Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 14-001314

Employee: Anita Paxton

Employer: Little Sisters of the Poor

Insurer: Old Republic 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, heard oral argument, 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.

Preliminaries
The parties asked the administrative law judge to resolve the following issues:

1. Was employee's surgery to repair the peroneal nerve in her left ankle medically causally related to her work injury on January 11, 2014?
2. Did employee's January 11, 2014, accident cause a traumatic olecranon bursitis with MRSA to develop in employee's right elbow?
3. What is the nature and extent of employer/insurer's liability for permanent partial disability benefits, if any?
4. Did employee engage in post-injury misconduct?

The administrative law judge determined:

1. Surgery to repair the peroneal nerve in employee's left ankle was medically causally related to her January 11, 2014, work injury.
2. Employee's January 11, 2014, work accident caused a traumatic olecranon bursitis with MRSA in employee's right elbow.
3. Employer/insurer is liable to employee for 25% permanent partial disability of the left ankle and 7.5% permanent partial disability of the right elbow.
4. Employee did not engage in post-injury misconduct.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred in that:

1. Employee failed to provide evidence that her work injury caused the subsequent fall injury to her right elbow.
2. Employee failed to provide evidence that her work injury caused ill-being of her peroneal nerve.
3. Employee engaged in post-injury misconduct in that employee knowingly committed three errors, each of which violated Missouri state laws and the policies of employer, and which could have caused death, an injury or injuries to patients, staff or the public, entitling employer to a repayment of temporary total disability benefits it paid employee after a Temporary Award.
4. The percentage of permanent partial disability awarded in regard to employee's right elbow and left ankle was not supported by the facts and expert opinions.

For the reasons stated below, we modify the award and decision of the administrative law judge referable to the issue of post-injury misconduct and the award of temporary total disability benefits.

Discussion

Did employer discharge employee for post-injury misconduct, for purposes of § 287.170.4 RSMo

We adopt the following factual findings of the administrative law judge:

> In February 2013, the Employer hired Claimant as a registered nurse. She supervised CNAs, directed patient care, administered medication, evaluated patient mental and social status, provided emotional support to patients and tried to make residents feel at home. The pharmacy required a staff member to receive Schedule I and II drugs onto patient floors. Claimant knew these drugs were kept in a locked safe inside a locked medication chart, and the drugs were highly regulated to prevent theft.[1]

We find employee was aware of employer's policy relating to safe dispensing and administration of controlled medications in a nursing home in compliance with Missouri Department of Health and Senior Services, Division of Regulation and Licensure rules regarding controlled substances.

The employee did not appear or testify at the final, December 13, 2019, hearing. However, the administrative law judge's March 9, 2020, award incorporated testimony of employee presented at the earlier February 17, 2015, hearing for the Temporary or Partial Award, and employee's October 22, 2014, deposition testimony. In her May 27, 2015, *Temporary or Partial Award* in this matter, the administrative law judge stated, "I find Claimant was not generally credible about her administration of medication post injury and may have committed errors that violate state and/or local policies."[2] In the March 9, 2020, final award, the administrative law judge reiterated, "Claimant offered conflicting testimony about whether she left the medication cart and medication door unlocked on April 3 and received a warning, whether she gave a resident the wrong medication, if she watched the resident take the medicine or if she saw Exhibit C, the verbal warning."[3] We adopt these findings. We credit the employee's original October 22, 2014, deposition admission that she left a medication cart unlocked as she watched television with patients in an adjacent room because of "The fact that I trusted them."[4]

Section 287.170.4 RSMo, provides:

> If the employee is terminated from post-injury employment based upon the employee's post-injury misconduct, neither temporary total disability nor temporary partial disability benefits under this section or section 287.180 are payable. As used in this section, the phrase "post-injury misconduct" shall not include absence from the workplace due to an injury unless the employee is capable of working with restrictions, as certified by a physician.

---

[1] *Award*, p. 7.
[2] *Temporary or Partial Award*, p. 15.
[3] *Award*, p. 23.
[4] *Transcript*, 580.

The administrative law judge concluded that the employee did not commit post-injury misconduct as a matter of law because employee's errors relating to administration of medication to employer's nursing home patients were not *willful* but merely negligent or careless. While acknowledging that employee's decision to leave a medicine cart unlocked violated employer's policy as well as state law, the administrative law judge nonetheless concluded that employee "lacked the requisite intent for her action to rise to the level of misconduct". *Temporary or Partial Award*, p. 14. The administrative law judge further found noting inconsistencies in employer's evidence, that employer failed to meet its burden of proving post-injury misconduct.

The administrative law judge considered the statutory definition of misconduct included in § 288.030.1(23) as support for the conclusion that "Under the Employment Security chapter, "Misconduct" suggests a "willful disregard," "deliberate violation" or negligence or recurrence to the extent it manifests culpability. We disagree.

Section 288.030.1(23), specifies that work-connected misconduct shall include, among other behaviors:

> (a) Conduct or a failure to act demonstrating . . . knowing violation of the standards which the employer expects of his or her employee;
>
> . . .
>
> (e) A violation of an employer's rule, unless the employee can demonstrate that:
> a. He or she did not know, and could not reasonably know, of the rule's requirements;
> b. The rule is not lawful; or
> c. The rule is not fairly or consistently enforced.

In *Esquivel v. Hy-Vee, Inc.*, 498. S.W.2d 832 (Mo. App. 2016), the appellate court specifically found that whether an employee's admitted violation of an employer rule was deliberate was irrelevant, except insofar as such evidence established that the employee *did not know of the rule*. *Id.*, at 836. The court subsequently clarified this finding by limiting its application to employer rules that are specific in nature, barring particular and well-defined acts. *Wayne v. Div. of Empl. Sec.*, 600 S.W.3d 29, 37 (Mo. App. 2020).

As we have found, employee was aware of employer's policy and specific state regulations designed to ensure safe handling and administration of controlled medications in employer's nursing home setting. Employee violated employer's known policy as well as state safety regulations when she left a cart with controlled medications unlocked and out of her sight while she watched television with patients in an adjacent room. Irrespective of whether employee actually intended to harm employer's residents or whether any harm resulted from her actions we find that employee's irresponsible, dangerous, unlawful, admitted behavior constituted work connected misconduct pursuant to § 287.170.4 RSMo.

Employer documented two incidents that involved employee leaving a medication cart unlocked and unattended in its written warning dated April 3, 2014 and April 15, 2014. Employer thereafter discharged employee on May 5, 2014. Pursuant to § 287.170.4 RSMo, employee is therefore not entitled to temporary total disability benefits after her May 5, 2014, discharge.

Decision

We modify the award of the administrative law judge as to the issue of temporary total disability benefits. Because employer terminated employee from her employment for post-injury misconduct, employee is not eligible for temporary total disability benefits after her May 5, 2014,

discharge. Employer/insurer is entitled to $12,605.85 ($36,959.18, the stipulated amount employer paid employee for temporary total disability benefits from May 5, 2014, until July 26, 2015, in compliance with the Temporary or Partial Award in this matter, less $24,353.33, permanent partial disability awarded to employee by this award).

The awards and decisions of Administrative Law Judge Suzette Carlisle Flowers, issued May 27, 2015, and March 9, 2020, are attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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 5th day of January 2021.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert W. Cornejo, Chairman

Reid K. Forrester, Member

SEPARATE OPINION FILED
Shalonn K. Curls, Member

Attest:

Secretary

SEPARATE OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I disagree with the majority's award to the extent that it finds that employer discharged employee for post-injury misconduct and orders employee to reimburse employer for temporary total disability benefits it paid her on account of her compensable injury nearly five and a half years ago. I would affirm the administrative law judge's award as written.

At the outset, I take issue with the provisions of § 287.170.4 RSMo. I agree with the words of the late Judge Richard B. Teitelman that this provision:

> [P]unishes an employee for post-injury misconduct that, by virtue of being post-injury, could not have been a factor in causing the injury. The statute does not even require that the employer's decision to terminate the injured employee is reasonable or non-pretextual. There is nothing in the previous workers' compensation statute or any principle of common law that would deny otherwise available compensation based on post-injury misconduct that has no causal relationship to the injury that necessitated compensation in the first place.

Mo. All. for Retired Ams. v. DOL & Indus. Rels., Div. of Workers' Comp., 277 S.W.3d 670, 685-86 (Mo. 2009) (Teitelman, J., dissenting).

Here, the administrative law judge properly noted that post-injury misconduct is an affirmative defense and that the burden lies with employer to prove this issue. The administrative law judge observed employer's witnesses first hand and specifically found that they were not credible. She correctly concluded that employer/insurer failed to meet its burden of proving post-injury misconduct.

Section 287.800 mandates strict statutory construction of the provisions of Chapter 287. The workers' compensation law does not define misconduct. The term "misconduct" is defined in the dictionary as "intentional wrongdoing: deliberate violation of a rule of law or standard of behavior." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1443 (Unabridged, 2002).

Employee was not intentionally doing wrong or deliberately violating employer's rules or standards of behavior. Any medication errors employee made were innocent accidents and resulted in no harm to any of employer's patients. Employer did not even report employee's so called "misconduct" to its medical director or to the State Board of Healing Arts or Board of Nursing.

Based on the foregoing, I agree with the administrative law judge's finding that the penalty provided for in § 287.170.4 does not apply in this case because employer failed to prove that it terminated employee for post-injury misconduct. I would therefore affirm the administrative law judge's award in its entirety.

Because the Commission majority has decided otherwise, I respectfully dissent.

Shalonn K. Curls

Shalonn K. Curls, Member

AWARD

Employee: Anita Paxton

Dependents: N/A

Employer: Little Sisters of the Poor

Additional N/A

Insurer: Old Republic Insurance Company, c/o Gallagher Bassett Services

Injury No.: 14-001314

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

Hearing Date: December 13, 2019

Checked by: SC:LN

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: January 11, 2014
5. State location where accident occurred or occupational disease was contracted: St. Louis City
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 working, Claimant fell and injured her left ankle and right elbow.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left ankle, right elbow
14. Nature and extent of any permanent disability: 25% permanent partial disability of the left ankle, 7.5% permanent partial disability of the right elbow
15. Compensation paid to-date for temporary disability: $42,434.91
16. Value necessary medical aid paid to date by employer/insurer? $83,921.29

Employee: Anita Paxton

17. Value necessary medical aid not furnished by employer/insurer? N/A

18. Employee's average weekly wages: $872.07

19. Weekly compensation rate: $581.38 /$446.85

20. Method wages computation: Stipulated by the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

54.5 weeks of permanent partial disability from Employer	**$24,353.33**[1]

22. Second Injury Fund liability: No

TOTAL:	**$24,353.33**

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: Attorney Cynthia Hennessey.

[1] a) 155 x 25% PPD = 38.75 weeks for the ankle.
b) 210 x 7.5% = 15.75 weeks for the elbow.
c) 38.75 + 15.75 weeks = 54.5 weeks total.
d) 54.5 x $446.85 = **$24,353.33**

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Anita Paxton

Dependents: N/A

Employer: Little Sisters of the Poor

Additional N/A

Insurer: Old Republic Insurance Company, c/o Gallagher Bassett Services

Injury No.: 14-001314

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

STATEMENT OF THE CASE

On December 13, 2019, Ms. Anita Paxton ("Claimant") appeared by counsel before the undersigned Administrative Law Judge ("ALJ"), for a hearing for a final award at the Missouri Division of Workers' Compensation ("DWC"), St. Louis office.[2] Claimant seeks permanent partial disability benefits from Little Sisters of the Poor, ("Employer") and Old Republic Insurance Company ("Insurer"), c/o Gallagher Bassett Services. The Second Injury Fund is not a party to the case.

Attorney Cynthia Hennessey appeared for the Claimant. Attorney Robert Amsler appeared for the Employer and Insurer. The record closed after presentation of all the evidence. Court Reporter Lori Notze transcribed the court proceedings. Memorandums of law were submitted to the court by December 23, 2019.

VENUE and JURISDICTION

Venue is proper in St. Louis City and jurisdiction properly lies with the DWC.

PROCEDURAL HISTORY

The undersigned ALJ presided over a hearing for a temporary award in this matter on February 17, 2015, and the temporary award was signed May 27, 2015. The transcript and exhibits from the first hearing are incorporated by reference into this award.

STIPULATIONS

The parties stipulated that on January 11, 2014:

1. Claimant worked for the Employer and sustained an accident that arose out of and in the course of her employment in St. Louis City;[3]

[2] Claimant did not appear at the hearing and testify on the advice of her physician (See Claimant's Exhibit 8 (3 pages).
[3] All references in this award to the Employer also refer to the Insurer, unless otherwise stated.

2. Employer and Claimant operated under the Missouri Workers' Compensation Law;[4]
3. Employer's liability was fully insured by Old Republic Insurance Company;
4. Employer had proper notice of an injury;
5. A Claim for Compensation was timely filed;
6. Claimant's average weekly wage was $872.07;
7. Claimant's compensation rate for permanent partial disability ("PPD") benefits is $446.85 per week, and $581.38 for temporary total disability ("TTD") benefits;
8. Employer paid TTD benefits totaling $5,475.73 from January 26, 2014 to March 22, 2014;
9. Employer paid TTD benefits totaling $36,959.18 from May 5, 2014 to July 26, 2015;
10. Employer paid a grand total in TTD benefits of $42,434.91; and
11. Employer paid medical benefits totaling $83,921.29.

ISSUES

1. Was Claimant's surgery to repair the peroneal nerve in her left ankle medically causally related to her work injury on January 11, 2014? Answer: Yes
2. Did Claimant's January 11, 2014 accident cause a traumatic olecranon bursitis with MRSA to develop in Claimant's right elbow? Answer: Yes
3. What is the nature and extent of Employer liability for PPD benefits, if any? Answer: 25% PPD of the left ankle, and 7.5% PPD of the right elbow.
4. Did Claimant engage in post injury misconduct? Answer: No

EXHIBITS

In the temporary hearing, Claimant offered Exhibits 1 through 4. For the final hearing, Claimant offered the following Exhibits, five through nine, which were admitted into evidence without objection from the Employer:

Claimant's Exhibit	Description	Offered	Objection	Admitted
5	Transcript of the temporary Hearing dated 2-17-2015	Yes	No	Yes
6	Claimant's deposition	Yes	No	Yes

[4] All references in this award are to the 2005 MO Rev Statutes, unless otherwise stated.

Claimant's Exhibit	Description	Offered	Objection	Admitted
7	Letter, Dr. Schnidman	Yes	No	Yes
8	Letter, Dr. King	Yes	No	Yes
9	Report, Dr. Volarich	Yes	No	Yes

In the temporary hearing, the Employer offered Exhibits A through S, which are incorporated by reference into this award. In this hearing, the Employer offered the following Exhibits, E, and T through AAA, which were admitted into evidence without objection:

Employer's Exhibit	Description	Offered	Objection	Admitted
E	Termination letter	Yes	No	Yes
T	BJC x-ray (Dated 1-22-14) (Left ankle)	Yes	No	Yes
U	BJC – Venous Doppler Study (Dated 1-22-14)	Yes	No	Yes
V	Mercy Venous Doppler Study (Dated 1-29-14)	Yes	No	Yes
W	BJC x-ray right ankle (Dated 2-5-14)	Yes	No	Yes
X	BJC x-ray (Dated 2-5-14) (Left foot and ankle)	Yes	No	Yes
Y	MRI Dated 2-11-14 Professional Imaging	Yes	No	Yes
Z	BJC x-ray, 2-19-14 (Left ankle)	Yes	No	Yes
AA	BJC – x-ray, 3-31-2014 (Left ankle)	Yes	No	Yes
BB	BJC – x-ray, (Left ankle) (Dated 4-30-14)	Yes	No	Yes
CC	Orthopedic Surgery X-ray, (Dated 6-4- 14)	Yes	No	Yes
DD	MRI, 6-11-2014 (Professional Imaging)	Yes	No	Yes

Employer's Exhibit	Description	Offered	Objection	Admitted
EE	CT, (Dated 6-24-14) (Professional Imaging)	Yes	No	Yes
FF	Orthopedic Surgery x-ray, (Dated 7-9-14)	Yes	No	Yes
GG	BJC x-ray, (Dated 8-27-14) (Left ankle)	Yes	No	Yes
HH	Orthopedic Surgery x-ray (Dated 11-19-14)	Yes	No	Yes
II	Orthopedic Surgery Left ankle (Dated 1-7-15)	Yes	No	Yes
JJ	Mercy Emergency Room (Dated 1-12-14)	Yes	No	Yes
KK	Mercy Admission Records, (Dated 1-25-14)	Yes	No	Yes
LL	Medical records, Jeremy McCormick, M.D.	Yes	No	Yes
MM	Records, Diana Prablek	Yes	No	Yes
NN	Medical records, Thomas Tung	Yes	No	Yes
OO	Medical records, Anna Conti, M.D.	Yes	No	Yes
PP	Records, Workhealth St. Louis	Yes	No	Yes
QQ	Records, Aquatic Therapy	Yes	No	Yes
RR	Medical records, Dr. Politte	Yes	No	Yes
SS	Medical records, Dr. Lindhorst	Yes	No	Yes
TT	Records, Mercy Neurology	Yes	No	Yes
UU	Medical, Mercy Therapy	Yes	No	Yes
VV	Certified TTD payment records	Yes	No	Yes

Employer's Exhibit	Description	Offered	Objection	Admitted
WW	Report, Dr. Krause (Dated 1-25-16)	Yes	No	Yes
XX	Report, Dr. Krause (Dated 5-16-16)	Yes	No	Yes
YY	Medical report, Dr. Krause (Dated 6-17-16)	Yes	No	Yes
ZZ	Legal file – motions, orders	Yes	No	Yes
AAA	Claimant's deposition, 7-15-2019	Yes	No	Yes

Court's Exhibit	Description	Offered	Objection	Admitted
I[5]	Hearing information Sheet	Yes	No	Yes

Any marks or highlights contained in the above exhibits were made before they became a part of the record and were not placed there by the undersigned ALJ. Any objections made during the hearing, but not ruled on during the hearing or in this award, are now overruled.

FINDINGS of FACT

Claimant did not testify during the hearing for a final award, but she did testify at the first hearing and she was deposed on October 22, 2014. Her prior testimony is incorporated by reference into these findings of fact. The following facts were proven by a preponderance of the evidence:

In February 2013, the Employer hired Claimant as a registered nurse. She supervised CNAs, directed patient care, administered medication, evaluated patient mental and social status, provided emotional support to patients and tried to make residents feel at home. The pharmacy required a staff member to receive Schedule I and II drugs onto patient floors. Claimant knew these drugs were kept in a locked safe inside a locked medication cart, and the drugs were highly regulated to prevent theft.

In May 2013, Claimant signed her 90-day performance appraisal and became a full-time employee. Her only corrective plan was to take her scheduled breaks. Leading up to January 11, 2014, Claimant received no verbal or written warning about her work performance.

[5] Prior to the start of the hearing, the parties were asked to complete information contained in Court's Exhibit I about the expected exhibits, etc. to be presented at the second hearing. The Employer raised a number of objections that were discussed off the record and withdrawn before the start of the hearing. The information discussed prior to the hearing was marked and retained with the record for completeness.

On January 11, 2014, while walking in the parking lot at work, Claimant slipped on ice, fell and injured her left ankle. Several days later while on crutches from the earlier fall, Claimant fell again and lacerated her right elbow. She received antibiotics, but developed MRSA/bursitis, and was hospitalized. Washington University Orthopedics provided antibiotics. Claimant continued to medication at the time of the first hearing on February 17, 2015.

On March 22, 2014, Dr. McCormick, the authorized treating physician, released Claimant to return to work on light duty, with no standing more than 15 minutes per hour, and no lifting or climbing. The restrictions were later decreased to allow standing for 30 minutes per hour. When not at work, Claimant took Percocet to relieve discomfort.

April 3, 2014

On April 3, 2014, Claimant was the assigned floor nurse in charge of the medication cart on the seventh floor. During the hearing for a temporary award, Claimant testified she did not recall leaving the medicine cart unlocked. Nor did she see a write-up about leaving the medication cart unlocked until she requested to see her file. However, during deposition, Claimant testified she left the nurse's station and did not lock the medication cart or the nurse's room where the cart was located because she trusted patients.
She further testified:

> "I could hear what was going on in the next room. I just – that was just a brain fart. And the reason that I was next door watching television with these patients is because these patients, this is their home, and that is the difference between the Little Sisters and a regular nursing home or a hospital. It isn't run – from what I was told when I was hired, that it isn't run and that this is their home and we are to make them as comfortable as possible."

When asked during deposition what prevented a patient from going into the medication cart and taking medication, Claimant testified it was "the fact that I trusted them." (Page 84, lines 23-25 and page 85, lines 1-9).

At the hearing for a temporary award, Claimant testified that Ms. Avery told her she locked the cart.

On April 7, 2014, Claimant received a second performance appraisal signed by Ms. Patricia Avery, Director of Nursing, for the period February 2013 to February 2014.

April 15, 2014

At the hearing for the temporary award, Claimant testified she was not aware she left the medicine cart unlocked on April 15, 2014.

May 2, 2014

At the hearing for the temporary award, Claimant testified she left the resident's medicine on the TV, and did not witness the resident consume the medication because she wanted residents to feel like they were at home.

However, during deposition, Claimant testified she failed to watch a patient consume medication because:

> "I had to take medication to the other patient. I got distracted because I couldn't use the cart, so I had the medication with me. I got distracted into another patient's room. When I came out I pretty much – I went into the wrong room and the patient that was in there was totally lucid and blind and she told – she asked me to leave the medicines on her TV, which I did. And since she was totally lucid, then my goal to have their stay at Little Sisters be more like a home than a hospital. I did leave the –excuse me. I left the medications there for her to take."

During the hearing for the temporary award, Claimant testified she did not have the other patient's medication with her, she had to "go do it." During cross-examination, Claimant confirmed her deposition testimony. (Hearing transcript page 59).

Employer terminated Claimant on May 5, 2014. At that time Claimant was still on light duty with no standing more than 30 minutes per hour and no climbing stairs or lifting. At the time of the hearing on February 17, 2015, Claimant remained on restricted duty, no standing more than 30 minutes per hour and no lifting or climbing. Claimant denied seeing a written warning, until she requested to see her work record, and she never signed the written warning.

Witness 1 - Ms. Pat Avery

Ms. Pat Avery, a registered nurse, testified live at the first and second hearings at the request of the Employer. In 2014, Claimant worked as the Assistant Director of Nursing for the Employer. She supervised nurses, including Claimant. Ms. Avery had authority to discipline employees for attendance, tardiness, medication errors, interaction with residents, and other nursing problems.

During the temporary hearing, Ms. Avery testified that nurses are required to positively identify patients before providing residents with medication. The nurse's station door should be closed and locked when nurses are not present. In addition, the medication cart should be locked when not in use and a nurse is not present.

Nurses are trained to lock the medication cart if they leave it in the hallway to pass out medications. The medication cart must be locked if it is unattended at the nurse's station. Two

locks must be locked on the cart. The narcotic drawer will lock when the drawer is closed, and the main lock is pushed in to lock the entire cart.

Ms. Avery testified a nurse's first warning of a nursing violation is verbal. Ms. Avery would meet with the employee alone or with Mr. Deering, the human resource manager. The second warning of a nursing violation was in writing, and Mr. Deering was usually present. They would both meet with the employee in Mr. Deering's office, and he communicated their concerns to the employee. Mr. Deering maintained the written discipline files about nursing violations.

Before terminating a nurse, Ms. Avery and Mr. Deering discussed the matter. Either Mr. Deering or Ms. Avery wrote the warning. Mr. Deering presented the warning to Ms. Avery and the nurse. Sometimes Ms. Avery drafted the termination letter for a nurse because the infraction violated nursing policies and laws. Mr. Deering disciplined non-nursing violations of Employer's policies and the law.

Claimant returned to work on March 22, 2014. Ms. Avery assigned Claimant duties in line with her work restrictions. Ms. Avery transferred Claimant to a floor where residents walked past the nurse's station to eat and where they received medication. Claimant received instructions to stay at the nurse's station and let residents come to her.

On April 3, 2014, Mr. Avery arrived at the seventh-floor nurse's station where Claimant was on duty, and observed the medicine room door was open and she could see the medicine cart inside the room.

The medicine cart contained two locks, one for all the prescribed drugs. The cart contained a safe with a separate lock for Schedule I and Schedule II narcotic drugs. Ms. Avery observed the medicine cart was unlocked where the prescription drugs were stored but the safe was locked.

Ms. Avery looked for Claimant in that area and called her name but Claimant did not respond. Ms. Avery removed two charts from the medicine room and locked the medicine cart and the room. While waiting for the elevator, Ms. Avery heard Claimant's voice in the resident's lounge, on the other side of the medicine room, where the medication cart was stored. Claimant told Ms. Avery she was resting her foot.

Ms. Avery testified she told Claimant that she violated the Employer's policy and state law when she left the medication cart unlocked.[6] She advised Claimant to keep the medicine cart and medicine room door locked. The medication cart contained a number of medications, and Claimant would not know if a resident or a visitor took medicine from the cart and possibly

[6] During the first hearing Ms. Avery first testified she reprimanded Claimant on April 3, 2014 for leaving the medication cart and room unlocked. Later during testimony, Ms. Avery testified she reprimanded Claimant verbally "at the same time" for infractions that occurred on April 3 and April 15. This is consistent with the warning notice in evidence (Exhibit C), which lists both dates.

harmed themselves. Ms. Avery testified she thought the verbal warning took care of the problem.

Claimant was on medical leave when Ms. Avery completed her job evaluation on February 12, 2014. On April 7, 2014, Ms. Avery reviewed Claimant's job evaluation with her. Claimant received four out of five possible in performance, the equivalent of a commendable performance. Commendable was interpreted as performance that often exceeds the requirements of the job in some areas. Employer's policy required performance evaluations to be limited to performance during the evaluation period. In this case the evaluation period was February 2013 to February 2014.

Ms. Avery testified Claimant received a deficiency from the State in November 2013 for incomplete paperwork. No deficiencies were reported about securing or administering medication. That information is not contained in evidence.

On April 15, 2014, Ms. Paxton again observed both the nurse's door and the general lock on the medication cart were unlocked in the area where Claimant was on duty. Ms. Avery called Claimant's name but could not locate her. Ms. Avery testified she locked the nurse's door and medication cart. Later, Claimant informed Ms. Avery she was in a room.

On April 16, 2014, Ms. Avery testified she spoke to Mr. Deering about Claimant leaving the medication room and cart unlocked again. Together they drafted a written warning about both the April 3 and April 15 incidents (Exhibit C), and they discussed the document with Claimant. The document contained space for up to four offenses. Ms. Avery testified she combined the April 3 and April 15 infractions, and told Claimant this was the first written warning. Ms. Avery did not know if Claimant's file contained other violations, but no offenses were marked on Exhibit C. The document was signed by Ms. Avery, but not dated.

According to Ms. Avery, Claimant refused to sign the warning and denied leaving the medicine room door open and medication cart unlocked on April 15, 2014. The warning said in part that any further infraction could result in termination. However, Exhibit C is in evidence but does not contain a warning about termination.

Ms. Avery testified she and Mr. Deering reviewed the written warning with Claimant. She refused to sign the warning and denied leaving the door and cart unlocked. Claimant noted they were locked when she returned to her station. Ms. Avery testified she locked the nurse's door and the medication cart.

During the first hearing, Ms. Avery testified that on May 2, 2014, a patient informed her that Claimant gave her the wrong medication and she handed it to Ms. Avery. Ms. Avery confirmed that the medication Claimant gave the resident was not the medication prescribed for her. The patient should have received 10 milligrams of Sinemet statin, but 30 milligrams were

given to the patient.[7] Ms. Avery further testified the Employer's policy required Claimant to observe the patient consume the medication.

Ms. Avery testified she completed Employer's Exhibit D, a medication error report required by the Employer to keep track of medication errors and alert physicians about medication errors. Ms. Avery testified Dr. Salama was notified of medication errors, however, the record contains no evidence of the notification.[8]

Ms. Avery discussed the matter with Mr. Deering and notified the administrator and head nun. A decision was made to terminate Claimant. Ms. Avery and Mr. Deering drafted the termination document.

On May 5, 2014, Ms. Avery and Mr. Deering met with Claimant, reviewed the termination document with her, and terminated her employment. Claimant disagreed with the decision, became angry, refused to sign the termination document, and said they would hear from her attorney.

Witness 2 – Mr. Mike Deering

Mr. Mike Deering worked as a Human Resource Director for the Employer from December 2010 to January 2017. He testified at the request of the Employer's attorney. Mr. Deering enforced the Employer's policies and procedures as it related to the nursing staff.

Ms. Avery handled nursing violations and asked for his input. When nursing violations occurred, Mr. Deering disciplined the nurses involved. He was familiar with some of the laws and regulations related to nursing homes.

Claimant's annual performance review was due February 12, 2014; however, Claimant was out on medical leave for the work accident. It was appropriate for Ms. Avery to perform Claimant's performance review for the period ending February 2014 on April 7, 2014, when she returned to work.

The performance review is limited to the prior year's activities to avoid confusing performance from the previous year with performance in the current year. The incident in the current year can be mentioned, but it should not impact review of the prior year.

Ms. Avery informed him that Claimant violated medicine cart protocol on April 3 and April 15, 2014. Mr. Deering is aware of laws that require the medicine cart to be locked, and considered the infractions to be serious because of the potential harm to residents and visitors if they consumed the drugs.

---

[7] During the first hearing, Ms. Avery gave conflicting testimony about whether or not the patient received Sinemet: Question: How much Sinemet statin was the patient supposed to receive? Ms. Avery: 10 milligrams. Question: How much did she receive? Ms. Avery: She had a total of 30 milligrams in the cup. Question: Did she receive any Sinemet? Ms. Avery: In the cup, no. Question: Was there supposed to be? Ms. Avery: Yes.

[8] In the first hearing for a temporary award, Dr. Haney testified he had no firsthand knowledge of Claimant's competence as a nurse. He was made aware that a nurse violated a rule, but did not have the name of the nurse. He was not aware of any patient being harmed by a medicine error caused by Claimant.

On April 16, Mr. Deering testified he and Ms. Avery met with Claimant, expressed the seriousness of the infractions, and gave Claimant a written warning, which Claimant refused to sign. This was the first time Mr. Deering recalled disciplining medical staff for leaving the medicine cart open. He did not contact Haney Salama, M.D., the program Director, for input on discipline.

Ms. Avery informed him that Claimant committed a medication error on May 4, 2014. Mr. Deering was concerned again because the medication error was so close in time to the written warning about the unlocked carts. A resident could be harmed by a medication error in the same way someone could be injured from ingesting medication from an unlocked cart.

Mr. Deering concluded Claimant's conduct on three occasions showed a willful disregard for the interests of the Employer, and a deliberate violation of the rules and policies of the Employer. Mr. Deering decided to terminate Claimant because: 1) the infractions occurred so close together, 2) Claimant had been given a verbal warning, and 3) The infractions were serious. He and Ms. Avery drafted the letter to terminate Claimant.

On May 5, 2014, Mr. Deering discussed the seriousness of the medication error and recent unlocked medication carts with Claimant, and terminated her in the presence of Ms. Avery. (Exhibit E). Claimant denied the allegations and refused to sign the termination document.

Medical treatment - left ankle

On January 12, 2014, Claimant treated at the Mercy Hospital Emergency Department for an ankle fracture that occurred one hour earlier. X-rays showed a minimally displaced left ankle fracture. Claimant was referred to orthopedics, prescribed Percocet, and discharged in a wheelchair.

On January 13, 2014, Claimant was examined at Workhealth. Her ankle fracture was determined to be work related and Mr. Deering was notified.

Jeremy McCormick, M.D. initially treated Claimant on January 16, 2014 and diagnosed a left stable distal fibula fracture. Dr. McCormick ordered a walking boot, Ace wrap, and pain medication. Claimant was permitted to weight bear with the boot. He ordered a bone stimulator in July 2014 due to delayed healing.

On October 6, 2014, Dr. McCormick diagnosed delayed healing of the left ankle fracture. By November 2014 x-rays showed a healed fracture, however Claimant continued to have pain. Pain persisted despite work conditioning and work hardening. Thinking "outside the box," Dr. McCormick recommended an evaluation to see if the peroneal nerve had been stretched in some way.

Thomas Tung, M.D., injected Claimant's left ankle and administered a nerve block on March 14, 2015. Dr. Tung noted Claimant's history and location of pain were not entirely consistent with a superficial peroneal nerve lesion. Further, he did not expect nerve damage because the fracture was closed without surgery. He administered a nerve block in the area of the superficial peroneal nerve and Claimant's pain decreased considerably. Therefore, Dr. Tung recommended repair of the superficial peroneal nerve.

On March 31, 2015, Dr. Tung performed a left ankle decompression of the peroneal nerve, neurectomy and transposition of the posterior branch of the superficial nerve. Dr. Tung decompressed the superficial peroneal nerve, and released the fascia over it. The fascia was lower than expected. Dr. Tung observed a smaller posterior branch of the main superficial peroneal nerve, heading to the area where Claimant reported pain. The posterior branch was transected, cauterized, cut and inserted into the leg muscle. The main superficial peroneal nerve remained intact.

June 3, 2015, Dr. Tung imposed the following restrictions: work an eight-hour shift, no more than three shifts per week. Claimant noted improvement during physical therapy. On August 26, 2015, Claimant noted her pain had decreased from 9 out of 10 to 4 out of 10. Examination revealed a healed left leg, no significant edema. Dr. Tung concluded Claimant was doing very well and had completely healed, and reached maximum medical improvement. He returned Claimant to work full duty, and discharged her from care.

Dr. McCormick discharged Claimant from care on August 28, 2015.

Diagnostic findings of the left ankle

X-rays dated January 16, 2014, revealed a left ankle lateral malleolus fracture. X-rays dated January 22, 2014 revealed unchanged oblique fracture of the distal fibula (non-displaced). X-rays of the left ankle dated June 4, 2014, revealed delayed union or developing nonunion. MRI of the left ankle without contrast, on June 11, 2014 revealed a bone-bone gap of 2 mm, mild peroneal tendinopathy, distal Achilles tendinitis, arthritis, and plantar fasciitis.

A CT of the left ankle without contrast, revealed a very small amount of bony bridging of the fracture on June 24, 2014. X-rays on July 9, 2014 revealed some healing of the left ankle fracture. X-rays dated August 27, 2014, revealed a minimally displaced left ankle fracture. X-rays dated November 19, 2014 were unchanged, with a fragment extending into the anterolateral gutter. An x-ray dated January 7, 2015 remained unchanged.

Right elbow

On January 13, 2014, Claimant fell while using crutches after she fell on January 11, 2014, and lacerated her right elbow. Kevin King, M.D., Claimant's primary physician, prescribed Kelflex and Bacitrin and steri stripped the wound.

On January 26, 2014, Claimant was admitted to Mercy Emergency Room Department after she developed swelling and redness to the right elbow and forearm, warm to touch. Claimant gave a history of a laceration while walking on crutches the day after she fell at work. A healed laceration to the right elbow was noted. She was given Percocet for pain and diagnosed with a bacterial skin infection.

On January 28, 2014, Diana Prablek, M.D., diagnosed cellulitis, likely associated with trauma and laceration – now healed, and possible mild right olecranon bursitis.

An ultrasound of the right arm dated January 29, 2014 revealed no evidence of deep or superficial vein thrombosis. Test results were positive for MRSA and cellulitis. She was diagnosed with right olecranon bursitis and discharged the same day.

Daniel Osei, M.D., examined Claimant on February 5, 2014 and diagnosed olecranon bursitis, and prescribed a gel brace. An MRI of the right elbow dated February 11, 2014, revealed cellulitis over the elbow, and mild to moderate osteoarthritis.

Jay Keener, M.D., examined Claimant's right elbow on February 26, 2014 and diagnosed traumatic olecranon bursitis complicated by cellulitis and prescribed medication. Treatment for the work injury included a boot, crutches, medication, elbow pad, diagnostic studies, and physical therapy.

Dr. Keener returned Claimant to work on March 19, 2014 with the following restrictions: no lifting over 10 pounds, and avoid pushing the medicine cart. On March 31, 2014, Dr. Keener increased standing to 30 minutes per hour but no heavy lifting or patient transfers and renewed Claimant's Percocet prescription for one month. On April 30, 2014, Dr. Keener removed Claimant's work restrictions with instructions to follow up as needed.

Right ankle

X-rays of the right ankle dated February 5, 2014 showed arthritis of the interphalangeal joints of the right toes, likely caused by psoriasis. Dr. McCormick diagnosed a sprain based on new complaints made by Claimant on February 5, 2014. Claimant reported the ankle was sore when she fell the first time in January but became worse since walking on it. Eventually Claimant's right ankle symptoms resolved.

Subsequent medical treatment

After Dr. McCormick discharged Claimant, she received physical therapy from December 2015 to March 2017 for problems related to the cervical and lumbar spine, neuropathy and gait disorder. The record contains no evidence this treatment was related to the January 11, 2014 work injury.

Expert Medical Opinion

On January 20, 2016, David T. Volarich, D.O., performed an independent medical examination ("IME") at the request of Claimant's attorney. He reviewed medical records, examined Claimant, and wrote a report. At the time of the IME, Claimant reported she had not returned to work since May 2014 when she was terminated.

For the primary injury, Dr. Volarich diagnosed a left distal fibula fracture, left leg superficial peroneal neuropathy, and a right elbow contusion. Dr. Volarich opined the slip and fall on the parking lot on January 11, 2014 was the prevailing or primary factor that caused the left ankle fracture and neuropathic pain of the left ankle that required surgery. Dr. Volarich rated 40 percent permanent partial disability of the left ankle and 20 percent permanent partial disability of the right arm at the elbow.

Claimant gave Dr. Volarich a history of pre-existing vestibular dysfunction and peripheral neuropathy that affected her feet and toes and affected her balance. Leading up to January 11, 2014, Claimant had to be careful with movement, but, she was able to return to near normal function without physician-imposed restrictions.

Dr. Volarich imposed the following restrictions: avoid all stooping, squatting, crawling, kneeling, pivoting, climbing, and impact maneuvers, uneven terrain, slopes, steps, and ladders, limit walking to 30-45 minutes or tolerance, use knee pads and take Glucosamine and strengthening exercises.

On January 25, 2016, John Krause, M.D., a board-certified orthopedic surgeon, reviewed medical records, took Claimant's history, and performed an IME at the request of the Employer's attorney. Claimant gave Dr. Krause a history of pre-existing balance disorder. In the past, her balance problems responded favorably to physical therapy. After the January 11, 2014 work injury, therapy did not resolve her balance problems.

Dr. Krause concluded Claimant's fall on January 11, 2014 was the prevailing factor that caused her left ankle fracture and the need for non-operative treatment. Dr. Krause further opined the January 11, 2014 injury was not the prevailing factor that caused Claimant's disequilibrium or need for treatment.

In addition, Dr. Krause opined it is not common to develop superficial peroneal neuritis after an external rotation injury like the one Claimant suffered. Medical records do not support a conclusion that Claimant's superficial peroneal neuritis is related to the work injury. Therefore, Dr. Krause concluded the January 2014 fall is not the prevailing factor in the development of superficial peroneal neuritis or need for surgery.

Dr. Krause further opined Claimant reached maximum medical improvement on October 6, 2014 when Dr. McCormick reviewed the CT scan and noted the fracture was healed and did not recommend additional treatment.

Dr. Krause rated five percent permanent partial disability for the left ankle fracture, and he did not impose permanent restrictions for this injury. He concluded any work restrictions would be related to Claimant's long-standing disequilibrium condition.

He rated five percent permanent partial disability for repair of the superficial peroneal nerve, which he opined was unrelated to the January 11, 2014 work injury.

On May 15, 2016, Dr. Krause examined Claimant's right arm for the laceration she sustained when she fell using crutches after she fractured her ankle. He did not have medical records related to her medical care for the condition.

Examination of Claimant's right elbow revealed full function, normal x-rays and a small healed laceration, with some tenderness around the olecranon. Dr. Krause diagnosed a right elbow contusion and concluded Claimant's fall on January 11, 2014 and the need for crutches is the prevailing factor that caused her right elbow laceration and need for treatment. He concluded Claimant had reached maximum medical improvement for her right elbow and found no disability related to the injury. No permanent restrictions were imposed.

On June 17, 2016, Dr. Krause provided a third report after he reviewed treatment records for Claimant's right elbow. His opinion did not change.

1. Claimant's surgery to repair the peroneal nerve in her left ankle was medically causally related to her work injury on January 11, 2014

Claimant asserts the peroneal nerve repair to her left ankle was medically causally related to her work injury on January 11, 2014. Employer contends it was not related to her work injury.

RELEVANT LEGAL AUTHORITY

Section 287.808 provides the burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true. Based on evidence presented during the hearing and medical records in evidence, Claimant met her burden.

Section 287.020.3(1) defines "injury" as one that arises out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor

that caused both the resulting medical condition and disability. "The prevailing factor" is defined as the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Section 287.140.1 provides that 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.

Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor in the absence of expert opinion is the finding of causation within the competency of the administrative tribunal. *Silman v. William Montgomery & Associates,* 891 S.W.2d 173, 175 (Mo.App.1995).[9]

When there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo. App.1993).

[W]here there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor in the absence of expert opinion is the finding of causation within the competency of the administrative tribunal. *Griggs v. A.B.Chance Co.*, 503 S.W.2d 697,704 (Mo.App 1973). Proof of causation when dealing with an allegation of a pre-existing condition being aggravated by a subsequent injury is not within the realm of lay understanding. *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo. App. 1985).

The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.,* 809 S.W.2d 102, 105 (Mo.App.1991) (citations omitted).

DISCUSSION

Ankle: Dr. Volarich's opinion is more persuasive that Claimant's slip and fall on the parking lot on January 11, 2014 was the prevailing factor that caused the left ankle fracture and development of neuropathic pain of the left ankle that required surgery.

[9] The case is overruled on other grounds by *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 223 (Mo 2003). This award contains other cases overruled by the *Hampton* decision based on the same principle. No further reference is made in this award to the *Hampton* decision.

Drs. Krause, McCormick and Tung agree the location of Claimant's pain was not consistent with a superficial peroneal nerve injury.

However, Claimant had temporary relief from an injection to the left ankle which made her a good surgical candidate. During surgery, Dr. Tung released the fascia over the superficial peroneal nerve and observed the fascia was located lower than he expected it to be. He observed a smaller posterior branch of the main superficial peroneal nerve heading toward the area where Claimant reported pain, so he repaired the small posterior branch.

After surgery, Claimant's pain level decreased from 9 out of 10 to 4 out of 10. Claimant had no known problems with her left ankle before the 2014 fall on the parking lot. Based on Claimant's testimony and medical records in evidence, Dr. Volarich's opinion is more persuasive than Dr. Krause's opinion that the fall on January 11, 2014 did not injure Claimant's superficial peroneal nerve and require surgery.

2. Claimant's January 11, 2014 accident caused injury to Claimant's right elbow and the need for treatment

DISCUSSION

Test results were positive for exposure to MRSA and cellulitis, likely associated with trauma and laceration. Drs. Prablek, Keener and Osei diagnosed cellulitis and possible mild right olecranon bursitis. Drs. Volarich and Krause agree the January 11, 2014 accident is the prevailing factor that caused Claimant's right elbow contusion and her need for treatment.

Claimant's testimony is credible and consistent with medical records in evidence regarding the mechanism of injury to her right elbow. Claimant testified she fell and injured her right elbow while using crutches after her fall on January 11, 2014. Based on persuasive testimony by Drs. Volarich and Krause, and credible testimony by Claimant, she met her burden to prove her accident on January 11, 2014 caused her right arm contusion and her need for treatment.

3. Claimant sustained permanent partial disability from the January 11, 2014 work injury

At the start of the hearing the parties stipulated that Claimant sustained an accident that arose out of and in the course of her employment. They disagree on the nature and extent of the disability she sustained.

RELEVANT LEGAL AUTHORITY

A permanent partial award is intended to cover claimant's permanent limitations due to a work-related injury and any restrictions the limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App.1991).

With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983).

DISCUSSION

Drs. Krause and Volarich opined Claimant's fall in the parking lot on January 11, 2014 was the prevailing factor that caused her left ankle fracture. Dr. Volarich rated 40 percent permanent partial disability, and Dr. Krause rated five percent permanent partial disability for the injury. Based on persuasive testimony by Drs. Volarich and Krause, and medical records in evidence, Claimant met her burden to show she sustained 25 percent permanent partial disability of the left ankle for the January 11, 2014 fall on the parking lot at work.

Drs. Krause and Volarich further opined Claimant's fall on the parking lot and the need for crutches is the prevailing factor that caused her to fall and injure her right elbow. Dr. Volarich rated 20 percent permanent partial disability of the right elbow, and Dr. Krause found no disability. Based on persuasive testimony by Drs. Volarich and Krause, and medical records in evidence, Claimant met her burden to show she sustained 7.5 percent permanent partial disability of her right elbow as a result of the fall on January 11, 2014.

4. Claimant did not engage in post injury misconduct

The Employer asserts Claimant engaged in post-injury misconduct, therefore is not entitled to $42,434.91she received in temporary total disability benefits. Claimant denied she engaged in post-injury misconduct.

RELEVANT LEGAL AUTHORITY

Section 287.170.4 states: if the employee is terminated from post-injury employment based upon the employee's post-injury misconduct, neither temporary total disability nor temporary partial disability benefits under this section are payable. As used in this section, the phrase "post-injury misconduct" shall not include absence from the workplace due to an injury unless the employee is capable of working with restrictions, as certified by a physician.

Section 287.808 states: The burden to prove entitlement to compensation or an affirmative defense under the Act is on the party who asserts the claim. In asserting any claim or defense based on a factual proposition, the party making the assertion must establish the assertion is more likely to be true than not true.

Based on the discussion below, the Employer did not meet its burden to prove more likely than not, that Claimant engaged in post injury misconduct.

DISCUSSION

At the time of the February 2015 hearing, Section 287.170.4 did not define post injury misconduct and little case law existed to establish the criteria for post injury misconduct in workers' compensation cases. A recent review of Chapter 287 and case law remains unchanged.

After the 2019 hearing for a final award, the Employer relied on unemployment cases and other cases, to assert that Claimant engaged in post injury misconduct. Employer's reliance on the employment cases is not dispositive. The unemployment cases define misconduct based on unemployment compensation standards but do not define *post injury misconduct* based on workers' compensation standards, as described in Section 287.170.4. In addition, the statute is silent on use of the unemployment standard in workers' compensation cases.

In addition, the Employer's reliance on the following cases is not dispositive: *Baxi v. United Technologies Automotive*, 956 S.W.2d 340 (Mo.App. 1997 and *Hicks v. Missouri Department of Corrections, et al.*, injury number 14-004926. *Baxi* was decided before the enactment of Section 287.170.4 in 2005 and does not involve termination of employment based on post injury misconduct. Unlike this case, the decision in *Hicks* is based on activities related to the work injury. The same is true for the Jackson County family court case relied upon by the Employer.

In 2015, this court used statutory construction to ascertain the intent of the legislature to define post injury misconduct. A review was conducted of the plain and ordinary meaning of misconduct from Webster's Dictionary and Black's Law Dictionary. In addition, a review was made of the definition of misconduct found in Section 288.030(24) of the employment security chapter. However, this analysis also fails to dispose of the issue of post injury misconduct due to strict construction and the discussion above.

Section 287.800 requires strict statutory construction of the provisions contained in Chapter 287, which does not define post-injury misconduct.

In addition, the record contains conflicting evidence about when Ms. Avery gave Claimant a verbal warning about the April 3 violation. At the first hearing, Ms. Avery said she verbally warned Claimant on April 3. On cross-examination, Ms. Avery testified she told Claimant she combined the April 3 and April 15 incidents into the first offense.

Ms. Avery's second version of the warning is consistent with Exhibit C, the "Warning Notice," which lists violations for April 3 and April 15 on the same document for safety rules violations and careless work habits. It is not clear from the document which offense relates to which date, the total number of offenses, or the date the warning was written. Employer's Exhibit C is not persuasive.

In addition, Ms. Avery and Mr. Deering's testimony is not credible that they discussed Exhibit C with Claimant on April 16, 2014 because: 1) The warning notice is not dated. 2) It seems unlikely their recall about the date they spoke to Claimant is better now than it was nearly six years ago. 3) The bottom of the notice lists four possible offenses but none is marked to reflect these offenses. 4) Claimant testified she did not see the warning notice until she asked to see her file, and she did not sign Exhibit C. 5) According to Ms. Avery and Mr. Deering, Claimant refused to sign the notice, but that is not reflected on the warning notice.

Further, a verbal warning about the April 3 incident was not mentioned in the "goals to be worked on" section of the April 7 review. Both Ms. Avery and Mr. Deering testified the April 3 incident could have been mentioned during the April 7 review for a goal to work on, however it was not. Ms. Avery, Mr. Deering, Dr. Salama, and Sister Mildred all agreed an unlocked medicine cart serious infraction. Given the serious nature of the offense, it would seem reasonable to document the offense at the time it occurred, since it violated state and Employer policies and was below the standard of behavior expected of nurses as testified by Sister Mildred.

In addition, Ms. Avery and Mr. Deering did not report the incident to the state or the medical director.

Further, Exhibit D, the medicine error report, is not persuasive. Ms. Avery completed Exhibit D which shows the date of the medication error as May 2, not May 4 as stated in Mr. Deering's termination letter (Exhibit E). The only report in evidence labeled "Medication error report" is Exhibit D, dated May 2, 2014. According to the medication error report, Dr. Kapoor, the resident's physician, was not notified. Dr. Salama, the medical director at the nursing home, was not notified.

There was testimony that Claimant carried medication for two residents with her at the same time, but that violation was not listed in the error report.

In addition, Exhibit E is not persuasive. Exhibit E was admitted during the hearing for a final award. First, Claimant's termination was written on a "Warning Notice Verbal" form for neglect of duties and failure to follow instructions on May 4, 2014, not May 2, 2014. It is interesting to note the verbal warning form was used for Claimant's termination but not for Ms. Avery's verbal warning to Claimant about the April 3 incident.

Second, the termination form stated Claimant did not observe the resident take her medication and she administered the wrong medication to the resident. The document further stated: "As you have been previously warned concerning medication errors we are therefore terminating you at this time." Under "remarks" it read, "when asked at the beginning of the discussion how many times we have spoken to her about medication errors she responded several times." Ms. Avery testified Mr. Deering monitored the number of employee offenses, but none

of the four possible offenses listed on the document were marked on Exhibit E which contained Mr. Deering's typed signature.

Finally, Ms. Avery testified the medication mix-up was an accident. She did not believe Claimant would intentionally hurt a patient. The record contains no evidence that a resident was injured as a result of Claimant's actions.

Claimant offered conflicting testimony about whether she left the medication cart and medication door unlocked on April 3 and received a warning, whether she gave a resident the wrong medication, if she watched the resident take the medicine or if she saw Exhibit C, the verbal warning. Based on less than credible testimony by Ms. Avery and Mr. Deering, and exhibits in evidence, Employer did not meet its burden to prove Claimant engaged in post injury misconduct.

ADDITIONAL FINDINGS of FACT and RULINGS of LAW

1. Claimant testimony is not credible about whether she was reprimanded about leaving the medication cart and door unlocked on April 3, whether she was given a verbal warning the April 3 incident, whether she gave a resident the wrong medication, and if she failed to watch the resident take it.

2. Employer did not meet its burden to prove Claimant engaged in post injury misconduct.

3. Claimant's January 11, 2014 accident caused injury to Claimant's right elbow and the need for treatment.

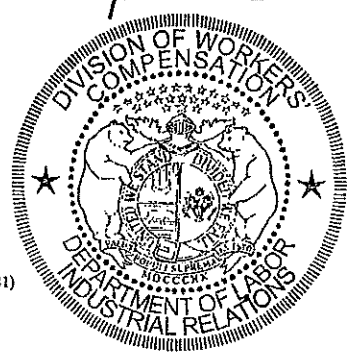
4. Claimant sustained permanent partial disability to her left ankle and right elbow from the January 11, 2014 work injury. See the award for details

5. The award is subject to a lien in favor of Claimant's attorney for legal services rendered.

I certify that on 3-9-20 I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By mpc

Made by: Suzette Carlisle Flowers
Suzette Carlisle Flowers
Administrative Law Judge
Division of Workers' Compensation



Issued by DIVISION OF WORKERS' COMPENSATION

TEMPORARY OR PARTIAL AWARD

Employee: Anita Paxton

Dependents: N/A

Employer: Little Sisters of the Poor

Additional Insurer: N/A

Insurer: Old Republic Insurance

Hearing Date: February 17, 2015

Injury No.: 14-001314

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

Checked by: SC

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: January 11, 2014
5. State location where accident occurred or occupational disease contracted: St. Louis City
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: Claimant slipped and fell on an icy parking lot and fractured her left ankle.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Left ankle
14. Compensation paid to-date for temporary disability: $5,475.73
15. Value necessary medical aid paid to date by employer/insurer? $66,664.80
16. Value necessary medical aid not furnished by employer/insurer? N/A

17. Employee's average weekly wages: $872.07

18. Weekly compensation rate: $581.38 (Temporary total disability rate)

19. Method wages computation: Stipulated

COMPENSATION PAYABLE

20. Amount of compensation payable:

Weeks of temporary total disability beginning May 5, 2014 and continuing until Claimant is released to full duty or reaches maximum medical improvement.

TOTAL: TO BE DETERMINED

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 N/A[1] all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Attorney Cynthia Hennessey

[1] At the hearing, Attorney Hennessey requested $19,500 in attorney's fees and $675.00 in costs for a total of $20,175.00. (Ms. Hennessey charged $250.00 per hour for 78 hours of work). In a post-hearing brief submitted February 23, 2015, Ms. Hennessey reported 82 hours of work, presumably for a revised total of $20,500.00.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Anita Paxton

Dependents: N/A

Employer: Little Sisters of the Poor

Additional N/A

Insurer: Old Republic Insurance

Hearing Date: February 17, 2015

Injury No.: 14-001314

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

Checked by: SC

STATEMENT OF THE CASE

On February 17, 2015, the parties appeared for a hearing at the request of Anita Paxton ("Claimant"), to determine if Little Sisters of the Poor ("Employer") and Old Republic Insurance Company ("Insurer") are responsible for additional temporary total disability ("TTD") benefits, and attorney fees and costs. At the hearing, Attorney Cynthia Hennessey represented Claimant. Attorney Robert Amsler represented Employer. The record remained open until February 24, 2014 for Attorney Hennessey to offer Exhibit 3. The court reporter was Jacque Williams.

STIPULATIONS

The parties stipulated that on January 11, 2014:

1. Claimant was an employee of Employer and sustained an accident which arose out of and in the course of his employment in St. Louis City;

2. Employer and Claimant operated under the Missouri Workers' Compensation Law; [2]

3. Employer's liability was fully insured;

4. Employer had proper notice of the injury;

5. A claim for compensation was timely filed;

6. Claimant's average weekly wage was $872.07 which resulted in a rate of $581.38 for TTD benefits;

[2] All references in this award to the Employer also refer to the Insurer unless otherwise stated. Statutory references in this award are to the Revised Statutes of Missouri (RSMo 2005) unless otherwise stated.

7. Employer paid TTD benefits totaling $5,475.73 and medical benefits totaling $66,664.80; and

8. Employer agreed to send Claimant to Dr. Thomas Tung for treatment.

ISSUES

The parties identified three issues for disposition:

1. Is this a Chapter 287.203 hearing?

2. Should costs and fees be assessed against Employer pursuant to Section 287.560 and 287.203?

3. Whether Employer is liable for TTD benefits from May 5, 2014 and continuing until Claimant returns to work full duty or reaches maximum medical improvement (MMI")?

EXHIBITS

Claimant offered Exhibits 1 through 4. A ruling was reserved on Exhibit 3 which was admitted over Employer's objection.[3] Employer offered Exhibits A through S. Exhibits A through D were admitted, Exhibit E was not admitted but was retained with the record[4], and Exhibits F through S were admitted without objection from Claimant. To the extent there may be marks or highlights contained in the exhibits, they were made prior to becoming a part of the record, and were not placed there by the undersigned administrative law judge. Any objections contained in the depositions or made during the hearing but not ruled on at the hearing or in this award are now overruled.

SUMMARY OF THE EVIDENCE

All evidence was reviewed but only evidence that supports this award is discussed below.

Live testimony Witness 1 - Claimant

1. At the time of the hearing, Claimant was 61 years old and was married to a physician. Claimant was educated and worked as a registered nurse for 39 years. For a number of years, Claimant volunteered her nursing services for various organizations including Guadalupe Clinic in Wichita. She served on the board of the Boys Children Home, and

[3] Employer objected to the admission of Claimant's Exhibit 3 based on untimely filing of the exhibit (February 25, 2015), abandonment of costs portion of the claim, failure to provide supporting evidence for entries, and billing in inappropriate hourly increments.

[4] Claimant objected to the admission of Exhibit E based on hearsay. The document was signed "Mike Deering," but Mr. Deering did not testify at the hearing. The objection is sustained.

Claimant and her husband established a crisis ministry through their church and trained counselors. Also, Claimant worked with the Red Cross during natural disasters.

2. In February 2013, Employer hired Claimant as a registered nurse. Claimant testified she was hired to meet patients' emotional and spiritual needs, and she supervised the aids that reported to her.

3. The pharmacy required a staff member sign to receive Schedule I and II drugs onto patient floors. Claimant knew these drugs were kept in a locked safe inside a locked medication cart. The drugs were highly regulated to prevent theft.

4. In May 2013, Claimant signed her 90 day performance appraisal and became a full-time employee. Claimant's only corrective plan was to take her scheduled breaks.

The work injury

5. On January 11, 2014, while walking in the parking lot, Claimant slipped and fell, and injured her left ankle. Several days later while on crutches, Claimant fell and cut her elbow. Claimant was hospitalized for infection.

6. On March 22, 2014, Dr. McCormick released Claimant to return to work on light duty, with no standing more than 15 minutes per hour, and no lifting or climbing. Later, Dr. McCormick increased standing to 30 minutes per hour. Claimant took Percocet when she was not at work. Prior to Claimant's return to work, Claimant testified she received no verbal or written warnings from Employer about the performance of her work.

7. On April 3, 2014, Claimant was the assigned floor nurse in charge of the medication cart on the seventh floor. During the hearing, Claimant testified she did not recall leaving the medicine cart unlocked and she did not see a write-up about leaving the medication cart unlocked until she requested a look at her file. However, during deposition, Claimant testified she left the nurse's station and did not lock the medication cart or the door to the room where the cart was located because she trusted the patients. Claimant further testified at the hearing that Ms. Avery informed Claimant she locked the cart after she removed medicine from it.

8. On April 7, 2014, Claimant received a second performance appraisal signed by Ms. Patricia Avery, Director of Nursing. The evaluation period covered February 2014 to February 2015 and showed Claimant received 4 out of 5 possible points for following Employer's policies and procedures, which qualified as a commendable performance. Ms. Avery did not mention in the appraisal that Claimant failed to lock a medicine cart on April 3 and did not provide a corrective plan for the future.

9. Between April 7, 2014 and May 5, 2014, Claimant testified she did not receive any written or verbal warnings about leaving a medication cart unlocked.

10. On May 5, 2014, Claimant was informed she was terminated because she left the medication unlocked twice, gave a patient the wrong medication, and did not watch another patient take their medicine.

11. Claimant testified she knew the medicine cart and safe should be locked when unattended. However, she did not know she should close and lock the door to the nurse's station when she left the room where the medication cart was kept.

12. Claimant testified she was not taught to carry medication for more than one patient at a time but it was her practice to only carry medicine for one patient.

13. Claimant did not recall leaving the medication cart unlocked on April 15, 2014.

14. During cross-examination at the hearing, Claimant did not recall giving the wrong medication to a patient on May 2, 2014. However, during Claimant's deposition, and a history to the physical therapist, she testified she gave a patient the wrong medicine.

15. During cross-examination at the hearing, Claimant did not recall having medicine with her for more than one patient at the time she administered the wrong medicine. However, during deposition Claimant testified she did not watch the patient consume the medicine because "I had medication to take to the other patient." When asked about her deposition testimony at the hearing, Claimant testified "I didn't have it with me, but I had to go do it." At the hearing, Claimant did not remember her deposition testimony where she testified, "I got distracted because I couldn't use the cart so I had the medication with me."

16. Claimant testified her termination on May 5, 2014 was her first notice about the charges that: 1) She gave the wrong medicine to a patient, 2) She administered medicine to more than one patient at a time, and 3) Gave Coumadin to a surgical patient by mistake.

17. At the time Claimant was terminated, she continued to have the following work restrictions: No standing more than 30 minutes and no lifting and climbing.

18. As of the date of the hearing, Claimant continued to receive medical treatment from Dr. McCormick, and Employer agreed to send Claimant to Dr. Thomas Tung for treatment.

Live testimony – Witness 2 – Ms. Patricia Avery

19. Ms. Patricia Avery, a registered nurse and Director of Nursing for Employer, testified at the hearing on behalf of Employer. For ten years Ms. Avery has supervised the nursing staff at the intermediate care facility for the elderly.

20. Ms. Avery testified in nursing school, nurses are taught to safeguard and administer medication. Additionally, nurses receive updates through a quarterly newsletter.

21. Employer trains new nurses to follow the law but treat patients like family. New hire nurses receive orientation about patient rights, infectious control, and they train with a unit nurse. The facility requires the nurse's station door be closed and locked when a nurse is not present. New nurses are trained to lock the medication cart when: 1) The cart is not in use, 2) The cart is in the hallway during pill passing, and 3) The nurse is not with the cart.

22. Exhibit I depicts a photo of the nurse's station and medication room on the 7th floor. Prescription and over-the-counter drugs are contained in the top drawer (Exhibit M). The second drawer contains patient prescription drugs (Exhibit N). The locked narcotic box is located inside the third drawer on the cart (Exhibit O). The box contains Schedule I and II drugs. A main lock is located at the top of the cart and secures the entire cart (Exhibit L).

23. Each nursing unit has a medication room where a medication cart is kept when it is not taken on rounds to administer medication to patients. The cart contains prescription medication. Over-the-counter medication is stocked in the medication room. The pharmacist recommends Schedule I through V medications be kept under double lock.

24. Before administrating medication, nurses are required to verify the patient's identity from a "MAR," which is the medication administration record and book. The "MAR" contains each resident's name, medication, and a photograph.

25. Annually, the Department of Health and Senior Services ("Department") inspects the facilities' medication carts, drug security, and drug administration and documentation. If inspectors find a medication cart unlocked, the facility is required to comply with a corrective plan, train all nurses, and document efforts to correct violations. Later, the Department re-inspects for compliance with the corrective plan.

26. Policy requires nurses observe patients take medication, unless the doctor informs the nursing staff the patient may self-administer. Improper drug interactions may be harmless or cause death, depending on how the drugs interact and the patient's condition.

27. Ms. Avery testified she is concerned about patients having access to the medication cart because some have dementia and may unknowingly harm themselves. Others have psychiatric problems and may try to commit suicide or harm others. Also, other employees or visitors may remove items from the cart if left unlocked.

28. Claimant returned to work with restrictions on March 22, 2014, was placed on a light-duty unit, and according to Ms. Avery, instructed to stay in the nurse's station and have residents come to her for medication.

29. On April 3, 2014, Ms. Avery observed the medication room door and medicine cart were open and Claimant was not there. Ms. Avery testified the incident violated Employer's policy and the law. Ms. Avery locked the medicine cabinet and the door to the room.

30. Ms. Avery heard Claimant talking in a recreation room next door, and she verbally informed Claimant it was unacceptable to leave the medicine cart and door unlocked. No written report was made of the incident at that time.

31. On April 7, 2014, Ms. Avery reviewed Claimant's February 2014 performance appraisal with her and signed it. The review period covered from February 2013 to February 2014. The appraisal review was delayed because Claimant did not return to work until the end of March 2014. Claimant also signed the appraisal.

32. During the appraisal review, Ms. Avery did not discuss the April 3 incident. For 2013, Ms. Avery evaluated Claimant's performance to be a four out of five which is commendable.[5] The only corrective plan was for Claimant to improve on paperwork. Ms. Avery testified she did not include April 3 cart incident in the appraisal because she believed she had already handled the situation and it would not be repeated.

33. On April 15, 2014, Ms. Avery observed the nurse's door and medicine cabinet were unlocked again on the 7th floor, and Claimant was not in the room. Ms. Avery testified she wrote an incident report on April 16, 2014 for the April 3 and April 15 incidents.[6] The report listed the April 3rd and April 15th incidents as one offense because it was the first warning. Claimant did not sign the document. (Exhibit C)

34. Ms. Avery testified she talked with Claimant about both incidents but does not recall the date. Ms. Avery testified she completed a warning notice about both incidents on the same document. Claimant denied leaving the door unlocked on April 15, 2014 and refused to sign the document.

35. According to Ms. Avery, on May 2, 2014, a patient was supposed to receive 10 milligrams of Sinemet statin but received no Sinemet from Claimant. Claimant was required to watch another patient take her medication but did not.

36. Ms. Avery completed a medication error report dated May 2, 2014, stating a patient did not receive the required medication. A second patient gave pills to the morning nurse because she knew it was not correct. (Exhibit D) The patient was not authorized to self-administer medication.

---

[5] Ms. Avery testified a commendable performance "exceeds the requirements of the job. Employee demonstrates successful performance requirements in some areas."

[6] The Warning Notice did not contain a date that the document was signed by Ms. Avery.

Department of Health and Senior Services regulations

37. 19 CSR 30-1.031 (1) Effective controls and procedures must be in place to prevent theft and diversion of controlled substances, as established in 19 CSR 30-1.032-19 CSR 30 – 1.034 for physical security.

38. 19 CSR 30-1.034 provides for physical security of Schedules I through V substances in a securely locked cabinet.

39. 19 CSR 30-1.066 provides direct supervision to employees who dispense controlled substances.

40. 19 CSR 30-85.042 (47) provides for a "safe and effective" way to distribute medicine.

41. 19 CSR 30 – 85.042 (49) provides for medication to be administered by a licensed … nurse ….

42. 19 CSR 30-85.042 (51) Self medication is permitted only if approved in writing by the resident's physician.

43. 19 CSR 30-85.042 (56) requires the facility to store and secure medication behind at least one locked door or cabinet.

44. 19 CSR 30-85.042 (57) Facilities shall store Schedule II medication under double lock separately from non-controlled medication.

Deposition Testimony

45. **Hany Salama, M.D.**, is board certified in internal medicine and has served as the medical director and physician for Employer's facility since 2003. As medical director, Dr. Salama resolves disputes regarding physicians, patient care, and he reviews the facility's policies and procedures.

46. Dr. Salama testified he would be concerned if a nurse allowed patients access to Schedules I through V drugs because people could hurt themselves. Dr. Salama further testified that leaving the medicine cart unlocked showed disregard for the standards of behavior set by Employer and showed negligence and "intentional and substantial" disregard for Employer's interest and the nurse's obligations to Employer.

47. Nurses are required to watch patients take medication, and report noncompliance to their immediate supervisor and the physician that ordered the medication. Failure to do so can result in anything from nothing to death.

48. Dr. Salama does not believe nurses should handle more than one patient's medicine at a time to avoid mistakes.

49. Dr. Salama testified he has no firsthand knowledge about Claimant's competency as a nurse. He was unaware of any patient harm caused by Claimant's medication error. Dr.

Salama was notified of a medication error but was not given detailed information or the name of the nurse.

50. **Ms. Mildred Ryan** ("Sister Mildred") is a sister and has been a registered nurse for 50 years. Her current position is director of nursing for Employer in Gallup, New Mexico. She has worked as a director of nursing for 30 years.

51. Sister Mildred worked in St. Louis as the director of nursing from May 2, 2012 to January 2014, when she stepped down for medical reasons. Sister Mildred was responsible for Claimant's new-hire training regarding the medication cart, which should be locked along with the nurse's station at all times. All nurses were encouraged to dispense medicine to one patient at a time. Sister Mildred completed Claimant's 90-day appraisal which resulted in her becoming a full-time employee.

52. Sister Mildred testified the rules that govern patient care with Employer are: Rules of Department of Health and Senior Services, Division 30 – Division of Regulations and Licensure, and Chapter 85 – Intermediate Care and Skilled Nursing Facility. The director of nursing is responsible for nursing homes and nurse compliance with the law regarding the security and administration of medication. Failure to safeguard the medication cart could result in deficiency and a corrective plan being implemented for the facility.

53. All nurses are required to know how to safeguard medicine and dispense it. Schedule I and II drugs are narcotics which are placed under double lock. Narcotics are kept in a separate locked box on the medication cart. Schedule III, IV, V, and over-the-counter drugs are kept under single lock on the cart. Both locks must be locked when the cart is unattended. Failure to lock the cart is a violation of the regulations. Non-compliance within a two- week period suggests unwillingness by the nurse to follow directions, according to Sister Mildred.

54. Employer requires nurses observe patients take medicine to avoid possible drug interactions including sickness and death. If patients refuse medication, nurses are to take the medicine back, circle the medicine, initial on the MAR, write "patient refused medication," time of the refusal, and notify the physician that prescribed the medication.

55. An unlocked medicine cart could be a danger to patients with chemical dependencies, depression, dementia or Alzheimer's.

56. Administering medicine to more than one patient at a time and administering the wrong medication to a patient are violations of the regulations and Employer's rules and standard of behavior expected of nurses. A repeat violation shows culpability, per Sister Mildred.

57. The facility encourages a family atmosphere for patients; however, the law must be followed if there is a conflict between family life and legal conduct.

Employee performance appraisal

58. An appraisal dated May 30, 2013 was signed by Sister Mildred and by Claimant dated June 16, 2013. Claimant received a score of "4" for compliance with policies for Employer and with state, local and federal regulations. A "4" evaluation is equivalent to a commendable rating, which means the Claimant:

> "Often exceeds the requirements of the job. Employee demonstrates successful performance on all major assignments and objectives and consistently exceeds position requirements in some areas. Errors are infrequent and are typically detected and corrected by the employee."

In other categories, Claimant scored "meets expectations" in one category, commendable in five categories and exceptional in two categories.

59. An annual appraisal for Claimant reflects the rating period as February 1, 2013 to February 12, 2014. Ms. Avery signed and dated the appraisal on April 7, 2014 and Claimant dated it for the same date. The appraisal reflects a score of "4" for compliance with policies for Employer, and with state, local and federal regulations. Other category ratings range from "3" to "5," all within the "meets expectations" range.

Medical treatment

60. X-rays taken on January 14, 2014 reveal a left ankle lateral malleolus fracture and dorsal soft tissue swelling of the left forefoot. Claimant developed an infection when she lacerated her elbow while walking with crutches.

61. On January 16, 2014, Jeremy McCormick, M.D., placed Claimant on temporary disability for 61 to 90 days, prescribed a walking boot, ASO brace, and physical therapy from February 24, 2014 to May 28, 2014.

62. On February 19, 2014, Dr. McCormick placed Claimant on limited work duty, no walking more than 15 minutes per hour, and no heavy lifting or climbing.

63. Jay Keener, M.D., treated Claimant's right elbow in March 2014 and returned her to work with medication and the following restrictions: No lifting more than 10 pounds with right arm, avoid pushing a heavy medicine cart. On May 2, 2014, Dr. Keener lifted work restrictions for Claimant's right elbow.

64. On March 31, 2014, Dr. McCormick continued physical therapy, increased standing and walking to 30 minutes per hour, but no climbing, heavy lifting or patient transfers, and prescribed more Percocet. On April 30, 2014, Dr. McCormick continued the restrictions and noted Claimant should not work alone because she was unable to assist if a patient fell.

65. On June 11, 2014, x-rays revealed mild peroneal tendinopathy, and distal fibular and plantar fasciitis.

66. Based on CT scan results in July 2014, Dr. McCormick diagnosed delayed union of the left distal fibula, recommended a bone stimulator and Claimant's work restrictions remained unchanged.

67. X-rays revealed solid bridging across the oblique distal fibular fracture by September 30, 2014. Mild arthritic changes were found based on a CT scan. Aquatic therapy occurred from October 24, 2014 to January 2, 2015. Dr. McCormick prescribed work conditioning for two weeks then work hardening for two weeks.

68. On January 21, 2015, Claimant gave the therapist a history of being fired from her job after a medication error when she left pills in a patient's room while the patient was in the bathroom, but "lucid." Dr. McCormick recommended work conditioning and work hardening, and work restrictions remained in effect.

FINDINGS OF FACT and RULINGS OF LAW

Claimant asserts this is a Chapter 287.203 hearing and Employer is liable for TTD benefits, costs, and attorney's fees under Sections 287.203 and 287.560. Employer contends Claimant is not entitled to TTD because she was terminated for post-injury misconduct; therefore, Attorney Hennessey is not entitled to costs and fees.

After careful consideration of the entire record, Claimant's demeanor during the hearing, competent and substantial evidence presented on the record, and the applicable law of the State of Missouri, I make the following findings of fact and rulings of law.

This is not a §287.203 hardship hearing

Section 287.800 provides: [T]he Court shall strictly construe the provisions of this chapter. Section 287.808 states: [T]he burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true. I find Claimant did not meet her burden to show this is a Section 287.203 hearing for the reasons stated below.

Section 287.203 provides in part:

> Whenever the employer has provided compensation under section 287.170, 287.180 or 287.200, and **terminates** such compensation, the employer shall notify the employee of such termination and shall advise the employee of the reason for such termination. If the employee disputes the termination of such benefits, the employee may request a hearing before the division and the division shall set the matter for hearing within sixty days of such request....

Here, Employer stopped paying TTD benefits when Claimant returned to work on light duty. I find Claimant does not dispute the termination of TTD benefits after she returned to

work. Instead, Claimant seeks a *reinstatement* of TTD benefits because her employment ended and she still has work restrictions. Therefore, based on strict construction of Section 287.203, I find Employer did not terminate Claimant's TTD benefits as required for a §287.203 hearing. I further find Claimant did not meet her burden to show that more likely than not this is a Section 287.203 hardship hearing.

Employer did not prove post-injury misconduct

Section 287.170.4, states, "If the employee is terminated from post-injury employment based upon the employee's post-injury misconduct, neither temporary total disability nor temporary partial disability benefits under this section or section 287.170 or 287.180 are payable. As used in this section, the phrase "post-injury misconduct" shall not include absence from the workplace due to an injury unless the employee is capable of working with restrictions, as certified by a physician."

Misconduct is not defined in Chapter 287 RSMo or in case law. Therefore, it is necessary to apply rules of statutory construction to decide the case.

The interpretation of a statute is a question of law, and appellate review is de novo. *Barker v. Barker,* 98 S.W.3d 532, 534 (Mo. banc 2003). The primary rule in statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning. *Nelson v. Crane,* 187 S.W.3d 868, 869-70 (Mo. 2006) (Citations omitted). In interpreting statutes, "it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times." *Lane v. Lens*meyer, 158 S.W.3d 218, 226 (Mo. 2005). (Citations omitted)

Webster's Dictionary defines "misconduct" as "intentional wrongdoing" or "improper behavior." Black's Law Dictionary defines "misconduct" as "A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness." Black's Law Dictionary 999 (6th ed. 1990).

Although Chapter 287 does not define "misconduct," Chapter 288 does define "misconduct" as it applies to Employment Security claims. I find Chapter 287 is related subject matter that can provide insight about the meaning of the word "misconduct" despite the term appearing in different chapters at different times. Both chapters are administered by the Department of Labor and Industrial Relations, and interpreted by the Labor and Industrial Relations Commission. Also, both chapters involve benefits paid to employees by employers.

Section 288.030.1(23) defines "misconduct" as: **"Misconduct,"** an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his or her employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.

The definitions above suggest Claimant must have an element of intent for her actions to rise to the level of "misconduct." Black's Law Dictionary excludes negligence or carelessness from the definition of "misconduct" unless the act is willful. Under the Employment Security chapter, "Misconduct" suggests a "willful disregard," "deliberate violation" or negligence or recurrence to the extent it manifests culpability.

Therefore, based on the definition in Black's Law Dictionary, and Section 288.030.1(23), I find the plain and ordinary meaning of the word "misconduct" is: a willful transgression of some established and definite rule of action, or some unlawful behavior, but not negligence or carelessness, unless the negligence is of such a degree or recurrence as to manifest culpability, wrongful intent or evil design, or show an intentional and substantial disregard of the employer's interest or the employee's duties and obligations to the employer.

Claimant testified her termination on May 5, 2014 was her first notice about charges that she: 1) Left the medicine cart unlocked on April 3 and 15, 2014, : 2) Gave the wrong medicine to a patient, 3) Administered medicine to more than one patient at a time, and 4) Gave Coumadin to a surgical patient by mistake.

Based on competent and substantial evidence discussed above, I find the allegations of post-injury misconduct do not meet the definition or any reasonable definition of "misconduct" under Chapter 287 for the reasons discussed below.

1. I find Claimant's decision to leave the medicine cart unlocked on April 3 violated state law and Employer's policy. However, I find Claimant lacked the requisite intent for her action to rise to the level of misconduct as defined above. Ms. Avery talked to Claimant about her actions on April 3 but did not complete a Verbal Warning form because she thought the talk was enough. There was no documentation of this violation between April 3 and April 7, when Claimant received a commendable performance review from February 2013 to February 2014. The "Goals Section" did not mention the April 3 incident. It seems the incident would have been documented in some way at the time it occurred if it violated state and Employer's policy and was below the standard of behavior expected of nurses, as testified by Sister Mildred.

2. Ms. Avery testified she and Mr. Deering found the medicine cart unlocked on April 15, but Claimant denied the charge and testified she first received notice of the charge when she was terminated. Mr. Deering did not testify at the hearing or by deposition, therefore, the document bearing his name was excluded from evidence. Ms. Avery signed a warning document for the April 3 and April 15 incidents but did not date it. Also, Claimant did not sign it, and the form does not indicate Claimant refused to sign it. Again, it would seem documentation would be clear if a repeat violation shows culpability, as testified by Sister Mildred.

3. Claimant gave contradictory testimony about whether she gave a patient the wrong medicine or failed to watch a patient take medication. The medication error report contains Ms. Avery's signature, but does not contain evidence that Claimant saw it or refused to sign. The form contained no place for Claimant's signature to show she agreed with the charges, offered an explanation, or even saw it. According to Claimant, she never saw the charges until she was terminated.

It is interesting to note Dr. Salama resolved disputes about patient care and the policies and procedures at the facility. However, Dr. Salama had no firsthand knowledge of the charges against Claimant, and no knowledge of any incompetencies associated with her performance on the job.

I find Claimant was not generally credible about her administration of medication post injury and may have committed errors that violate state and/ or local policies. However, I do not find Employer met the burden to show it rose to the level of "misconduct" as contemplated in the statute. I further find Employer did not prove Claimant willfully transgressed established and definite rules of action, unlawful behavior, or negligence to a degree or recurrence that manifests culpability, wrongful intent or evil design, or shows an intentional and substantial disregard for Employer's interests or Claimant's duties and responsibilities to Employer. As Employer had the burden of proof on this issue, I find no "post-injury misconduct" has been proven and payment of TTD benefits is not barred by the application of the Section 287.170.4.

Employer is liable for temporary total disability benefits

Section 287.170 RSMo. provides for TTD benefits to cover the employee's healing period following a compensable work injury. The test for TTD benefits is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ her during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997).[7] Claimant bore the burden to prove entitlement to TTD benefits by a reasonable probability. *Id.* at 574-75. (Citations omitted). The purpose of [TTD]

[7] Several cases herein were overruled by *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003*)* on grounds other than those for which the cases are cited. No further reference will be made to *Hampton* in this award.

benefits is to cover the claimant's healing period. TTD awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. *Tilley v. USF Holland Inc.* 325 S.W.3d 487, 492 (Mo.App. 2010) (Citations omitted). I find Claimant met her burden to prove she is entitled to receive TTD benefits during the period claimed.

Dr. McCormick returned Claimant to work at the end of March 2014, increased standing or walking to 30 minutes per hour, continued restrictions on climbing stairs, heavy lifting and patient transfers, and prescribed more Percocet. On April 30, 2014, Dr. McCormick continued the restrictions and noted Claimant should not work alone because she was unable to assist if a patient fell. At the hearing, Claimant testified she has continued uninterrupted treatment with Dr. McCormick, who has not lifted the restrictions, and the record contains no contrary evidence. Claimant credibly testified she does not believe she can perform work as a registered nurse within these restrictions.

Based on credible testimony by Claimant regarding her ability to work at this time, which is supported by medical records, I find no employer in the usual course of business would reasonably be expected to employ Claimant with these restrictions during the time period claimed. I find Employer is liable for TTD benefits from May 5, 2014 and continuing until Claimant returns to work full duty or the condition has reached maximum medical improvement.

Employer is not liable for costs and fees under §287.203 or §287.560

Attorney Hennessey seeks attorney's fees and costs totaling $20,500.00. Exhibit 3 contains a breakdown of her involvement with the case from intake May 14, 2014 to a post trial memo dated February 21, 2015.

Courts have cautioned the [fact finder] to limit an award of costs to those cases where "the issue is clear and the offense egregious." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 250 (Mo. 2003).

I previously found Claimant failed to show this is a §287.203 hardship, therefore, the issue of attorney fees and costs is moot under Section 287.203. Similarly, Section 287.560 states:

> All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division of workers' compensation; provided, however, that **if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them...** . (Emphasis added)

Based upon the evidence discussed above, I find Employer's defense was not unreasonable. Therefore, I find Claimant did not meet her burden to show Employer is liable for attorney's fees and costs.

CONCLUSION

Employer did not prove Claimant engaged in post-injury misconduct. Employer is responsible for TTD benefits as outlined in this award. No attorney's fees and costs are awarded. This is a temporary award and jurisdiction remains with the Division of Workers' Compensation until resolution of the case.

I certify that on 5/27/15, I delivered a copy of the foregoing award to the parties to the case. A complete record of the method of delivery and date of service upon each party is retained with the executed award in the Division's case file.

By mp

Made by: Suzette Carlisle

Suzette Carlisle
Administrative Law Judge
Division of Workers' Compensation

DIVISION OF WORKERS' COMPENSATION
DEPARTMENT OF LABOR
INDUSTRIAL RELATIONS