable pain and that her only relief was to lie down with a heating pad. The administrative law judge found employee testified credibly regarding her injury and resulting problems she experienced with her low back. Employer identifies no reason why we should disbelieve this testimony from employee. Instead, employer argues that because the experts did not address the issue of temporary total disability, employee failed to meet her burden.

Employer's argument fails. "A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. 2003). We conclude that, given employee's unbearable low back pain following the work injury, no employer in the usual course of business would reasonably be expected to employ her during the weeks claimed. Employer is liable for temporary total disability benefits.

Clerical error

We noted some clerical errors in the administrative law judge's award. We hereby correct them as follows.

On page 5 of the award, in the last paragraph, second sentence, the administrative law judge states: "Dr. Musich found that Employee sustained an acute lumbar trauma on August 21, 2009, which resulted in chronic residual symptoms of pain in her low back, and radicular symptoms into Employee's right leg." We correct the foregoing sentence to read as follows: "Dr. Musich found that Employee sustained an acute lumbar trauma on August 31, 2009, which resulted in chronic residual symptoms of pain in her low back, and radicular symptoms into Employee's right leg."

On page 7 of the award, in the first full sentence, the administrative law judge states: "Permanent partial disability can be awarded even if the injured worker returns to her same employment, as long as her injury impairs his ability to efficiently pursue the ordinary activities of life." We correct the foregoing sentence to read as follows: "Permanent partial disability can be awarded even if the injured worker returns to her same employment, as long as her injury impairs her ability to efficiently pursue the ordinary activities of life."

Conclusion

The Commission supplements the award and decision of the administrative law judge with our own analysis herein.

Employee: Barbara Shupe

- 3 -

The award and decision of Administrative Law Judge Lee B. Schaefer, issued February 7, 2012, is affirmed and is attached hereto and incorporated herein to the extent it is not inconsistent with this supplemental opinion.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 10th day of October 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Barbara Shupe

Injury No.: 09-080077

Dependents: N/A

Employer: St. Johns Mercy Health Systems

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

Additional Party: Second Injury Fund

Insurer: Mercy Hospitals East Communities

Hearing Date: November 10, 2011

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: August 31, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While reaching overhead to unload totes containing medical supplies off of a skid, the bottom tote flipped causing the heavier, upper totes, to fall on Employee.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 8 % of the body as a whole
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Donna Shupe

Injury No.: 09-080077

- 17. Value necessary medical aid not furnished by employer/insurer? \$ 1,504.00 (alleged)
- 18. Employee's average weekly wages: \$493.20
- 19. Weekly compensation rate: \$328.80/\$328.80
- 20. Method wages computation: By using the table

COMPENSATION PAYABLE

- 21. Amount of compensation payable

2 weeks of temporary total disability	\$ 657.60
32 weeks of permanent partial disability from Employer:	\$ 10,521.60
TOTAL: \$ 11,179.20	
- 22. Second Injury Fund liability: None
- 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 Haywood

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Barbara Shupe	Injury No.:	09-080077
Dependents:	N/A		
Employer:	St. Johns Mercy Medical Center		Before the Division of Workers' Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri
Insurer:	Mercy Hospitals East Communities		Jefferson City, Missouri
Hearing date:	November 10, 2011		

An evidentiary hearing was held in the above-referenced matter on November 10, 2011. This matter was tried jointly with Injury Number 09-080095; a separate Award will be issued in that case. Barbara Shupe (“Employee”), appeared in person and was represented by her counsel, Mark Haywood. St. Johns Mercy Health Systems (“Employer”), and its insurer, Mercy Hospitals East Communities (“Insurer”), were represented by counsel, Maurice Early. The Second Injury Fund was left open, and therefore, was not present at the time of the Hearing. However, Employee and the Second Injury Fund have entered a Stipulation as to the liability of the Second Injury Fund should the primary injury reach threshold. If the primary injury fails to reach threshold, the claim against the Second Injury Fund will be dismissed.

STIPLULATIONS

The parties stipulated to the following facts:

1. Employee and Employer were operating under and subject to the provisions on the Missouri Workers’ Compensation Law;
2. On August 31, 2009, Employee allegedly sustained an injury to her low back while lifting a tote filled with medical supplies, which caused another tote to fall on top of her;
3. Employer was provided proper notice of Employee’s injury;
4. Employee filed her Claim for Compensation in a timely manner;
5. Employer has not paid any benefits in this matter;
6. Venue for the Hearing in this matter is proper at the St. Louis Office of the Missouri Division of Workers’ Compensation.

ISSUES

The issues to be resolved at this Hearing are as follows:

1. Whether Employee sustained an accident;

2. Whether Employee's alleged accident arose out of and in the course and scope of employment;
3. Whether Employee's back injury was medically caused by her alleged work accident;
4. Whether Employer is liable for past medical benefits in the amount of \$1,504.00;
5. Whether Employer is liable for temporary total disability benefits for two weeks;
6. The nature and extent, if any, of Employee's permanent partial disability;
7. The nature and extent, if any, of liability of the Second Injury Fund based on a Stipulation between Employee and the Second Injury Fund.

EXHIBITS

Employee offered, and had admitted in to evidence, the following Exhibits:

- Exhibit A: Report of Dr. Thomas Musich
- Exhibit B: Curriculum Vitae of Dr. Thomas Musich
- Exhibit C: Medical records from SJMMC Doctors Building
- Exhibit D: Medical records from BJC Internal Medicine Specialists
- Exhibit E: Medical records from Mercy Internal Medicine
- Exhibit F: Bill from Open MRI of St. Louis

Employer offered, and had admitted into evidence, the following Exhibit:

- Exhibit 1: Deposition of Dr. Donald de Grange

FINDINGS OF FACT

Based upon the relevant testimony of Employee, and the Exhibits introduced into evidence, I make the following Findings of Fact:

Live Testimony

Employee has been employed as a night shift, supply technician for Employer for five years. She worked 40 hours a week earning \$12.33 per hour. On August 31, 2009, she helped unload and distribute skids of supplies from the loading dock. She was then assigned to unload the skids and put away the supplies on the 4th floor of the hospital.

Although the totes on the skids were only supposed to be stacked five totes high, the totes on the skid Employee was unloading were stacked six totes high. Further, the totes were not to contain more than 50 pounds of supplies; however, many of the totes on the skid appeared to weigh more than 50 pounds. As Employee was lifting a heavy tote from the top of the skid (which required her to reach over her head), the bottom tote flipped, causing another tote to fall on top of Employee. When Employee tried to catch the tote that was falling, she lost her balance and the tote then fell on her and then hit the floor.

Employee immediately felt a sharp pain in her low back at her waistline. She finished her shift, which was another three hours, because she felt the work had to be completed. There were no witnesses to this event as the other supply technicians were working on other floors. However, before she left to go home, Employee reported to Karen Vogel (the lead supply technician for the morning shift) that she had hurt her back. Employee also reported her injury to the morning manager, Mary Obermann.

The next day, Employee called her internist's (Dr. Basheer) office for an appointment regarding her back injury. She was first seen by the nurse practitioner in Dr. Basheer's office. The nurse practitioner took Employee off of work for two weeks and gave Employee prescription pain medication. After seeing the nurse practitioner, Employee went to her department and gave them the off work slip. Although she was in "unbearable pain", Employee had to wait for an hour before being given a form to complete regarding her work injury.

Employee remained off work for two weeks following this injury. She was not paid any TTD by Employer during that time period. During those two weeks, Employee remained in bed with a heating pad on her low back. After those two weeks, Employee was released to return to work. On September 15, 2009, Employee experienced the incident that is the subject of Injury No. 09-080095.

Currently, Employee has low back pain on a daily basis. The pain occasionally radiates into her buttocks and right thigh. Employee's back pain has affected her ability to engage in activities of daily living. She no longer can take baths because she cannot get out of the bathtub. She has gained 40 pounds because of her lack of mobility. She is unable to walk for exercise as she did prior to her work injuries. Employee was a member at Bally's Fitness for thirty years; however, she can no longer go there to work out because it hurts too much. Employee takes Tylenol or Ibuprofen on a regular basis and sleeps with a heating pad on her back at night.

Medical Evidence

Employee was seen by Jane Hancock, the Nurse Practitioner for Dr. Basheer, on September 2, 2009. (Exhibit C) At that time, Employee reported that she had low back pain that was shooting into her right leg. Employee also reported that she was experiencing numbness and tingling in her right leg. In addition, both of her knees felt weak. The nurse practitioner noted that Employee had a history of low back pain and fibromyalgia. Employee was given medication and referred to physical therapy.

Employee returned to Dr. Basheer's office on September 14, 2009, at which time she was seen by Dr. Basheer. He found that Employee had recovered from her acute back pain and was able to return to work. Dr. Basheer noted that Employee had chronic back pain, arthritis in her neck and spina bifida occulta.

Employee was rated by Dr. Musich on January 10, 2011. (Exhibit A) Dr. Musich found that Employee sustained an acute lumbar trauma on August 21, 2009, which resulted in chronic residual symptoms of pain in her low back, and radicular symptoms into Employee's right leg. The doctor further found that Employee's later accident of September 15, 2009 (Injury No. 09-

080095), merely aggravated her low back injury caused by the August 31, 2009 accident. Dr. Musich rated Employee's low back disability at 25% of the body as a whole, all which related to the August 31, 2009 accident.

Dr. Donald de Grange, an orthopedic surgeon, examined Employee on behalf of Employer on September 1, 2011. (Exhibit 1) The doctor reported that Employee told him about both work accidents. In addition, Employee reported that she was in an automobile accident in 2003, which caused symptoms that resolved after a few months. When Employee was seen by Dr. de Grange, her chief complaint was diffuse low back pain that was present on a regular basis. Employee reported that her symptoms occasionally radiated into her right thigh. Employee told Dr. de Grange that she suffered from pre-existing arthritis, depression and fibromyalgia syndrome. Dr. de Grange conducted a physical examination of Employee and reviewed her medical records and MRI. The doctor diagnosed Employee as having lumbar strain, L5-S1 spondylolisthesis, L4-L5 degenerative disc disease and fibromyalgia syndrome.

Dr. de Grange noted that Employee was diagnosed with fibromyalgia sometime between 2000 and 2004. He also noted that she had complaints regarding both her neck and low back for many years preceding her work injuries. Those complaints date back to at least 2003, when Employee was involved in an automobile accident. The doctor noted that the spondylolisthesis was a degenerative condition that also likely caused the disc bulges. Therefore, he found that the work injury on August 31, 2009 resulted in an aggravation of the pre-existing degenerative condition in Employee's low back.

In conclusion, Dr. De Grange found that Employee did not sustain any permanent disability as a result of the August 31, 2009 accident. However, he did find that Employee had pre-existing disability of 10% BAW related to her spondylolisthesis and injury from the 2003 automobile accident. Dr. de Grange found, as did Dr. Musich, that the September 15, 2009 accident was not a new injury, but was an exacerbation of the August 31, 2009 injury from which Employee had not yet recovered.

RULINGS OF LAW

Rate

Regarding the issue of the appropriate rate, Employee testified that she worked forty (40) hours each week and was paid \$12.33 an hour; Employer did not offer contrary or differing evidence. Therefore, applying the statute, Employee has an average weekly wage of \$493.20. Section 287.250.1 R.S.Mo. 2005. Based on that average weekly wage, Employee is entitled to compensation in the amount of \$328.80 for temporary total disability and permanent partial disability. Section 287.170 R.S.Mo. 2005.

Permanent Partial Disability

Workers' Compensation awards for permanent partial disability are authorized under Section 287.190 R.S.Mo. 2005. Permanent partial disability awards are intended to compensate injured workers for lost earnings. *Grubbs v. Standard Ins. Co.*, 328 S.W.3d 458, 463 (Mo.App.

2010). Permanent partial disability can be awarded even if the injured worker returns to her same employment, as long as her injury impairs his ability to efficiently pursue the ordinary activities of life. *Seeley v. Anchor Fence Co.*, 96 S.W.3d 809, 819-820 (Mo.App. 2002).¹ In a workers' compensation case in which an injured worker is seeking permanent partial disability benefits, the injured worker must prove both that she sustained a work-related accident, and that her disability resulted from that accident. *Id.* In the present case, I find that Employee did sustain a work-related injury that resulted in permanent partial disability.

The next issue to be determined is the amount of the permanent partial disability sustained by Employee. In cases of alleged permanent partial disability, it is up to the trier of fact to reach a conclusion regarding the percentage of disability sustained. *Buskuehl v. The Doe Run Co.*, 68 S.W. 3d 535, 542, (Mo.App 2001). The fact finder is not bound by the percentages of disability assessed by the rating doctors, and is free to award a percentage of disability that is higher, or lower, than that found by the rating physicians. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 234 (Mo.App 2003).

I find that Employee testified in a credible manner regarding the injury and resulting problems she experienced with her low back. Further, I find the testimony of both Drs. Musich and de Grange credible and persuasive on the issue of whether all of Employee's disability should be attributed to the accident of August 31, 2009. As both doctors found that the September 15, 2009 injury was merely an exacerbation of the August injury that had not resolved, all permanent partial disability should be assessed on the August 31, 2009 injury. Therefore, based on the symptoms Employee experienced at the time of the injury and Employee's testimony regarding her continuing disability, I find that Employee sustained permanent partial disability of 8% BAW referable to her low back.

Temporary Total Disability Benefits

Employee seeks to recover two (2) weeks of TTD compensation for the time period Dr. Basheer took her off work post-accident. The purpose of a temporary, total disability award is to cover the employee's healing period. *Birdsong v. Waste Management*, 147 S.W.3d 132, 140 (Mo.App. S.D.2004). Temporary total disability awards should cover the period of time from the accident until the employee can either find employment or has reached maximum medical recovery. *Id.* Having found that Employee was injured in a work related accident and that she was then taken off work by her treating physician for two weeks, I find Employee is entitled to recover TTD compensation to cover her healing period. Employer is liable to Employee for \$ 657.60 in TTD benefits.

Past Medical Benefits

Employee also seeks to receive compensation for unpaid medical expenses, in particular for an MRI for which Employee incurred a bill of \$1,504.00. However, because that MRI was

¹ This is one of the several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-232 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

not performed until after Employee's second accident, she is not entitled to compensation for that bill in this Award.

Second Injury Fund Liability

As Employee's disability for her primary injury fails to reach the threshold for Second Injury Fund liability, Employee's claim against the Second Injury Fund is dismissed.

Attorney Mark Haywood is awarded an attorney's fee of 25% of the total Award in this matter.

Date: _____

Made by: _____

LEE B. SCHAEFER.
Administrative Law Judge
Division of Workers' Compensation