

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

Injury No.: 10-026805

Employee: Betty J. Yount

Employer: Circle K

Insurer: Ace American Insurance Company

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, we modify the 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

Nature and extent of permanent partial disability

The parties asked the administrative law judge to resolve the issue of the nature and extent of permanent disability resulting from the accident of January 17, 2010. Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with a compensable work injury. The administrative law judge found that employee suffered a 7.5% permanent partial disability of the right lower extremity at the 155-week level as a result of the work injury. We find this rating insufficient for the following reasons.

Employee's evaluating expert, Dr. David Volarich, rated employee's work injury at 50% permanent partial disability of the right ankle. On the other hand, employer's evaluating expert, Dr. John Krause, rated 0% permanent partial disability of the right ankle based on his assessment that the medical records reveal that employee's right ankle "returned to normal." We do not read the contemporaneous medical treatment record as supportive of a finding that employee's right ankle returned to normal. Instead, the medical records suggest employee continued to suffer from pain and swelling when, at her request, the doctors permitted her to return to work in February 2010. Employee also presented uncontested and credible testimony (and we so find) that her doctors informed her at the time of her release that her right ankle would never be the same, and that she continued to suffer from daily pain, swelling, and weakness in her right ankle, and that she was unable to run, walked with a limp, and relied more heavily on her left lower extremity when standing.

In light of the foregoing findings, we modify the award of the administrative law judge on this point. We find that, as a result of the accident, employee suffered a 25% permanent partial disability of the right lower extremity at the 155-week level. At the stipulated permanent partial disability benefit rate of \$352.27, we conclude that employer is liable under § 287.190 for \$13,650.46 in permanent partial disability benefits.

Statements of fact deemed admitted under 8 CSR 50-2.010(8)(B)

The parties asked the administrative law judge to resolve the issue of whether employer filed a late answer to employee's claim for compensation, and if so, whether the issue of medical causation is one of the facts that should be deemed admitted by the employer

Employee: Betty J. Yount

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pursuant to 8 CSR 50-2.010(8)(B). The administrative law judge disposed of the issue by concluding that medical causation is a question of law, not fact, and therefore employer was not precluded from disputing that issue even if it filed an untimely answer.

Contrary to the administrative law judge's analysis, the Missouri courts have held that the issue of medical causation is one of fact. See, e.g., *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo. App. 1999)(stating that "[w]hether or not the employment is a substantial factor in causing the injury is a question of fact.") In light of this precedent, it appears to us that if employee had alleged, in her claim for compensation, that the accident of January 17, 2010, was the prevailing factor causing her to suffer the resulting medical condition of a peroneal tendon tear, that employer's answer, if late, would be deemed to admit those facts pursuant to 8 CSR 50-2.010(8)(B). But because employee did not so allege, there is no basis for a conclusion that employer admitted the specific issue of medical causation involved in this case. For this reason, we conclude that 8 CSR 50-2.010(8)(B) does not work the effect that employer was precluded from disputing the issue of medical causation.

Conclusion

We modify the award of the administrative law judge as to the issue of the nature and extent of permanent partial disability employee suffered as a result of the accident of January 17, 2010.

Employer is liable for \$13,650.46 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Gary L. Robbins, issued July 25, 2013, is attached and incorporated by this reference to the extent not inconsistent with our award and decision herein.

The Commission approves and affirms the administrative law judge's allowance of an 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 6th day of May 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Betty J. Yount Injury No. 10-026805
Dependents: N/A
Employer: Circle K
Insurer: Ace American Insurance Company
Appearances: John J. Larsen Jr., attorney for the employee.
Edward L. Weiss, attorney for the employer-insurer.
Hearing Date: April 29, 2013 Checked by: GLR/rm

SUMMARY OF FINDINGS

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? January 17, 2010.
5. State location where accident occurred or occupational disease contracted: Jefferson 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 happened or occupational disease contracted: The employee stepped off a ladder and injured her right ankle.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right ankle.
14. Nature and extent of any permanent disability: 7½% permanent partial disability to the right ankle.
15. Compensation paid to date for temporary total disability: \$704.51.
16. Value necessary medical aid paid to date by employer-insurer: \$5,198.38.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$528.40.
19. Weekly compensation rate: The employee's compensation rate for all purposes is \$352.27 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$4,095.14. See Award.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the employee 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 employee: John J. Larsen Jr.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On April 29, 2013, the employee, Betty J. Yount, appeared in person and with her attorney, John J. Larsen Jr. for a hearing for a temporary award. The parties indicated that a final award should be prepared if the Court did not order the employer-insurer to provide additional medical care. The employer-insurer was represented at the hearing by their attorney, Edward L. Weiss. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Circle K was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Ace American Insurance Company.
2. On January 17, 2010, Betty J. Yount was an employee of Circle K and was working under the Workers' Compensation Act.
3. On January 17, 2010, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage is \$528.40, resulting in a compensation rate of \$352.27 per week for all purposes.
7. The employer-insurer paid \$5,198.38 in medical aid.
8. The employer-insurer paid \$704.51 in temporary disability benefits.
9. The employee has no claim for previously incurred medical bills.
10. The employee has no claim for mileage.
11. The employee had no claim for any temporary disability benefits.
12. The employee has no claim for permanent total disability.
13. The parties agreed that the employee reached maximum medical improvement as of February 1, 2010, if she receives no additional medical care.

ISSUES:

1. Medical Causation - Whether the employee's need for additional medical care after February 1, 2010 is medically causally related to the accident?
2. Additional Medical Care.
3. Permanent Partial Disability.
4. If the employer-insurer fails to file a timely answer is the need for medical care a factual issue and therefore admitted?

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Deposition of David T. Volarich, D.O.
- B. Division of Workers' Compensation records.
- C. Medical records of Seth M. Anderson, DPM.
- D. Medical records from St. Anthony's Medical Center.
- E. Medical records.

Employer-insurer Exhibits:

- 1. Deposition of John O. Krause, M.D.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee, Betty J. Yount was the only witness to personally testify at trial. All other evidence was presented in the form of written records, medical records or deposition testimony.

On January 17, 2010, the employee was employed by Circle K as an assistant manager. Her duties included stocking, cleaning, customer service and various other activities on a day to day basis. She works on her feet virtually her whole shift. She sustained injury on January 17, 2010, when she missed a rung while descending a ladder and fell backwards against an ice machine and onto the floor. In this process, the employee injured her right ankle, low back and left hip. She said that her ankle popped. There were no witnesses to the incident.

Immediately following this event, employee was unable to bear weight on her right lower extremity. She crawled to the front of the store and called the store manager for assistance. After the store manager arrived, the employee was taken to the hospital by her father.

Employee was seen in the emergency room at St. Anthony's Hospital shortly after midnight following the accident. Records referable to this emergency room visit document complaints referable to employee's back, left hip, and right ankle. X-rays were taken of the employee's injuries, including the right ankle. Clinical findings of right ankle swelling were noted, and x-rays of the right ankle demonstrated ankle joint effusion and lateral soft tissue swelling. The employee was referred for follow up care.

The employee was seen in follow up later that same day at Urgent Care with continued complaints referable to her low back, left hip, and right ankle. She was placed on light duty, given an air cast, and advised to continue using crutches. Swelling and ecchymosis of the right ankle was noted at Urgent Care again on January 25, 2010, and the employee was maintained on light duty status at that time. When last seen at Urgent Care on February 1, 2010, complaints referable to the left hip and low back had resolved. The employee continued to describe difficulty with weight-bearing on her right lower extremity. The employee was released from active care at that time.

When released from active care in February 2010, employee was told by the treating physician that she would always have problems with her right foot and ankle, but that there was no more treatment that could be done.

Employee returned to full duty work after February 1, 2010. She testified that she continued to experience problems with weight-bearing on her right lower extremity. She walked with a limp. She further testified that the symptoms referable to the right foot and ankle never completely resolved. The employee testified that she had continued problems of lots of pain, swelling and weakness. She indicated that she has a pain level that is continuous at 7/10. She also testified that every time she takes a step it feels like there is a knife in her foot. When questioned by the Court the employee maintained that every time she takes a step it feels like a knife is in her foot. She also indicated that she is not taking any medication for her ankle problems.

The employee worked full duty at Circle K until she was discharged on June 11, 2012, for problems unrelated to her accident.

On September 6, 2011, the employee testified that she worked a double shift. She indicated that after her shift she laid down and when she got up she could not put any pressure on her right foot and "could not stand it". She used her group health and sought care with Dr. Anderson who saw her on September 6, 2011. The employee testified that Dr. Anderson looked at her foot, examined old x-rays and ordered an MRI. After the MRI was completed, the employee reported that she was told by Dr. Anderson that she had a tear and needed surgery.

The employee reported this treatment and these findings to her employer. She was referred to Dr. Krause for an IME. Dr. Krause is a board certified orthopedic surgeon who specializes in the lower extremities. Dr. Krause saw the employee on October 24, 2011. Dr. Krause took a history form the employee, performed a physical examination and reviewed medical records. He reported that:

- The employee is 5'5" and weighs 240 pounds.
- The employee went approximately 19 months before she sought any additional treatment for her right ankle.
- The employee denied any new injury.
- He found mild swelling around her lateral hindfoot and peroneal tubercle, satisfactory ankle range of motion, pain with passive inversion and active eversion, tenderness around her peroneal tubercle, tenderness over her cuboid, tenderness at her 4th and 5th

tarsometatarsal joints, nonspecific tenderness around her anterior ankle, and tenderness around her 2nd metatarsal base and shaft.

- The AP, lateral and oblique right ankle x-rays were normal.
- The doctor characterized the MRI that he reviewed as not of high quality, but indicated it showed edema in the second metatarsal consistent with a stress reaction, some edema in the cuboid and in the posterior talus, changes in the peroneal tendons around the peroneal tubercle and lateral hindfoot.

Dr. Krause's assessment:

1. "Diffuse midfoot pain with multiple areas of bone edema consistent with recent injury".
2. "Lateral hindfoot pain cannot rule out peroneal tendon tear".

Dr. Krause also provided his opinions stating:

- "Based on the patient's history and records available, it is my opinion to a reasonable degree of medical certainty that the injury dated 1/17/10 is not the prevailing factor in the patient's right peroneal tendon pathology or need for treatment".
- "It is very uncommon for a patient to tolerate a peroneal tendon tear for 20 months. Based on the MRI evidence of recent injuries to the 2nd metatarsal and cuboid, I suspect the patient has had a secondary injury within the last several months. This is likely the time that she tore her peroneal tendons".
- "Dr. Anderson's treatment for her peroneal tendons is not unreasonable. Any treatment for her foot and ankle is unrelated to her injury dated 1/17/10".
- "The patient is at maximum medical treatment regarding her injury dated 1/17/10. She has 0% permanent partial disability regarding that injury".

On May 23, 2012, Dr. Volarich conducted an IME at the request of her attorney. Dr. Volarich also examined the employee, reviewed records and prepared a report dated May 23, 2012.

Dr. Volarich reported that:

- The employee was still working when he saw her.
- The employee was injured on 1/17/10. She worked for 1½ years after the accident with progressively worsening pain.
- Surgery was eventually recommended, but never performed.
- At the emergency room the employee was diagnosed with right foot contusion and right ankle sprain.
- Records indicate she was ready to return to work.
- On 9/6/11 the employee worked 16 hours and had severe pain in her right foot. She was diagnosed with possible peroneal tendon repair.
- A 9/8/11 MRI of the right foot had suggestion of thickness tearing of the peroneus brevis. There was a stress fracture at the base of the metatarsal with adjacent bone marrow edema.
- On 10/21/11 Dr. Anderson diagnosed peroneal tendon tear on the right, possible cyst with sinus tarsal syndrome of the right lateral ankle with osteochondral defect.

- On 10/24/11 the employee saw Dr. Krause for an IME. He said the employee had bony edema consistent with recent injury.
- The employee says after the 1/17/10 accident she had ongoing foot and ankle pain and swelling. She said she had to ice and heat throughout the day and when she got home she had to elevate her foot.
- The employee reported no difficulties with her right ankle until her accident.
- The employee walks with a limp due to right ankle pain. Could only stand on right foot for two seconds due to pain.
- The employee was 5'5½" tall and weighed 261 pounds.

Dr. Volarich diagnosed:

1. Impact trauma right ankle with partial inversion causing osteochondral defects of the talus and tibia as well as tear of the peroneus brevis tendon-S/P non operative care.
2. Abnormal weight bearing with limp causing stress fracture 2nd metatarsal.

Dr. Volarich opined:

- "... the accident that occurred 1/17/10 ... was the substantial contributing factor as well as prevailing or primary factor causing the osteochondral defects of the talus and tibia and the longitudinal tear of the peroneal brevis tendon. Due to abnormal weight bearing for over a year and a half she developed a stress fracture of the 2nd metatarsal as well. The work injury was a prevailing factor causing her symptoms and need for treatment".
- The employee is not at MMI.

Dr. Volarich also provided disability ratings:

- Assuming no additional care, 50% permanent partial disability of the right lower extremity rated at the ankle due to the osteochondral defects of the talus and tibia and the tear of the peroneal brevis tendon. He also recommended more medical care including meds, PT and injections.
- He stated that the employee requires surgical repair of her right ankle and osteochondral defects and peroneal tear.

On June 5, 2012, employee reinjured her right ankle, working for Circle K, when she pivoted while carrying gallons of milk and her right ankle popped.

The employee was seen again by Dr. Krause and by Dr. Volarich following this event.

On July 24, 2012, Dr. Volarich saw the employee again and prepared a report dated July 24, 2012. He indicated that the employee was not working at that time and that she reported increased pain, popping and swelling since the June 5, 2012 accident. Dr. Volarich's opinion was that this was an exacerbation of her right ankle syndrome and does not represent a new injury to the right ankle. His initial opinions remained.

Dr. Krause saw the employee again on December 12, 2012, and prepared a report of the same date. He had the benefit of Dr. Volarich's report. Dr. Krause indicated that the new records that he saw and the new injury did not change his initial opinions.

Dr. Volarich testified by deposition on October 5, 2012. In addition to the information that he already provided, he indicated that:

- When he saw the September 8, 2011 MRI he thought the stress fracture had healed.
- You would expect a fracture or stress fracture or even a complete bony fracture to be healed by that time.

Dr. Volarich testified that he agrees with some of the findings of Dr. Krause. However, he reported that the bone marrow edema in the cuboid and the second metatarsal are from the stress injuries to those bones, and that was because of abnormal weight bearing which was as a result of the accident to the ankle. He also testified that he agreed with Dr. Krause in that it is very uncommon for a person to tolerate a peroneal tear for 20 months. He indicated that he saw no evidence of a new injury - "She just bit the bullet and went on".

Dr. Krause testified by deposition on February 13, 2013. He discussed the MRI that was done on September 18, 2011. He indicated that:

- There was not a definite tear on the MRI but with the quality of the MRI he could not rule it out.
- The employee had multiple areas of bone edema you see on the MRI from September, so that would suggest a recent injury, not an injury that is 19 months old.
- If she had an injury in 2010 the bone edema would have resolved. It would only last for three to five months after the injury.
- We know for a fact that the edema in the second metatarsal did not occur in January of 2010. It suggests a more recent injury than January 2010.
- There is no evidence that would suggest that a tendon tear would have been the result of the injury at work.
- The vast majority of patients with peroneal tendon tears do not walk around on them for 19-20 months.
- The employee may have been able to do her work at Circle K, but she would have sought treatment along the way.

Dr. Krause further testified that:

- The treatment that Dr. Anderson gave was reasonable. He said if she truly has a tendon tear, surgery is fair and reasonable.
- A peroneal tear will not get better until you have surgery.
- The employee is at MMI from her ankle strain of 1/17/10 and has no disability.

Dr. Krause commented about the reports of Dr. Volarich that he reviewed:

- The employee has some atrophy in her calf that she did not have before. He says peroneal tendon tears don't cause calf atrophy.
- The June 5 injury didn't change a whole lot in her physical exam or her clinical course.

Dr. Krause testified that his second examination did not change his prior opinions. During cross examination, Dr. Krause indicated that he cannot rule out a peroneal tear. He agreed that if the employee has a peroneal tear it would be the result of a traumatic event, but indicated that the employee did not sustain a peroneal tear at the time of her 1/17/10 injury.

He would not say that the employee's story of events was untrue. He testified that "It would be my opinion that clearly she had a second injury from the MRI that shows the edema in the second metatarsal. So whether she identifies that or whether she remembers that, I'm not saying the employee is lying, she just may not remember that. But clearly she's got a second injury via second metatarsal stress reaction, clearly had a second injury. Secondly, peroneal tendons don't progress. So for her to say, I had this in January of 2010 and it got so bad it kept increasing, that's not a peroneal tendon tear. They just don't get better but they don't get worse without a second injury. So if she had the testimony that – if she said in her testimony that, I had this injury on January 17th, 2010, and over 18 or 19 months it slowly got worse and I know a hundred percent I didn't have a second injury, I would not agree with that. I would say something is misleading here".

Dr. Krause would not agree that the employee could have torn her peroneal tendon and not be aware of it.

RULINGS OF LAW:

Issue 1. Medical Causation - Whether the employee's need for additional medical care after February 1, 2010 is medically causally related to the accident? and Issue 2. Additional Medical Care.

The evidence surrounding the critical areas of dispute in this case is centered in just a few areas:

1. Did the employee tear a tendon in her January 17, 2010 accident?
2. Is the employee's testimony persuasive where she says that she:
 - a. went 19-20 months working on her feet everyday without getting medical assistance while experiencing 7/10 constant pain. She said that her ankle had a feeling as if there was a knife in her foot with every step she took.
 - b. never had a second accident where she tore tendons.
3. Whether the medical evidence in the case supports the opinions of Dr. Volarich or Dr. Krause as to medical causation and the need for additional medical care?

There appears to be consensus that the employee is in need of medical care due to trauma that has been done to her right ankle. The medical evidence is in total disagreement as to whether the need for such care resulted from the January 17, 2010 accident.

Dr. Volarich clearly states that the employee is not at maximum medical improvement and needs medical care including surgery due to her accident of January 17, 2010.

Dr. Krause says the need for additional care is not related to the accident of January 17, 2010. In part he justifies his opinion on objective evidence. He reported that the employee went 19-20 months before seeking additional medical care. He questions how this can be done given the extent of the problems that the employee claims resulted from her January 17, 2010 accident. More importantly, when Dr. Krause reviewed the medical records, including the September 2011 MRI, he reported that the employee had multiple areas of bony edema. He testified that any bony edema from the January 17, 2010 accident would have resolved in a period of three to five months. Since the employee had bony edema, it could not have resulted from the January 17, 2010 accident and as the doctor said suggests a more recent accident. This objective evidence supports his opinion that the employee's need for medical care is not related to her accident of January 17, 2010. The Court finds this explanation regarding bony edema to be more persuasive than the explanation provided by Dr. Volarich that the bony edema was caused by stress injuries and abnormal weight bearing. In addition to the objective medical evidence, the Court finds that it is unlikely that the employee could have stood and worked on her feet every day in the pain levels that she described. The only reasonable explanation is that there was a subsequent event.

Based on a consideration of all of the evidence in this case, the Court finds the medical opinions of Dr. Krause to be more persuasive than the medical opinions of Dr. Volarich. The Court finds that while the employee is in need of additional medical care, it is not the responsibility of the employer-insurer as any need for medical care is not medically causally related to the employee's accident of January 17, 2010. The employer-insurer is not required to provide additional medical care to the employee.

3. Permanent partial Disability.

The parties indicated that if the Court finds that the employee is at maximum medical improvement and does not need additional medical care as a result of her January 17, 2010 accident; then the Court should rule of the issue of permanent partial disability.

Based on a consideration of all of the evidence, the Court finds that the employee sustained a 7½% permanent partial disability to her right ankle as a result of her January 17, 2010 accident. The Court orders the employer-insurer to pay \$4,095.14 to the employee as permanent partial disability compensation.

4. If the employer-insurer fails to file a timely answer is the need for medical care a factual issue and therefore admitted?

The Division of Workers' Compensation records show that the employee filed her claim on November 17, 2011. The claim has a date stamp showing that the document was received on that date. The Division of Workers' Compensation records show that the employer-insurer filed its answer on December 19, 2011. The answer has a date stamp showing that the document was received on December 19, 2011.

Department of Labor and Industrial Relations Rule 8 CSR 50-2.010.8B indicates that "Unless the Answer to Claim for Compensation is filed within thirty (30) days from the date the division acknowledges receipt of the claim or any extension previously granted, the statements of fact in the Claim for Compensation shall be deemed admitted for any further proceedings.

It is commonly understood that the question of medical causation, the need for medical treatment and surgery is a subject that requires expert medical opinion.

After considering the arguments of the attorneys, the rules and regulations and cited law, the Court finds that the issue of medical causation, the need for treatment and surgery is not a factual issue that can be admitted by the late filing of an answer. There is no expert medical opinion contained within the claim stating that the employee needs medical care. Assuming that the employer-insurer filed a late answer, the Court finds that such late filing does not factually admit any issue regarding medical causation or the employee's need for medical treatment. The issue of medical causation is a legal rather than a factual determination.

ATTORNEY'S FEE:

John J. Larsen Jr., attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation