

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

Injury No.: 07-095109

Employee: Pamela Simpson

Employer: Board of Education of the City of St. Louis

Insurer: Self-Insured c/o Cannon Cochran Management Services

Preliminaries

This workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo.¹ Having reviewed the evidence, read the parties' briefs, heard the parties' arguments and considered the whole record, we find 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, we affirm the award and decision of the administrative law judge by this supplemental opinion. The October 1, 2010, award and decision of Administrative Law Judge Margaret D. Landolt is attached and incorporated by this reference.

We offer this supplemental opinion to address employer's sole point on appeal. In particular, employer argues that the administrative law judge's opinion is in error because the administrative law judge awarded disability and medical expenses based upon the opinion of a psychologist, Dr. Shaw, testifying within a reasonable degree of psychiatric certainty. Employee responds that employer has waived its objection to Dr. Shaw's opinion evidence because employer did not object to the introduction of Dr. Shaw's deposition and report.

Discussion

Employer contends that § 287.190.6(2) RSMo, as amended in 2005, added two new elements to a worker's burden of proof as regards permanent partial disability; the worker must show that the permanent partial disability has been demonstrated and certified by a physician, and, 2) the worker must produce opinion evidence regarding compensability and disability that is a medical opinion(s) given with medical certainty. We disagree.

Demonstrated and certified by a physician

As to the first alleged new element, employer asserts that only an individual licensed as a physician under Chapter 334 RSMo may demonstrate and certify a permanent partial disability under the statute. We agree that this provision describes demonstrations and certifications to be performed only by a physician. But we do not believe the provision creates a new statutory element, without proof of which employee's claim must fail.

¹ References are to the Revised Statutes of Missouri 2006, unless otherwise indicated.

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The subsection does not describe or define “demonstrated” or “certified” for the purposes of the subsection. Nor does the subsection provide a sanction for a worker’s failure to produce evidence that a physician has so demonstrated or certified.

"[T]he use of 'shall' in a statute does not inevitably render compliance mandatory, when the legislature has not prescribed a sanction for noncompliance." *State ex rel. Fischer v. Brooks*, 150 S.W.3d 284 (Mo. banc 2004). Depending on context, "shall" may prescribe a mandatory duty, as in *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009), but it may be considered only directory. *Id.* "[D]etermining if the word 'shall' is mandatory or directory requires courts to review the context of the statute and to ascertain legislative intent." *Id.*²

We find nothing in § 287.190 or elsewhere in Chapter 287 describing sanctions for non-compliance with § 287.190.6(2) RSMo. We conclude that the provision requiring that permanent disability be demonstrated and certified by a physician is directory.

Stated within a reasonable degree of medical certainty

As to the second alleged requirement, employer asserts that the administrative law judge’s award cannot be founded upon the opinion of a psychologist. As support, employer directs us to the provision that reads, “[m]edical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty.”

Dr. Shaw did not offer a medical opinion; she offered her opinion as a licensed psychologist. Dr. Shaw’s testimony does not run afoul of the statute. During deposition, employee’s counsel asked Dr. Shaw if her opinion was given “within a reasonable degree of *psychiatric* testimony,” to which Dr. Shaw answered affirmatively. We decline employer’s invitation to transform Dr. Shaw’s persuasive psychological opinion into an impermissible medical opinion based solely on that brief exchange, particularly since employer’s counsel did not raise an objection during the deposition.

Further, if we were to accept employer’s premise that every claim for permanent disability must be supported by a medical opinion, we would render nearly meaningless the portion of § 287.200 RSMo providing compensation for permanent total disability benefits because the determination of whether an injured worker is permanently and totally disabled is not solely a medical question.

The term "total disability" means the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7 [redesignated sub. 6]. The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. The pivotal question is whether an employer can reasonably be expected to hire this employee, given his

² *State ex rel. State v. Parkinson*, 280 S.W.3d 70, 76 (Mo. 2009).

Employee: Pamela Simpson

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present physical condition, and reasonably expect him to successfully perform the work.³

The answer to the pivotal permanent total disability question is not solely a medical determination. In fact, it is common for physicians to offer their opinion on the disability resultant from a worker's physical conditions, while deferring to a vocational expert as to whether the worker is totally disabled. We do not believe it was the intention of our legislature to place a nearly insurmountable evidentiary hurdle before the most seriously disabled workers.

Finally, we find it highly unlikely that by the enactment of § 287.190.6 the legislature intended to summarily exclude from our consideration the expert opinion of every non-physician mental health or vocational professional. We find it more likely that the language of the subsection is directed solely to proof of disabilities resulting from physical injuries.

Award

We affirm the award and decision of the administrative law judge, as supplemented herein.

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 26th day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED

John J. Hickey, Member

Attest:

Secretary

³ *Sutton v. Vee Jay Cement Contr. Co.*, 37 S.W.3d 803, 811 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

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SEPARATE OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified.

I join in the majority's supplementation of the administrative law judge's award to reject employer's point on appeal.

I write separately to express my opinion that the administrative law judge awarded insufficient permanent partial disability benefits. I find credible Dr. Shaw's opinion that employee sustained a 40% permanent partial disability as a result of her work injury and I would so award.

John J. Hickey, Member

AWARD

Employee: Pamela Simpson

Injury No.: 07-095109

Dependents: N/A

Employer: Board of Education of the City of St. Louis

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

Additional Party: N/A

Insurer: Self-Insured C/O Cannon Cochran Management Services

Hearing Date: August 5, 2010

Checked by: MDL

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 7, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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 Employee was teaching school she was assaulted by a student
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Body as a whole - psychiatric
14. Nature and extent of any permanent disability: 12.5% PPD of the body as a whole - psychiatric
15. Compensation paid to-date for temporary disability: \$26,127.67
16. Value necessary medical aid paid to date by employer/insurer? \$3,875.84

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Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? \$2,156.66
- 18. Employee's average weekly wages: \$949.27
- 19. Weekly compensation rate: \$632.85/\$389.04
- 20. Method wages computation: stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$2,156.66
25-3/7 weeks of temporary total disability	\$16,092.47
50 weeks of permanent partial disability from Employer	\$19,452.00
TOTAL:	\$37,701.13

23. Future requirements awarded: None

Said payments to begin 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: Ms. Colleen J. Vetter.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Pamela Simpson

Injury No.: 07-095109

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Board of Education of the City of St. Louis

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: Self-Insured C/O Cannon Cochran Management Services

Checked by: MDL

PRELIMINARIES

A hearing was held on August 5, 2010 at the Division of Workers' Compensation in the City of St. Louis, Missouri. Pamela Simpson ("Claimant") was represent ("Employer"), which is self-insured C/O Cannon Cochran Management Services, was represented by Mr. Harvey Taylor. Ms. Vetter requested a fee of 25% of Claimant's award.

The parties stipulated that on or about September 7, 2007, Claimant sustained an accidental injury arising out of and in the course and scope of employment; Claimant was an employee of Employer; venue is proper in the City of St. Louis, Missouri; Employer received proper notice of the injury; and the claim was timely filed. The parties further stipulated Claimant was earning an average weekly wage of \$949.27 which resulted in rates of compensation of \$632.85 for Temporary Total Disability ("TTD") benefits, and \$389.04 for Permanent Partial Disability ("PPD") benefits. Employer paid TTD benefits of \$26,127.67 from September 10, 2007 to June 25, 2008. Employer also paid medical benefits of \$3,875.84.

The issues for determination by hearing are whether Employer is liable for reimbursement of medical expenses of \$2,156.66; whether Employer is liable for past TTD benefits from June 26, 2008 to December 20, 2008; and nature and extent of PPD benefits owed to Claimant.

SUMMARY OF EVIDENCE

Claimant is a 45 year old woman who worked as an art teacher for Employer for 17 years. On September 7, 2007 Claimant was teaching art at a high school in St. Louis, Missouri when she was assaulted by a student. Claimant observed the student in question carving graffiti on a desk. When she asked him to stop he refused. When Claimant began to call the student's parents, he jumped up, came at her and pushed her, threatened her, and shouted obscenities at her. Claimant does not remember all the details of the assault, but eventually the student was subdued by three security guards. The student continued to make threatening statements to Claimant while he was being subdued.

Claimant reported the assault to Employer, and was told to go to the Police Department to make a statement. After she went to the police station, she was referred to Barnes Care for

treatment. The records from Barnes Care indicate Claimant was crying and nervous and was having difficulty dealing with her nerves after the assault. She was diagnosed with contusions of both arms, a superficial contusion of the right chest wall, and acute stress reaction. She was advised to remain off work until seen by a counselor/psychologist.

Employer referred Claimant to Dr. Wayne Stillings, a psychiatrist, for treatment. Dr. Stillings diagnosed adjustment disorder, and stated the September 7, 2007 work incident is the prevailing factor in causing Claimant to experience an adjustment disorder. He prescribed medications for depression, anxiety, and sleep, and psychotherapy. Claimant paid for her own medications by using her group health insurance. Although she was given a prescription card provided by Employer, no one would accept the card, so she paid for it herself.

Claimant was not comfortable with the treatment prescribed by Dr. Stillings and did not find it to be effective. At one point, Claimant found Dr. Stillings tape recording her therapy session without her permission, which made her distrust him. Dr. Stillings kept telling Claimant she would be ok if she would just go back to work.

In the months following her assault at work, Claimant continued to have feelings of fear and anxiety about the event. She felt like her life had been threatened, and she was afraid when she left her house, and found herself looking behind and around her when she was out of the house. She was not able to leave her house alone. In October, 2007, she suffered a setback when she attended the criminal trial of the student who assaulted her. She felt physically and emotionally unable to return to the school building, and avoided speaking to teachers she had worked with for years.

After almost a year of treatment from Dr. Stillings, Claimant was still unable to return to work. Although Dr. Stillings noted in April of 2008 that Claimant was motivated to return to work, she felt Dr. Stillings had not helped her heal. Claimant felt she was not ready to return to work, and wrote a letter to Employer asking for additional medical care. Claimant did not receive a response from Employer, and was offered no further medical care from Employer after her last appointment with Dr. Stillings. Employer stopped TTD benefits on June 25, 2008.

Claimant sought treatment on her own from a psychologist, Dr. Patricia Shaw in September, 2008. Dr. Shaw diagnosed post traumatic stress disorder ("PTSD"), caused by the assault at work. Dr. Shaw testified when she first saw Claimant she continued to suffer from symptoms of PTSD. She was very fearful, afraid to go out alone, could not go near the school, and the thought of trying to teach there again brought tears and she would become very upset. Dr. Shaw testified Claimant had withdrawn from friends and former activities. She did not want to talk about the incident with anyone. Dr. Shaw found Claimant's motivation in doing daily things was greatly diminished. Claimant had persistent headaches and insomnia. She was hyper vigilant, always watching her back. She was unable to concentrate and had a hyper startle reaction.

Dr. Shaw stated Claimant was unable to return to the classroom due to fear and hyper-arousal of her autonomic system (rapid heartbeat, tension, difficulty breathing, and anxiety). Claimant wanted to return to teaching, and her principal insisted she return, but she could not, due to her PTSD.

Dr. Shaw used therapy to help Claimant heal from the trauma at school. The therapy included using exercises to help Claimant express her feelings about the assault and to think of things she could do to get better. Dr. Shaw's treatment was successful in helping Claimant heal from the emotional trauma of the assault. Claimant initially did some work decorating for weddings, and then she was able to return to work as a teacher at a summer school program at church where she felt she was safe from harm. She no longer avoided telephone calls from teachers she worked with before. Although Claimant still feels afraid sometimes, she is now attempting to find a teaching position.

Dr. Shaw testified Claimant had not reached maximum medical improvement at the time she was first seen in September 2008, that she continued to suffer from symptoms due to the assault at work, and she was in need of further treatment. Dr. Shaw testified Claimant was temporarily totally disabled from the date of the assault, September 7, 2007 through December 20, 2008.

Dr. Shaw testified Claimant's assault at work was the prevailing factor in causing the symptoms she was experiencing. She also noted Claimant had nothing in her history to cause the PTSD, and the symptoms only manifested after the assault at work, and were specific to the assault because it was a life-threatening event.

Dr. Shaw testified Claimant continues to exhibit residual symptoms of PTSD and sustained 40% PPD as a result of the September 7, 2007 work incident.

Dr. Stillings did not testify, however, he stated in a letter dated July 14, 2008, that Claimant sustained no PPD as a result of the September 7, 2007 work injury.

FINDINGS OF FACT AND RULINGS OF LAW

Employer provided Claimant with psychiatric treatment by Dr. Stillings for almost a year, but his treatment was not effective, and did not cure and relieve her of the effects of the injury. After the last appointment with Dr. Stillings, Claimant requested further medical treatment but received no response from Employer.

I find the testimony of Dr. Shaw to be credible. Dr. Stillings did not testify, and I do not find his opinions as stated in his medical records credible.

Dr. Shaw credibly testified Claimant had not reached MMI when she first saw Claimant in September 2008, and she was temporarily and totally disabled from September 7, 2007 through December 20, 2008. I find Claimant is entitled to past TTD benefits of \$16,092.47 for the period of June 26, 2008 to December 20, 2008.

I find Claimant was in need of further treatment to cure and relieve her from the effects of her work injury. Claimant is awarded reimbursement of \$2,156.66 for medical services paid to Dr. Shaw and also for medications she was prescribed by Dr. Stillings, and which she paid for out of her own pocket.

I further find Claimant sustained PPD of 12.5% PPD of the body as a whole – psychiatric, and is awarded benefits in the amount of \$19,452.00.

This award is subject to an attorneys' fee of 25% of Claimant's award to Colleen Joern Vetter.

Date: _____

Made by: _____

MARGARET D. LANDOLT
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation