

TEMPORARY AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 10-026132

Employee: Linda Thompson
Employer: Lone Star S & S of S Missouri
Insurer: Zurich American Insurance Co.

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. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to section 286.090 RSMo, we issue this final award and decision modifying the August 5, 2011, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

Future medical treatment

We agree that employee met her burden of proving she is entitled to medical treatment from the employer. We are concerned, however, with the form in which the administrative law judge awarded medical treatment. Specifically, we find it inappropriate to award medical treatment "with a qualified surgeon ... other than Dr. Chabot." *Award*, page 8. The administrative law judge cited § 287.140.2, RSMo, which provides as follows:

If it be shown to the division or the commission that the [employee's medical treatment] requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the division or the commission may order a change in the physician, surgeon, hospital or other requirement.

We find no showing at this stage of the proceedings that employer has furnished medical treatment in such manner that there are grounds (reasonable or otherwise) to believe that employee's life, health, or recovery have been endangered thereby. As a result, we conclude that § 287.140.2 is not implicated in this matter. Accordingly, we must modify the award to give effect to the appropriate statutory language pertaining to employer's obligation to provide medical treatment. Section 287.140.1, RSMo, provides, in relevant part, as follows:

In 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.

Employee: Linda Thompson

- 2 -

We find and conclude that employee is entitled to, and employer is obligated to provide, that medical treatment which may reasonably be required to cure and relieve the effects of the injury of March 8, 2010.

Award

We modify the award of the administrative law judge. We find that employee is entitled to such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, which may reasonably be required to cure and relieve from the effects of the injury of March 8, 2010.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued August 5, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 8th day of November 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY AWARD

Employee: Linda Thompson

Injury No.: 10-026132

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Lone Star S & S of S Missouri

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

Additional Party: Second injury Fund (open)

Insurer: Zurich American Insurance Co.

Hearing Date: June 7, 2011

Checked by: JED/sw

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:
5. State location where accident occurred or occupational disease contracted: St. Louis County
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 happened or occupational disease contracted:
Employee was waiting tables when she injured her low back lifting a rack of drinking glasses.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: Low back
14. Compensation paid to-date for temporary disability: -0-
15. Value necessary medical aid paid to date by employer/insurer? -0-
16. Value necessary medical aid not furnished by employer/insurer? Unknown

Employee: Linda Thompson

Injury No.: 10-026132

- 17. Employee's average weekly wages: Unknown
- 18. Weekly compensation rate: \$
- 19. Method wages computation: Stipulation

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	Unknown
temporary total disability (or temporary partial disability)	None
TOTAL:	\$ -0-

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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:

S. Todd Hamby

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Linda Thompson	Injury No.:	10-026132
Dependents:	N/A		Before the
Employer:	Lone Star S & S of S Missouri		Division of Workers'
Additional Party:	Second injury Fund (open)		Compensation
Insurer:	Zurich American Insurance Co.		Department of Labor and Industrial
Hearing Date:	June 7, 2011		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	JED/sw

TEMPORARY AWARD

This case involves a disputed low back injury resulting to Claimant with the reported accident date of March 8, 2010. Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund is a party to this claim but remains open for a determination of liability at a future date. Both parties are represented by counsel. This matter proceeds pursuant to Hardship Petition requesting tender of benefits.

Issues for Trial

1. Accident;
2. whether injury arose out of and in the course of employment;
3. medical causation/maximum medical improvement (MMI).

FINDINGS OF FACT

Accident and Injury

Claimant currently works as a server for Employer. On the reported accident date, Claimant was lifting a full rack of 25 glass ice tea glasses. Claimant bent over to lift a rack of large drinking glasses from the floor to a position just above her head. While performing this task, Claimant felt an immediate onset of sharp pain in her low back. The pain was so intense that Claimant stopped working and rested.

Co-worker Doug Garces witnessed the accident (Exhibit C). Claimant told Mr. Garces that she was experiencing pain in her low back. Claimant told Mr. Garces she could not move due to the onset of severe low back pain. She stopped working for a short while and Mr. Garces checked her customer tables. He confirmed that the rack of glasses weighed about 25 lbs. and that he saw Claimant lifting the glasses. Mr. Garces testified that while Claimant had previously complained of low back discomfort, she had never before had pain that caused her to take a break from work and that the subject incident was immediately preceded by the lifting of the glass rack

as describe above. Further, Mr. Garces was asked to identify the managers which included Jamie [Jordan]. Mr. Garces identified her as a shift leader, or “stand-in” manager. He knew Claimant had reported the injury because Jamie Jordan asked him about the incident and he told her that Claimant had low back pain after lifting the glass rack. This testimony was cogent and unrebutted.

Claimant finished her shift. She continued to work but noticed a worsening of her symptoms and shortly thereafter the pain began radiating into her right leg. Claimant stated she had some low back symptoms about ten years ago. She never had pain radiating into her lower extremities. Claimant’s testimony was credible, corroborated and unrebutted.

Medical Treatment

On March 24, 2010, she presented to her primary care physician at SSM DePaul Medical Group. The diagnosis was right leg neuropathy and low back pain. A lumbar MRI on March 29, 2010 revealed at T12-L2 a small bulging disc. At L4-5, there was noted to be a moderate disc protrusion extending into the inferior aspect of the right neuroforamen. At L5-S1, there was a moderately large right paracentral disc extrusion with inferiorly migrated disc fragment abutting the thecal sac and the right S1 nerve root compression (according to medical records).

On March 31, 2010, she saw a chiropractor complaining of right low back pain and right leg pain. Claimant reported that her pain and numbness in her back, leg and foot began three weeks ago. (Group Exhibit A2, p. 15). He noted an inability to dorsiflex her right foot and numbness in the right foot. He prescribed myofascial and therapeutic exercises and electrical muscle stimulation. On April 1, 2010, she presented to St. John's Mercy Medical Center Emergency Room complaining of low back pain with right lower extremity radicular symptoms. Exam there revealed a positive straight leg raise on the right at 45°. In addition, there was 3/5 right tibialis anterior, extensor digitorum and extensor hallucis longus and peroneus longus. There was also diminished sensation in the right L5-S1 dermatomes and 1/4 deep tendon reflex at the right heel. They recommended pain management.

On April 7, 2010, she underwent right L5-S1 transforaminal epidural steroid injection by Dr. Ahmad and on April 20, 2010, underwent the second injection. Claimant told Dr. Volarich that the injections helped considerably with the pain, but did nothing for the foot drop. On April 28, 2010 Claimant told Dr. Ahmad she started having pain in her back and it started to radiate down into her right leg around March 8, 2010. (Group Exhibit A3, p. 28). On May 7, 2010, she saw Dr. DeGrange. His diagnosis was herniated nucleus pulposus and he recommended an AFO for the right foot.

Opinion Evidence

Dr. Volarich

Claimant offered the deposition and report of David T. Volarich, D.O., as Group Exhibit B. In August 2011, Dr. Volarich examined Claimant and reviewed the medical record. Dr. Volarich diagnosed Claimant with a herniated nucleus pulposus, L4-5 to the right, causing the

right leg L5 radiculopathy with foot drop and herniated nucleus pulposus at L5-S1 to the right, causing right S1 paresthesias and weakness. Dr. Volarich further testified that Claimant had preexisting minor lumbar strain from the 1990s that had resolved and was asymptomatic. (p. 18.) Dr. Volarich testified that within a reasonable degree of medical certainty Claimant's low back symptoms were caused by the reported accident. Dr. Volarich testified that the March 8, 2010 accident was the prevailing factor in causing the disc herniations. Dr. Volarich testified Claimant was not at maximum medical improvement as a result of the injuries sustained on March 8, 2010. (pp. 19-20.)

Dr. Volarich testified that within a reasonable degree of medical certainty Claimant was in need of additional treatment and diagnostics, including an EMG nerve conduction study of the right lower extremity to evaluate the severity of the radiculopathy and a myelogram CT of the lumbar spine to evaluate the severity of the nerve root impingement, and determine whether there was any instability present in the lower back. He recommended Claimant see David Robson, M.D., a spine surgeon (in the St. Louis area). (p. 21.)

Dr. Chabot

Employer offered the deposition of Dr. Michael C. Chabot as Exhibit C. Dr. Chabot examined Claimant in September and December of 2010 and reviewed the medical record. He recorded a history including Claimant not seeking treatment immediately but seeing her primary care physician a few weeks later complaining of right lower extremity symptoms including the right foot. Dr. Chabot acknowledges the MRI findings at L4-5 and L5-S1 from the study on March 29, 2010. Dr. Chabot believes further diagnostic studies of Claimant's back would be reasonable. He further noted the epidural injection series in April and May 2010 with noted relief of symptoms.

Separately, he does not believe Claimant was injured on the job because it is his opinion that [a work related accident] was not appropriately documented in the medical records. Dr. Chabot stated that notes suggested Claimant "had a recent history of disc herniation diagnosed five weeks ago." (p. 11.)

RULINGS OF LAW

Accident and Injury Arising "out of" and "in"
the Course of Employment

Claimant presented substantial credible evidence of a work related accident and injury having occurred on the reported accident date. Claimant further presented substantial evidence that Employer received notice of accident and injury on the reported accident date. This evidence was un rebutted by Employer. Claimant's expert, Dr. Volarich, gave cogent and persuasive testimony that Claimant sustained serious injury as a result of the reported accident. He further recommended a recognized spine surgeon to her for evaluation of the low back pain and right leg radiculopathy.

Expert Opinion

Claimant proffered persuasive expert testimony that she sustained work related injury to her low back, that she was diagnosed with lumbar disc pathology and that she was still in need of treatment to relieve severe symptoms. On the other hand, Employer offered the testimony of Dr. Chabot who admitted the medical condition, which includes identification of disc pathology by Dr. DeGrange *in the weeks following the reported accident*. Dr. Volarich examined Claimant and reported his findings as early as August 9, 2010. Dr. Volarich recommended further treatment in response to his own clinical findings, persistent symptoms and the prior suggestion of surgery by Dr. DeGrange as early as April 1, 2010. (Group Exhibit A3, p.0055.) However, Dr. Chabot did not find the condition to be work related.

Specifically, Dr. Chabot testified that he “felt that there was insufficient documentation that she had sustained a significant work injury that [he] could consider the prevailing factor in her present persistent complaints.” (p. 10.) Claimant’s attorney objected to this testimony as improper comment on credibility which is overruled. Forensic experts may analyze patient histories contained in medical records; here, Dr. Chabot simply ignored the contemporaneity of the disc diagnosis.

Dr. Chabot’s causation testimony is remarkable for its deviation from the plain facts of the undisputed treatment record of a recognized service provider in the St. Louis area. The note of April 1, 2010 from St. John’s Mercy Medical Center reads (in relevant part):

Patient is a 41 y.o. female presenting with back pain. The history is provided by the patient.

Back Pain

This is a chronic problem. Episode Onset: 5 weeks The problem has been gradually worsening (had MRI LUMBAR 3/29 PROTRUDING DISC RT L5-S1). Pertinent negatives include no chest pain and no headaches. The symptoms are worsened by walking. Nothing relieves the symptoms. Treatments Tried: flexeril, vicodin, no real relief, The treatment provided no relief. (Group Exhibit A3, p.0046.)

From this note Dr. Chabot concludes:

And the additional note from St. John’s dated 4-1-2010 indicated that she had a recent history of disc herniation diagnosed five weeks ago. (Underline added.) (Exhibit C, pp. 11-12.)

Dr. Chabot’s comment suggests a pre-accident herniation diagnosis. This conclusion is inexplicable when the note is dated April 1 and the MRI is dated March 29. No words contained in the note permit his conclusion that a herniation was diagnosed prior to the reported injury.

Dr. Chabot goes on to reference Dr. DeGrange’s notes which indicate a history of “no known event.” Such a *de minimis* note, while not corroborative of a work accident, is,

nevertheless, consistent with Claimant's complex medical facts of disc pathology and legal requirements of causation; the context of the brief note was undeveloped in the evidence. As stated by the co-worker, in his lay opinion, he did not think lifting the glass rack was an accident. Indeed, no one fell, nothing was broken and everyone went back to work. Claimant had experienced low back pain before the reported injury. Also, Dr. Chabot cites no patient history suggesting a non-work related origin. Dr. Volarich provided the more persuasive analysis.

Statutory Protections and Underlying Policies

Employer does not place notice of accident/injury in issue. However, the policies underlying the *notice concept* are useful in evaluating the timetable and circumstances of the case. The purpose of the thirty-day period is to allow an employer opportunity for *timely* investigation in order to minimize the effects of the injury. Willis v. Jewish Hospital, 854 S.W.2d 82 (Mo.App. 1993). Notice preserves an employee's case as much as it prompts an employer's right to investigate and its obligation to cure and relieve the effects of the injury. See Sections 287.140.1, 287.420 RSMo (2000).

Here, Claimant presented substantial evidence that she gave actual notice on the day of the reported accident. Most importantly, Claimant's notice to Employer was *timely*. Claimant reported the lifting incident and she also reported back pain. Despite this notice of injury, Employer did not direct Claimant to any medical provider.

At the outset, neither party embraced statutory protections and Claimant rather casually self-treated until examined by Dr. Volarich. Claimant's request for treatment per Dr. Volarich was met with Employer's IME, six months after notice of injury. Claimant continued work for Employer and under the same demands of the food service trade. No prejudice to Employer is suggested by any acts of Claimant.

Unconventionally, Claimant seems to have made no demand for treatment, treated privately and continued to work. She does not seek reimbursement for her private treatment. Equally unconventional is Employer's failure to perform contemporaneous IMEs and undertake other risk containment procedures to limit the effects of the injury. While unusual, the absence of a demand for treatment is not a rebuttal of Claimant's corroborated complaint of severe low back symptom onset. Claimant's injury is a case of unchanged pathology and one that is characterized by episodic symptomatology. More importantly, Dr. DeGrange considered removing a disc" as early as April 1, 2010, less than sixty days after the reported accident. Also, no evidence of new injury is suggested in the record which might otherwise raise doubt about the causal chain which had begun six months before Dr. Chabot's evaluation, or thereafter and to date.

MMI and Treatment

Claimant has not yet attained maximum medical improvement. Dr. Volarich referred Claimant to a surgeon. The record contains no evidence of Claimant's failure to cooperate or attend IMEs with qualified surgeons. Less clear is the reason for the absence of any demand for treatment. However, Claimant was able to work for Employer and, as with any complex

pathology, it is often the case that causation is unclear. Nothing in Chapter 287 requires an injured employee to self-diagnose nor is there any requirement that a treatment demand be made within a specified time period. Indeed, no prejudice obtained, nor is it asserted by Employer.

After some delay, Claimant communicated Dr. Volarich's report which equates to a demand for treatment. Claimant took reasonable steps to notify Employer of her need for treatment and her continued employment identified an avenue of communication. Employer did not tender treatment but scheduled the IME with Dr. Chabot. It is important to note that Employer may stand on its medical opinions but it does so with the known risk of reimbursability of such medical expenses where, as here, Claimant has communicated either need for treatment or a doctor's treatment plan.

The evidence compels a conclusion that the work-related accident of March 8, 2010 was the prevailing factor in causing Claimant's injuries to her back including the herniated disc at L4-5 and L5-S1. Claimant is entitled to additional medical treatment.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the record as a whole, Claimant is found to have demonstrated a need for relief from disabling symptoms and a plan for further relief of those symptoms. Claimant is entitled to additional medical benefits, and any accompanying TTD benefits, thereafter, until competent medical authority suggests otherwise. Employer shall immediately tender medical benefits by tendering treatment with a qualified surgeon with a demonstrated record in treating spinal pathologies, other than Dr. Chabot. Section 287.140.2 RSMo (2000).

The issue of permanent disability, including any attribution for pre-existing disability, if any, remains undetermined.

Date: _____

Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge