

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

Injury No.: 09-080095

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

Past medical expenses

Employer appeals the issue of past medical expenses. Employer argues that because employee never asked it to pay for her medical treatment following the work injury, and because that treatment was not authorized by employer, employer cannot be held liable for her past medical expenses.

As a general rule, the employer is given control over the selection of the employee's medical providers. This principle, however, is subject to an important caveat. If the employer is on notice that the employee needs treatment and fails or refuses to provide it, the employee may select his or her own medical provider and hold the employer liable for the costs thereof.

Martin v. Town & Country Supermarkets, 220 S.W.3d 836, 844 (Mo. App. 2007) (citations omitted).

Employee reported the September 15, 2009, accident to employer. Employer was unquestionably aware of employee's need for medical treatment, as employee's doctor practices at employer's hospital, and employee kept her supervisors apprised of her need for treatment and time off work. Employer never offered to provide medical treatment, and employee never asked for it, because she didn't know she could, and also was afraid for her job after her supervisors made clear that they would prefer she not pursue workers' compensation benefits. Employee credibly testified that her supervisors cornered her in a private meeting, told her employer wasn't going to pay workers' compensation benefits, and pressured her into signing something. Because employee did not specifically identify the timeframe in which this meeting occurred, and

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whether it was before or after she obtained her self-directed treatment, there is insufficient evidence that employer made an outright refusal to provide employee's medical treatment. But employer's notice of employee's need for treatment and subsequent failure to provide it is sufficient under *Martin*.

We conclude employer was on notice that employee needed treatment after the September 15, 2009, accident, and that employer failed to provide it. Employer is liable for past medical expenses.

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, 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 six weeks she was off work following the work injury.

At the hearing, employee testified the pain she experienced following the September 15, 2009, accident was so severe that it was difficult to do everyday activities, and that all she did was lie around during the time she was off work. 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."

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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."

Also on page 7 of the award, in the last sentence of the first paragraph, the administrative law judge states: "In the present case, I find that Employee did sustain a work-related injury that resulted in permanent partial disability." We delete the foregoing sentence, because the administrative law judge did not find any permanent partial disability resulting from the September 15, 2009, accident, and we have adopted that finding.

Conclusion

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

The award and decision of Administrative Law Judge Lee B. Schaefer, issued February 6, 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.: 09-080095

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: September 15, 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 putting away supplies from a tote of medical supplies, and twisting and reaching to place them in a closet, Employee injured her back.
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: 0 % 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

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- 17. Value necessary medical aid not furnished by employer/insurer? \$ 1,504.00
- 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

6 weeks of temporary total disability from Employer:	\$ 1,972.80
Unpaid medical expenses	\$ 1,504.00

TOTAL: \$ 3,476.80

- 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.:	09-080095
Dependents:	N/A	Before the	
Employer:	St. Johns Mercy Medical Center	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 09-080077; 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 September 15, 2009, Employee allegedly sustained an injury to her low back- while putting away supplies from a tote of medical supplies, and twisting and reaching to place them in a closet;
3. while lifting a tote of medical supplies, and twisting and reaching to place it in a closet;
4. Employer was provided proper notice of Employee’s injury;
5. Employee filed her Claim for Compensation in a timely manner;
6. Employer has not paid any benefits in this matter;
7. 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 four 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.

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
- 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 and made \$12.33 per hour. (See Award in Injury No. 09-080077) On September 15, 2009, the first night back at work following her August 31, 2009 injury, Employee was assigned to work on the Labor & Delivery Floor. Employee was working alone in her area. Her job was to unload skids of supplies and stock the closets located in 30 rooms. However, the task was complicated by the fact that she had to reach around sterile tables and other supplies stored in front of the shelves in the closets.

As Employee was unloading 30 ounce bottles of sterile water, and reaching around to put them away, she either aggravated or re-injured her back. The next morning she went back to Dr. Basheer. He prescribed steroids and took her off of work. She continued to see him every two weeks. Dr. Basheer also sent Employee for an MRI of her low back. Employee's pain in her low

back increased following the September 15 incident. She missed six weeks of work following the September incident. Employee testified that she lied to Dr. Basheer and told him that she was “doing fine” so that he would allow her to return to work. Although she was somewhat better, she felt as though she had to return to work or she would be fired.

When Employee hired an attorney, she was called into the Human Resources Office by her boss. When she arrived, she had a meeting with the person in charge of Human Resources, the person in charge of Worker’s Compensation and her boss. Her boss told her that they had discussed her case and did not believe it was work-related; they also asked her to sign a paper to that effect. Employee was not given a copy of that paper. Although Employee felt as though she was being “hoodwinked”, she signed the paper because she was afraid she would lose her job.

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 Dr. Basheer on September 17, 2009. (Exhibit C) At that time, Employee reported that she had low back pain radiating in to her legs. She reported that her back pain was a result of recent heavy lifting and a recent injury at work. Dr. Basheer prescribed a pain medication and a steroid. He also sent Employee for an MRI. He recommended that she remain off work and return in two weeks.

Employee returned to Dr. Basheer’s office on September 28, 2009, at which time she continued to have pain in her low back. The doctor indicated that Employee wanted to return to work without restrictions, but he felt that she should take precautions to allow her back to heal. Dr. Basheer further indicated that Employee should undergo 4 – 6 weeks of careful monitoring to avoid further injury.

When Employee returned to Dr. Basheer on October 12, 2009, she reported that her back continued to hurt. Although her symptoms had improved, the doctor recommended that she remain off of work. Employee was last seen for her back complaints on October 29, 2009. At that time, she reported that she was not in pain. However, the doctor noted that Employee appeared to be in mild to moderate pain and walked an antalgic gait. Dr. Basheer did release Employee to return to work at that visit.

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, 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 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, I am not awarding any permanent partial disability for the aggravation caused by the September 15, 2009 incident.

Temporary Total Disability Benefits

Employee seeks to recover six (6) weeks of TTD compensation for the time period Dr. Basheer had 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 six weeks, I find Employee is entitled to recover TTD compensation to cover her healing period. Employer is liable to Employee for \$ 1,972.80 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. Claimant did sustain a compensable accidental injury. Section 287.120.1 provides, in pertinent part, that "[e]very employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident

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.

arising out of and in the course of employee's employment.” Section 287.140 provides, “[i]n addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of the medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo.App. E.D.1995).

In this case, the undisputed testimony is that Employer never offered to provide medical care to Employee for either of her injuries. Therefore, as Dr. Basheer, Employee’s treating physician, found that an MRI was necessary as part of the treatment for Employee’s work injury, I find that Employee is entitled to \$1,504.00 for the cost of the MRI.

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