

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

Injury No.: 99-166495

Employee: Bobbie Strode  
Employer: Des Peres Hospital  
Insurer: Insurance Company of the State of Pennsylvania  
c/o SRS, Inc.  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 12, 1999  
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 26, 2006, as supplemented herein.

The administrative law judge concluded that employee was permanently and totally disabled as a result of her back condition. Employer/Insurer filed a timely Application for Review with the Commission alleging that the administrative law judge's finding that the claimant is permanently and totally disabled is against the weight of the competent and substantial evidence on the whole record. We disagree and affirm the benefits awarded by the administrative law judge.

However, the Commission must address the attempt by the administrative law judge to correct the original award. The administrative law judge issued an award in this matter on May 26, 2006. The administrative law judge issued a purported corrected award on June 8, 2006. On June 6, 2006, employer/insurer filed an Application for Review with the Labor and Industrial Relations Commission (Commission) indicating employer/insurer was seeking review of the award issued May 26, 2006.

Section 287.610.6 RSMo provides, in part:

The administrative law judges appointed by the division shall only have jurisdiction to hear and determine claims upon original hearing and shall have no jurisdiction upon any review hearing, either in the way of an appeal from an original hearing or by way of reopening any prior award, except to correct a clerical error in an award or settlement if the correction is made by the administrative law judge within twenty days of the original award or settlement.

This section does not prohibit the administrative law judge from correcting the original award prior to the filing of an application for review and within the twenty days in which the award can be appealed. However it "prohibits the administrative law judge from acting only after the earlier of the timely filing of an application for review and the expiration of the twenty-day period to seek review." *Farmer v. Barlow Truck Lines*, 979 S.W.2d 169, 170 (Mo.banc 1998).

The administrative law judge attempted to correct an error in the May 26, 2006, award indicating Second Injury

Fund liability. However the corrected award was issued on June 8, 2006, after employer/insurer submitted its application for review; therefore, the amended award is void. We modify the May 26, 2006 award to correct the error and find that the Second Injury Fund has no liability in this case.

The Commission agrees with the ultimate conclusion reached by the administrative law judge, that employee is permanently and totally disabled as a result of her back condition.

The Commission agrees that appropriate workers' compensation benefits were awarded employee.

The award and decision of Administrative Law Judge Mathew D. Vacca, issued May 26, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms 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 8<sup>th</sup> day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

DISSENTING OPINION FILED

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed. I believe the administrative law judge erred in concluding that employee was permanently and totally disabled.

Permanent and total disability is defined by section 287.020.7 RSMo (2000) as 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.

The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

*Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849, 853 (Mo.App. S.D. 1995) (citations omitted).

Employee resumed work as a nurse five months after her work-related injury, but quit after she was unable to sustain the work. Employee never subsequently sought employment that would have been more in line with the restrictions recommended by Dr. Volarich or Dr. Lange. Employee never attempted work at a light or even sedentary exertional level. This is important to note as employee may be unable to sustain work in the nursing

field, but could still be capable of maintaining work in a less physically demanding profession. In order to be entitled to permanent total disability benefits employee must show that she cannot return to any employment, not just her former work.

Furthermore, I find fault with the administrative law judge's decision with regard to two key issues. The administrative law judge noted in his decision that the employer did not have permanent light duty available; however, that should not have been a determining factor. The key factor is whether employee is employable. The administrative law judge also cited Dr. Lange in support of his finding of permanent total disability; however Dr. Lange opined that although he did not feel employee was capable of her past work, that she was not permanently and totally disabled from all work. Dr. Volarich opined that employee should only consider sedentary or light work in the future but chose to defer to vocational experts to determine whether work was available.

Vocational experts, June Blaine and James England, both opined that employee was employable in the open labor market and the types of jobs presented would allow her to work within the sedentary to light work demands.

Therefore, employee failed to show that she is permanently and totally disabled as a result of her work-related back injury. Accordingly, I would reverse the decision of the administrative law judge.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Alice A. Bartlett, Member