

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

Injury No.: 08-068309

Employee: Kimberly L. Swierk

Employer: Fusion Support Service, LLC.

Insurer: New Hampshire Insurance Co. c/o AIG Domestic Claims

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)

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 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 8, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued October 8, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of January 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee:	Kimberly L. Swierk	Injury No.: 08-068309
Dependents:	N/A	Before the
Employer:	Fusion Support Service, LLC.	Division of Workers'
Additional Party:	Second Injury Fund (dismissed)	Compensation
Insurer:	New Hampshire Insurance Co. c/o AIG Domestic Claims	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Hearing Date:	July 9, 2009	Checked by: MDV:cw

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: June 24, 2008
5. State location where accident occurred or occupational disease was contracted: 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? No
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: Walking with contractor to door when contractor grabbed breast.
12. Did accident or occupational disease cause death? No Date of death?
13. Part(s) of body injured by accident or occupational disease: None
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$0

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Kimberly L. Swierk Injury No.: 08-068309

17. Employee's average weekly wages: \$400.00

18. Weekly compensation rate: \$266.67

19. Method wages computation: Agreed

COMPENSATION PAYABLE

20. Amount of compensation payable: \$0

21. Second Injury Fund liability: Second Injury Fund Dismissed

TOTAL: \$0

22. Future requirements awarded:

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 of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Kimberly L. Swierk	Injury No: 08-068309
Dependents:	N/A	Before the
Employer:	Fusion Support Service LLC	Division of Workers'
Additional Party: Second Injury Fund (dismissed)		Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	New Hampshire Insurance Co. c/o AIG Domestic Claims	Checked by MDV:cw

ISSUED PRESENTED

The issues presented are accident, injury, medical causation, past and future medical care and temporary and permanent disability benefits.

FINDINGS OF FACT

1. Claimant is a 44 year old married woman with two children.
2. On June 24, 2008. Claimant was working at Employer's office with an outside contractor who was teaching her a computer program.
3. Claimant and the contractor were working by themselves. During the training, the outside contractor said he was "touchy-feely" and tried to hug Claimant. Claimant knocked his hands away and told him "no". Approximately 20 to 30 minutes after the first incident the contractor was leaving.
4. Claimant was walking toward the door, with and near the contractor, when he turned around as if to hug her again and at that time he grabbed her breast, which was covered by her business attire. Claimant immediately knocked his hands away and ran to the warehouse to tell co-employees. Claimant was upset. There was no physical injury of any type to the claimant's breast. The contractor did not strike Claimant or in any other way except as described above, touch or act inappropriately toward the Claimant. The police were called and Claimant gave a statement. The contractor was prosecuted.
5. Claimant said her Employer made her return to work on or about July 1st or July 2, 2008. However she was unable to remain at the work place for the full day due to a panic attack. Claimant has not worked since that date either at this Employer or for any other Employer. Claimant contends she is permanently and totally disabled as a result of this incident.
6. Employee attributes the following symptoms to the work incident of June 24, 2008: panic attacks when she goes outside of her home alone, inability to sleep and Claimant cannot remember or concentrate.

7. Initially, Claimant sought medical treatment from Suburban West Internal Medicine. She had been treated at this location by various group staff for general internal medicine issues since 1995. Claimant saw Dr. Douglas Dripps three times between 7/02/08 and 09/24/08. Suburban West Internal Medical referred her for counseling to Sharon Marbarger. Claimant saw Ms. Marbarger one time.
8. On September 24, 2008, Dr. Dripps referred Claimant to Dr. Dawn Holemon for psychiatric treatment. Claimant saw Dr. Holemon six times between 09/24/08 and 12/16/08. Dr. Holemon recommended that Claimant seek and receive ongoing psychological therapy.
9. Thereafter, Claimant has on a weekly basis seen a therapist named Kim Solteziak who was referred to her by her insurance through Medicaid. Claimant's health insurance has paid and is paying for all the above treatment.
10. Claimant has a medical history of prior psychiatric and similar medical complaints since 1995 which include sleep problems, panic attacks, work/home stress, anxiety, heart pounding, and work loss from anxiety concerning all of the above. The medical records from Suburban West Internal Medicine indicate she has had prior similar symptoms and complaints since she originally began treating there and also again episodically in January 1995, October 2002, July 2007, and most recently in January 2008. These symptoms predate the work event.
11. Claimant at different times from January to July 1995 had various symptoms including marital stress, fatigue, mood swings, insomnia, vertigo (dizziness), heart pounding, and difficulty breathing (no pattern). Claimant was totally unable to work from February through July 11, 1995 due to psychiatric complaints. Again, these predate the work incident.
12. In October 2002, Claimant again saw Dr. Furukawa due to stress at work. Claimant felt on the verge of collapse, close to a nervous breakdown, her life seemed to be spiraling out of control, she was always close to tears, she felt very angry, had heart pounding and emotional stress. Dr. Furukawa kept Claimant incapacitated and off work due to psyche problems until November 6, 2002. Again, this was prior to the work incident.
13. In July 2007, Claimant again saw Dr. Furukawa complaining of depression and stress at home and at work as well as sleeping problems.
14. Six months before the work incident, on January 14, 2008, Claimant called Suburban West Internal Medicine and it was noted she had emotion problems, anxiety and depression and felt her "world is falling apart".
15. Claimant has a significant history of relationships with abusive men. This began at an early age when she was physically and sexually abused by an uncle (Dr. Holemon's records). Thereafter, she had a physically abusive boyfriend. She has had various separations from her alcoholic husband who is emotionally abusive. After a five year separation, he returned to the family home in July 2008 right into the midst of this work incident. That reconciliation failed and Claimant and husband are again separated and

Claimant has moved in with her sister. Claimant testified her family life is not stressful and tumultuous.

16. Dr. Douglass Dripps believes Claimant was unable to work during the period of July 2, 2008 through November 07, 2008 and signed off on work notes to that effect.
17. The Employer/Insurer submitted the deposition testimony of Wayne Stillings M.D. Dr. Stillings is a medical doctor specializing in and board certified in psychiatry since 1978/1979. Dr. Stillings regularly diagnoses and treats the conditions from which Claimant suffers and which he diagnosed in Claimant. (Depo. 6-7, Ex. A (CV)).
18. Dr. Stillings diagnosed Claimant with the following pre-existing chronic ongoing medical conditions; relational problem (chronic ongoing marital discord, alcoholic and emotionally abusive husband, panic disorder, personality disorder, NOS (not otherwise specified) with depressive, somatoform, schizoid, avoidant, obsessive/compulsive personality traits. (Depo, 12-19, Ex. B pg. 12-13).
19. Dr. Stillings believes Claimant had significant pre-existing psychiatric problems with associated psychiatric disability. (Depo. 31-33); the prevailing factor in causing claimant's psychiatric symptoms on and since June 24, 2008 is her underlying chronic pre-existing conditions, not the June 24, 2008 work incident. (Depo. 31-33).
20. At best, Dr. Stillings believes the work incident of June 24, 2008 was at most a triggering or precipitating event. (Depo. 31-33) The work event of June 24, 2008 was temporarily upsetting, but it resulted in no need for psychiatric treatment and no permanent psychiatric condition or malfunction.
21. Dr. Stillings suggests Claimant is in need of psychiatric treatment to address her current symptoms, but those symptoms are primarily caused by her underlying chaotic life and chronic and ongoing pre-existing conditions, not the June 24, 2008 work event. (Depo. 40-41, Ex. B pg. 12-13).
22. Dr. Stillings explains his opinions as follows: Ms. Swierk has possessed an underlying pre-existing panic disorder since at least 1995. It is the nature of her panic disorder that it is chronic and that it waxes and wanes. It had previously caused major work disruptions. Her medical records from October 2002 and July 2007 are consistent with this diagnosis. (Depo. 15-17).
23. Claimant will project her own psychiatric problems onto the work place and try to blame the work place as the cause of all her problems when in fact it is her psychiatric problems or inability to deal with events that cause her stress at work. This is corroborated by her belief that her family life is not chaotic or stressful. Claimant is not well adjusted, well equipped to deal with life and not functioning adequately at home or work; she struggles in both spheres of her life. (Depo. 20-22).
24. Claimant's statement in January 2008, six months before the work incident in the Suburban West Internal Medicine records states that she "feels her world is coming apart" is reflective of the waxing and waning nature of her underlying psychiatric

condition. Even if you subtract the June 24, 2008 incident, Dr. Stillings is certain Claimant is going to constantly have more chronic and ongoing panic attacks. (Depo. 31-33).

25. Claimant also has a pre-existing personality disorder that has contributed significantly to her turbulent life. She has lived with an alcoholic abusive husband off and on for 20 years. Her panic disorder and ongoing abusive marital relation are chronic stressors which have far greater effect on a person than an acute event of the nature she described. It is her underlying long standing psychiatric chronic condition rather than the June 24, 2008 work event which is the prevailing factor in causing her current mental symptoms.
26. Dr. Stillings is critical of Dr. Dripps simplistic reasoning about diagnosis and causation in this very complex matter. Dr. Dripps' diagnosis of "acute stress reaction" is not a recognized psychiatric diagnosis. (Depo. 37). It is not the type of conclusion psychiatric experts reach and is therefore not helpful. Dr. Stillings disagrees that the June 24, 2008 incident can aggravate her underlying condition into a permanent condition (Depo. 37). Dr. Stillings also notes that reaching a diagnosis without considering the person's past medical history is not reliable. This is also not how experts make diagnoses in complex cases and completely renders Dr. Dripp's opinion psychiatric of any authority or weight. (Depo. 15).
27. Dr. Stillings also criticizes Dr. Dripps opinions regarding causation in this matter. Dr. Stillings states that concluding the June 24 work incident is the cause of her symptoms based upon the fact that she was able to work prior to that incident, but unable to work thereafter, is "not scientific and is extremely flawed methodology". Essentially it ignores the "chronic" underlying nature of Ms. Swierk's psychiatric medical condition. Her panic disorder and relational disorder waxes and wanes and they are aggravated by her ongoing chronic partner relational problems. She had them as recently as six months before the work incident in January 2008, which was already heralding some intensification of her pre-existing condition. She also had them as long ago as 1995. Dr. Dripps completely ignores 14 years of longstanding psychiatric disarray and dysfunction. At best, the incident of June 24, 2008 was precipitating or triggering to the current symptoms. (Depo. 32-33).
28. Dale Dripps, M.D. is a medical doctor specializing in internal medicine since 1995. He is employed by Suburban West Internal Medicine. He initially saw Claimant on 7-02-08 and saw her two more times through 9-24-08. He did not investigate any other possible sources of stress other than the work-related incident which Claimant told him was causing her current symptoms. Prior to seeing Ms. Swierk for the first time, he had not reviewed all of her medical chart. He did not know that she had prior complaints of stress at home or work. (Depo. 22-23, 60-69).
29. Later, after reviewing Ms. Swierk's past medical records at Suburban West, he concluded that Ms Swierk had a longstanding history of anxiety and depression and that it was chronic since 1995. (Depo. 22-23, 60-69). Since 1995 Dr. Dripp's office has treated this condition with prescription drugs such as Cymbalta. The Claimant has also been treated with Valium since 1996 for sleep problems and requested larger dosages in January 2008. In January 2007, Claimant called complaining of stress and depression and wanted refills

of Valium and Cymbalta to treat her chronic depression/anxiety and her sleep problems. (Depo. 47-51, 54, 60-68).

30. Dr. Dripps believes that Ms. Swierk is unable to work. He believes this is predominantly due to the June 24, 2008 work event. He does not believe that her long standing underlying mental condition contributed in any way to any of her current symptoms. He states that she was able to work even with her chronic anxiety and depression until June 24, 2008. This is inaccurate since the prior mental illness caused her to lose huge blocks of work. He states that the June 24, 2008 event is not an exacerbation of her underlying chronic problems, but resulted in completely different and independently caused symptoms. He acknowledges that he does not know whether Ms. Swierk had any other stressors that might be contributing to her current condition. (Depo. 68-72). Clearly there are many relevant factors of which he is unaware. Dr. Dripps opinion is simply not scientific. Dr. Dripps says Claimant is disabled because she says so and he believes her. This does not constitute expert evidence.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and all the reasonable inferences to be derived therefrom and the applicable law, I find the following:

1. The incident of June 24, 2008 wherein an independent contractor was working at the employer and touched Claimant's breast was certainly objectionable. No physical injury to her breast is claimed. Claimant was upset and angry which is understandable and justified.
2. However, Claimant is alleging that the June 24, 2008 work incident has caused her to develop a mental condition which she never had before and which has caused her to be totally disabled from working for the period of June 24, 2008 through the date of trial and into the future permanently. The issue of causation is further complicated by Ms. Swierk's pre-existing and chronic mental health problems and her background of various abusive relationships. Claimant has a history of the same or similar symptoms of panic attacks, anxiety, sleep problems and heart racing and stress at her house and with her abusive alcoholic husband who moved back into the family home at the same time as her current symptoms.
3. In general, in cases which involve an alleged mental/psychiatric injury and pre-existing conditions, I find the opinions of a specialist in psychiatry to be of more assistance than those of an internal medicine physician. Here the Employer/Insurer did provide the opinion of Wayne Stillings, M.D., a psychiatrist, which I find to be very persuasive and well thought out. It takes into account many factors and gives an overall picture of Claimant's condition. I don't think Dr. Dripps is qualified by past practice experience or training to distinguish between two chronic mental conditions and to apportion causation to one over the other. He also did not possess major pertinent medical facts. His opinion is not helpful.

4. Thus, based on all of the evidence I find Claimant has failed to meet her burden of proof that the June 24, 2008 work incident was the prevailing factor in causing her medical condition or her need for medical treatment on or since that date. While I find that the work event of 6-24-08 did cause Claimant to be upset and angry, it was not the prevailing factor in causing her to have the disabling mental symptoms she described, i.e. panic attacks, inability to sleep, memory and concentration problems, and for which she has been treated since the incident. I find the 6-24-08 work incident was at most the triggering or precipitating event which contributed to the symptoms she has experienced since June 24, 2008. §287.020.2 (RSMo 2008)
5. Because I do not find causation in this matter, there is no need to address the other issues.

Date: _____

Made by: _____

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest: