Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 03-145872

Employee: Christina Alcorn

Employer: Monroe City R-1 School District

Insurer: Westport Insurance Corporation

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the arguments of the parties, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated August 20, 2008.

Preliminaries

The issues stipulated at trial were whether employee sustained an accident arising out of and in the course of employment; whether employee's injuries were medically causally related to the alleged accident; whether employee gave proper notice of the alleged accident to employer; and whether employee was entitled to additional medical treatment.

The administrative law judge determined and concluded that employee sustained an accident arising out of and in the course of employment. The administrative law judge further found the employer failed to show prejudice from the failure to report the injury in a timely manner.

A timely Application for Review with the Commission was submitted by employer alleging that the award issued by the administrative law judge was erroneous because section 287.420 RSMo, requires employee provide written notice of the time, place, and nature of the injury to employer no later than thirty days after the accident, and by employee's own admission, employee failed to do so. Employer further alleges that the only exception to the notice requirement is if the employee proves employer was not prejudiced by the failure to receive notice and employee failed to adduce any evidence that employer was not prejudiced.

For the reasons set forth in this award and decision, the Commission reverses the administrative law judge's award.

Summary of Facts

The findings of fact and stipulations of the parties were recounted in the award of the administrative law

judge; therefore, the pertinent facts will merely be summarized below.

Employee worked for employer as a paraprofessional educator. On November 11, 2003, employee was attending an assembly with students when one student had a seizure and fell between the bleachers. Employee testified that when she lifted the unconscious child from the bleachers, she experienced sharp pain in her lower back and it felt like something gave way. Employee testified that the pain continued throughout the day. Employee did not report the incident to supervisor the day it occurred. Employee testified she did not report the incident because she was not aware of how badly she was hurt and was not a tenured employee and fearful of losing her job.

Employee testified the pain in her back stayed constant for the next few months. On March 25, 2004, employee contacted the office of her general practitioner, Dr. Rice, and was prescribed Voltaren. That was the first record of any treatment and employee did not recall any prior treatment. Employee sought treatment from Dr. Rice's office, and saw Nurse Practitioner Daniel, in May 2004. It was noted that employee had low back pain, and was scheduled for an MRI and referred to Columbia Orthopedic Group. In May and June 2004, employee saw Dr. Trecha with Columbia Orthopedic Group, and it was noted that employee was experiencing low back pain, right lower extremity pain, weakness, numbness, and decreased range of motion. Employee was diagnosed with L5-S1 herniated nucleus pulposus to the right. Employee was prescribed Vioxx for pain and received steroid injections.

Employee continued to experience ongoing low back pain and right leg pain with numbness. On November 29, 2004, employee sought a second opinion from Dr. Jolly. Employee had been receiving treatment through her group health insurance. At this time, employer still had not been notified of the incident occurring November 11, 2003. Employee testified that she did not report her November 11, 2003 injury until February 2005. Employee alleges that on February 3 and February 7, 2005, employee aggravated her back at work (Injury No. 05-00967) and employee reported those incidents to employer.

Employee saw Dr. Miles with the Columbia Orthopedic Group on May 12, 2005. Dr. Miles opined that employee was a candidate for disc replacement and fusion. Employee underwent three independent medical examinations, the first with Dr. Jeffries on March 7, 2005. Dr. Jeffries opined the November 11, 2003, incident caused an injury that was work-related and was a substantial factor in her resulting medical condition.

On November 16, 2005, employee saw Dr. Mirkin for an independent medical examination. Dr. Mirkin opined that the November 2003 incident was not the substantial cause for the need for surgery; rather that degenerative disc disease was the substantial cause for the need for treatment. On July 18, 2006, employee saw Dr. Bernardi for an independent medical examination. Dr. Bernardi opined that employee's symptoms were due to degenerative disc disease; and that employee might be a surgical candidate, but did not feel that the surgery would be the result of a work-related event.

Findings of Fact and Conclusions of Law

Upon careful review of the entire record, the Commission determines and concludes that the evidence supports a finding that employee failed to provide employer written notice within 30 days of her accident; and failed to establish good cause for her failure to provide notice, or that employer was not prejudiced by employee's failure to provide notice.

Section 287.420 RSMo, provides:

No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the

employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice.

Under section 287.420 RSMo, employee must provide written notice to employer within 30 days of the accident or show either that 1) employee had good cause for not providing notice or 2) employer was not prejudiced by employee's failure to provide timely notice.

The purpose of this section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. However, the failure to give timely written notice may be excused if...there was good cause for the failure or that the failure did not prejudice the employer.

The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

However, when the claimant does not show either written notice or actual knowledge, the burden rests on claimant to supply evidence and obtain the Commission's finding that no prejudice to the employer resulted. If no such evidence is adduced, we presume that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation.

Soos v. Mallinckrodt Chem. Co., 19 S.W.3d 683, 686 (Mo.App. E.D. 2000) (citations omitted).

Employee admits that she failed to provide employer written notice within 30 days of her accident. The administrative law judge noted that employee did not report her injury for a couple of reasons: employee did not know at the time how badly she was injured; and she was not yet a tenured employee so was concerned about losing her job if she reported the injury. However, the administrative law judge did not address whether that amounted to good cause for employee's failure to notify employer of her injury. We find that it does not. There is no evidence supporting that employee would have been discharged or would have suffered repercussions if she reported her injury. In addition, by her own admission, employee's pain remained constant from the time of her alleged injury on November 11, 2003, up and until she reported her injury in February 2005.

The administrative law judge noted that employee testified that she sent medical records to the case manager, assigned to handle the case. The administrative law judge stated:

While Dr. Jolly's records were inexplicably unavailable at the time of the hearing it is certainly reasonable to conclude those records were received by the insurer or their third party administrator and the references to those records indicates the employer had been provided with actual knowledge of the potential need for treatment for an alleged work related injury.

As noted by the administrative law judge, the records from Dr. Jolly were not contained in the record. Although the record may indicate that the records were sent to insurer's third party administrator, it is unknown exactly what was stated in those records to determine whether they would have put employer on notice that employee had incurred a work-related injury. Furthermore, employee saw Dr. Jolly in late 2004, more than a year after her alleged accident. Employee was receiving treatment through her own health insurance group and readily admitted that she had not notified employer of her injury. Even if we conceded employer had actual knowledge upon receiving Dr. Jolly's medical records, employer did not have actual

knowledge of the accident when it occurred, but such knowledge came more than a year later. There is no question that employer did not have actual knowledge of the accident when it occurred. Therefore, employee did not make a prima facie showing of absence of prejudice that would shift the burden to employer to show prejudice.

The administrative law judge goes on to state:

Employer has failed to show prejudice from the failure to report the injury in a timely manner. The employer had ample time to after receiving actual notice to conduct an investigation or inquiry. What little treatment employee has received to date has been of a conservative nature and is consistent with the recommendations of the doctors the employer/insurer has sent the employee to see.
Given that employee did not show that employer had actual knowledge of the accident when it occurred, the burden rests on employee to show that employer was not prejudiced by the failure to receive notice. The administrative law judge wrongly placed the burden on employer to show prejudice. It is not employer's burden to show that employer was prejudiced, but employee must show lack of prejudice to employer.

Employee failed to offer any evidence that employer was not prejudiced by her failure to give timely notice. Employee's decision not to report the accident/injury clearly deprived employer the timely opportunity to investigate the facts surrounding the November 11, 2003 incident, or in the event employee sustained a work-related injury, the ability to provide the employee medical attention in order to minimize any disability. Without evidence showing a lack of prejudice, it is presumed that employer is prejudiced; and therefore, employee's failure to give proper notice under section 287.420 RSMo, bars employee from the recovery of benefits in this matter.

Conclusion

Based on the foregoing, the Commission concludes and determines that employee failed to comply with the statutory notice provisions of section 287.420 RSMo. Accordingly, employee's claim for benefits is denied.

The temporary award and decision of Administrative Law Judge Ronald F. Harris, issued August 20, 2008, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 8th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

_____
Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

After a review of the entire record as a whole, and consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the award and decision of the administrative law judge should be affirmed. The award of the administrative law judge is well written, well reasoned, and well supported.

The administrative law judge found that employer failed to show prejudice from employee's failure to provide notice and that employer had ample time after receiving actual notice to conduct an investigation or inquiry.

I am in agreement with the administrative law judge that employee's failure to give employer notice within 30 days of the November 11, 2003 accident, pursuant to section 287.420 RSMo, did not prejudice employer. The purpose of providing notice is to allow employer an opportunity to timely investigate the matter and minimize the injury by directing treatment. Employee received minimal treatment between the time of her November 11, 2003 injury and when employer received actual notice of the injury; therefore, employer was not prevented from directing any significant treatment for employee's injury. In addition, employer was able to direct treatment after employer became aware of the injury. Furthermore, the delay in providing notice did not prevent employer from conducting an investigation. There are no allegations denying the occurrence of the incident that lead to employee's injury, i.e., that the student did not suffer a seizure on November 11, 2003; nor are there allegations that employee did not assist the student or aid in lifting the student from the bleachers after the student suffered the seizure.

Upon receiving actual notice, employer was able to both investigate the accident/injury and direct treatment; consequently employer did not suffer any prejudice from employee's failure to provide timely notice.

I agree with the conclusion of the administrative law judge that employer was not prejudiced by employee's failure to give notice pursuant to section 287.420 RSMo.

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

John J. Hickey, Member

TEMPORARY OR PARTIAL AWARD

Employee: Christina Alcorn Injury No. 03-145872

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Monroe City R-I School District

Additional Party: SIF (left open)

Insurer: Westport Insurance Corporation

Hearing Date: June 23, 2008 Checked by: RFH:lw

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: November 11, 2003

5. State location where accident occurred or occupational disease contracted: Monroe City, Missouri

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? Yes

9. Was claim for compensation filed within time required by Law? Yes

10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident happened or occupational disease contracted: Attempting to extricate young boy who had become wedged between two bleachers following a seizure

12. Did accident or occupational disease cause death? No. Date of death? N/A

13. Parts of body injured by accident or occupational disease: Back

14. Compensation paid to-date for temporary disability: None

15. Value necessary medical aid paid to date by employer/insurer? None

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

17. Employee's average weekly wages: $178.06

18. Weekly compensation rate: $118.71/$118.71

19. Method wages computation: Stipulation

COMPENSATION PAYABLE

20. Additional Medical Treatment – See Award

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.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Christina Alcorn Injury No: 03-145872

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: N/A

Employer: Monroe City R-I School District

Additional Party: SIF (left open)

Insurer: Westport Insurance Company

Checked by: RFH:lw

PRELIMINARIES

On June 23, 2008, Christina Alcorn ("Employee") appeared in person and by her attorney, Mr. Neil Maune, for a temporary hearing on her claim against Monroe City R-I School District ("Employer") and its insurer, Westport Insurance Corporation ("Insurer"). The employer and its insurer were represented at the hearing by attorney, Mr. Robert Kerr. By agreement, the Second Injury Fund is left open and did not appear. At the same time this case was heard, evidence was also taken on Employee's other claim against the same employer with an Injury Number of 05-009967. Separate Awards will be issued for each claim. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of facts and rulings of law, are set forth below as follows:

STIPULATIONS:

- Employee has alleged an injury with a date of injury of November 11, 2003.
- Employee was employed by the employer on or about November 11, 2003.
- Venue is proper.
- The Claim was filed within the time prescribed by the law.
- At the relevant time, Employee's average weekly wage was $178.06 which would equate to a compensation rate for both temporary total disability and permanent partial disability benefits of $118.71.
- Employer has paid no temporary total disability benefits or medical expenses.
- Employee and Employer were operating under the provisions of the Workers' Compensation Act at the time in question.

ISSUES:

- Did Employee sustain an accident arising out of and in the course of employment on November 11, 2003?
- Are Employee's injuries and continuing complaints medically causally connected to her alleged accident on November 11, 2003?
- Did Employee give proper notice of the alleged accident?
- Is Employee entitled to additional treatment?

EXHIBITS OF EMPLOYEE

The following exhibits were admitted into evidence:

Employee Exhibits:

A. Summary of dates and events
B. Columbia Orthopedic Group records

Employer/Insurer Exhibits:

- Deposition of R. Peter Mirkin, M.D.
- Deposition of Robert Bernardi, M.D.
- Deposition of Edith Daniel, Family Nurse Practitioner
- Deposition of Joel Jefferies, M.D.
- Rice Clinic office notes (admitted as to 05-009967 only)
- Hannibal Regional Hospital Progress report (admitted as to 05-009967 only)

- Claim for compensation (admitted as to 05-009967 only)

9. Columbia Orthopedic Group report (Also contained in Employee's Exhibit B)

This case, Injury number 03-145872 involves a claim alleging an accident at work on November 11, 2003. The employer is Monroe City R-I School District and the insurer is Westport Insurance Corporation.

Injury Number 05-009967 is also a claim alleging an accident at work on or about February 3, 2005. The employer is the same, Monroe City R-I School District but at the time of this alleged accident the employer was self-insured through Missouri United School Insurance Corporation ("MUSIC").

Both claims allege injury to the same body part and while there are separate insurers Gallagher Bassett acted as the service company or third party administrator on both claims.

As noted earlier, separate awards will be issued for each claim but as the same body part is alleged on both claims there is some overlap of testimony and evidence. In the interest of avoiding duplication, the parties stipulated to Employer/Insurer's Exhibits 1, 2, 3, 4, and 9 being used in both claims.

Any exhibits containing markings, highlighting, etc., were submitted in that manner. The undersigned has made no markings of any kind on any of the evidence. Any objections not specifically addressed in this award are overruled.

Employee's attorney requests a fee of 25% of all benefits awarded.

In the event an award is entered in favor of the Employer/Insurer, the Employer/Insurer requests the issuance of a Final Award rather than a temporary Award.

FINDINGS OF FACT

Based on a comprehensive review of all the testimony and evidence, I find as follows:

The employee testified that on November 11, 2003, she was employed by the employer as a special education paraprofessional for an early childhood special education program, serving as the "right hand" to the lead teacher. At that time she had been employed by the employer for some nine years.

During a school wide assembly on November 11, 2003, the child the employee was assigned to care for suffered a seizure and fell into the bleachers, becoming wedged between two of the bleachers. Employee grabbed the student and attempted twice, unsuccessfully, to extricate him from the bleachers. Finally, with the assistance of Ms. Franklin, a co-worker, she was able to lift the child out of the bleachers. Employee stated the student who had lost consciousness, became responsive and then fell asleep on employee's lap.

Employee stated that she experienced an immediate onset of low back pain and felt like she had "pulled something". She admitted she did not report the incident immediately to the employer because she was not yet "tenured" and feared if she did so she would lose her job. However, the pain persisted and increased over the next week and employee testified she discussed this with a fellow teacher.

On March 25, 2004 and again on May 10, 2004, employee contacted Dr. Rice, her family physician, who issued prescriptions for Voltaren. On May 17 and May 20, 2004, employee presented to Dr. Rice's office and was seen by Nurse Practitioner Edith Daniel. Nurse Daniel noted complaints of low back pain, scheduled an MRI and also scheduled a referral to Columbia Orthopedic Group.

Employee was seen by Dr. Trecha, Columbia Orthopedic Group, on May 26 and June 23, 2004. Dr. Trecha noted complaints of low back and right lower extremity pain and numbness as well as diminished range of motion. The

doctor also reviewed the MRI, diagnosed L5-S1 herniated nucleus pulposus to the right and discussed possible surgical options, specifically a lumbar microdiscectomy. Employee returned to Dr. Trecha on July 28 and September 14, 2004 with complaints of low back pain with pain radiating into the right lower extremity. The doctor again discussed surgery as well as epidural injections.

On November 29, 2004, employee saw Dr. Jolly for a second opinion. According to Dr. Jefferies, who would see employee later, Dr. Jolly discussed a fusion and performed an injection which did not provide employee with any relief. Employee testified that during this visit with Dr. Jolly, the doctor stated she should file a workers' compensation claim.

Employee continued to experience ongoing low back pain with right leg pain and numbness into her right toe. On February 3 and again on February 7, 2005, events at work aggravated employee's back pain (these are the subject of Employee's other claim on Injury Number 05-009967 and will be explored in more detail in the award on that claim). She reported these events to the employer and was sent to Dr. Woods for evaluation. Dr. Woods noted complaints of back and leg pain and substantially diminished lumbar range of motion. The doctor noted one level disc disease and recommended a rehabilitation program.

Gallagher Bassett then sent employee to Dr. Jeffries for an IME on March 7, 2005. Dr. Jeffries obtained a history, reviewed medical records and performed an evaluation of the employee. The doctor noted continuing complaints of back pain with pain radiating down the right leg from November 2003 but also noted new complaints on the left side and into the left hip. The doctor reviewed the May 25, 2004 MRI and noted a small, right lateral herniated nucleus pulposus at the L5-S1 level. The doctor discussed surgical options for the November 2003 injury including an artificial disc replacement or fusion at the L5-S1 level but felt it appropriate to pursue rehabilitation prior to such intervention. Because of the new complaints on the left side, the doctor recommended a new MRI which was performed on March 16, 2005.

In response to an inquiry from Gallagher Bassett, Dr. Jeffries issued a report dated April 2, 2005, after reviewing the new MRI and comparing it to the MRI from May 2004. The doctor noted a diffuse disc bulge at L5-S1 with a larger component to the right with slight displacement of the descending nerve root on the right side. The doctor also noted no substantial difference between the two MRI's. He further noted the abnormality on both MRI's was to the right and therefore he could offer no explanation for the employee's new complaints of left lower extremity pain. The doctor went on to state he remained of the opinion the employee should attempt rehabilitation. The doctor also opined that the employee's condition was an aggravation of a pre-existing condition. In response to questions posed by Ms. Billiard, the case manager, Dr. Jeffries issued an addendum dated April 25, 2005. In that addendum the doctor opined that in the event the Employee did become a surgical candidate it would be substantially as the result of the work related back injury of November 2003. Based on the history and his review of the medical records, Dr. Jeffries opined the November 11, 2003, incident caused an injury that was clearly work related and was a substantial factor in her resulting medical condition. (Employer/Insurer's Exhibit 4, p.54).

Gallagher Bassett then sent employee to Dr. Miles at the Columbia Orthopedic Group. Dr. Miles first saw employee on May 12, 2005. Dr. Miles felt employee was a candidate for either a total disc arthroplasty or an anterior lumbar interbody fusion but wanted to have a CAT scan performed first. The doctor noted the case had been accepted by two insurance companies with one assuming liability for non-operative care and the other assuming liability for any surgical intervention.

Dr. Miles next saw employee on May 26, 2005 following the CAT scan. At that time the doctor had reviewed the CAT scan as well as the two prior MRI's and noted employee had advanced spondylosis at L5-S1 with a small right side disc bulge at that level. The doctor felt she would be an ideal candidate for disc replacement and discussed that procedure as well as a fusion with the employee at that time. He noted the employee had some matters she needed to take care of over the summer and that August might be optimal timing for the surgery. The office notes indicate a handwritten note dated November 2, 2005, indicating a denial letter had been received from Gallagher Bassett.

Employee was then sent to Dr. Mirkin for another IME on November 16, 2005. Although noting employee complained of pain down her legs a few days after the November 2003 event, the doctor concluded the 2003 event was not the

substantial cause of the need for surgery or treatment. Instead the doctor opined the substantial cause for the need for treatment was degenerative disc disease that was symptomatic prior to November 2003. (Employer/Insurer's Exhibit 1, p.15).

During his deposition, Dr. Mirkin noted a herniated disc usually causes symptoms of radiculopathy or pain down the extremity and stated there was no indication of a herniated disc prior to the March 16, 2005 MRI. (Employer/Insurer's Exhibit 1, p.38). When it was then brought to the doctor's attention that the May 2004 MRI did indeed reveal a disc herniation at L5-S1 he acknowledged that was true. (Employer/Insurer's Exhibit 1, p.42). The following exchange then occurred during recross:

"Q. Now that George has let the cat out of the bag, Doc, there, in fact, despite your prior testimony, there was evidence of a herniation before 2005?

A. That's right, there was a MRI that Trecha talks about, I believe it's in July (sic) 2004, where there's a disc protrusion on the right side.

Q. So, your prior testimony was, in fact, incorrect?

A. Correct." (Employer/Insurer's Exhibit 1, p.43).

When the employee saw Dr. Mirkin she made no mention of the events in February 2005. The doctor was later advised of the February 2005 events and was asked if he thought those events were significant with respect to the employee's condition. The doctor opined that those events were not significant as "The horse was out of the barn well ahead of that time." (Employer/Insurer's Exhibit 1, p.33). The doctor did note that if the symptoms became intolerable, the employee would be a surgical candidate but that he did not feel any surgery would be the result of a work related incident.

Next the Employee was sent to Dr. Bernardi on July 18, 2006, for another IME. Dr. Bernardi obtained a history and reviewed the medical records. The doctor did not feel the employee was fabricating her symptoms but believed while the employee might have a bulging disc it was not herniated and that her symptoms were the result of degenerative disc disease rather than an event at work. When asked during his deposition if he was disagreeing with Dr. Trecha's diagnosis of a herniated disc the doctor responded that he was not necessarily disagreeing with Dr. Trecha but was simply saying he had not seen the films. (Employer/Insurer's Exhibit 2, p.48). Dr. Bernardi agreed employee might be a surgical candidate but did not feel any surgery would be the result of a work related event.

Employee acknowledged hurting her back while lifting a tub at work on October 13, 1997 and was diagnosed with a lumbar strain. There was no evidence of any additional back treatment prior to March 25, 2003, when the employee presented to her family doctor complaining of a sore back and was diagnosed with lumbar and sacral myositis. Employee was given a 10 day prescription which she did not refill. Employee received no further back treatment prior to the November 11, 2003 incident.

I find the employee to be a credible witness. I also find Dr. Jeffries understanding of Employee's overall condition to be clear, well-founded and supported by the testimony and evidence. His disagreement with the opinions of Drs. Mirkin and Bernardi are explained thoroughly and logically and are well reasoned. After thorough review and consideration I find Dr. Jeffries opinions are more credible than others to the contrary.

RULINGS OF LAW

Based on a comprehensive review of the substantial and competent evidence described above, including Employee's testimony, the expert medical opinions and depositions, the medical records, my personal observations of Employee at hearing and the relevant statutory and case law, I find the following:

Issue 1: Did Employee sustain an accident arising out of and in the course of employment on November

11, 2003?

Although raised as a contested issue, no evidence or testimony was offered to refute the employee's description of the incident arising on November 11, 2003, in which she testified that she attempted to extricate a child who had experienced a seizure, had fallen and become wedged between two bleachers. There also was no evidence or testimony to dispute employee was engaged in performing the duties of her employment at the time of the accident.

Clearly, the employee did sustain an accident arising out of and in the course of her employment.

Issue 3: Did Employee give proper notice of the alleged accident?

At the time of the filing of the Claim for Compensation, 287.420 RSMo, dealing with written notice of injury to be given to an employer, provided as follows:

"No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice…".

The Courts have held the purpose of Section 287.420 is to give the employer timely opportunity to investigate the facts surrounding the accident, and if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Gander v. Shelby County*, 933 S.W.2d 892, 895 (Mo.App.1996). However, the failure to give timely notice may be excused if there was either good cause for the failure or the failure did not prejudice the employer. *Soos v. Mallinckrodt Chemical Co*., 19 S.W.3d 683 (Mo. App. 2000).

A claimant may demonstrate lack of prejudice where evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the trier of fact. *Pursifull v. Braun Plastering & Drywall*, 233 S.W.3d 219 (Mo. App. 2007). If the employer does not admit actual knowledge, the issue becomes one of fact. *Soos* at 686. If the employee produces substantial evidence the employer had actual knowledge the employee thereby makes a prima facie showing which then switches the burden of showing prejudice to the employer. *Gander* at 892.

In the instant case, Employer contends Employee has failed to show either written notice was given or that the employer had actual knowledge. The record does not support that contention.

Employee admitted that she did not report her problems to the employer immediately or shortly thereafter for a couple of reasons. The first being she did not know at the time how badly she was injured and secondly she was not yet a tenured employee and was concerned that if she were to report this she might lose her job.

Employee stated that she had discussed her condition with another teacher during the week after the accident. On cross examination, presumably to establish Employee failed to follow proper procedure in reporting the incident, employee was asked if she had ever been given an employee handbook. When the employee responded that she did not begin her employment at the beginning of the school year and did not recall ever being given an employee handbook, that questioning ceased.

Additionally, employee testified that when she saw Dr. Jolly in late 2004, the doctor discussed filing a workers' compensation claim. Employee further testified that she sent Dr. Jolly's records to Ms. Suzie Billiard, the case manager assigned by Gallagher Bassett to handle the case. That testimony is supported by references throughout the evidence to Dr. Jolly's records in correspondence from the case manager and Gallagher Bassett to various doctors seeking their opinions regarding treatment and causation. While Dr. Jolly's records were inexplicably unavailable at the time of the hearing it is certainly reasonable to conclude those records were received by the insurer or their third party administrator and the references to those records indicates the employer had been provided with actual knowledge of the potential need for treatment for an alleged work related injury.

Finally, Employer has failed to show prejudice from the failure to report the injury in a timely manner. The employer had ample time after receiving actual notice to conduct an investigation or inquiry. What little treatment employee has received to date has been of a conservative nature and is consistent with the recommendations of the doctors the employer/insurer has sent the employee to see.

The issue of notice is resolved in favor of the employee.

Issue 2: Are Employee's injuries and continuing complaints medically causally connected to her alleged accident on November 11, 2003?

Section 287.020.2 RSMo provides, in pertinent part, as follows: "An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor."

The employee bears the burden of proving all the essential elements of her claim, including causation. *Decker v. Square D Company*, 974 S.W.2d 667 (Mo. App. 1998). Causation is established by medial testimony. *Elliott v. Kansas City, Mo., School Dist*., 71 S.W.3d 652 (Mo. App. 2002).

The employee has been to a number of doctors most selected by the employer/insurer, all of whom discuss surgery as an option but with differing opinions as to whether the need for medical treatment is or is not the result of a work related injury.

Initially, the employee sought treatment through her family doctor who ordered an MRI and referred her to Dr. Trecha. After reviewing the May 2004 MRI, the doctor diagnosed a herniated disc at L5-S1 administered an injection, prescribed medication and in September 2004 discussed the possibility of surgery with the employee. Dr. Trecha did not discuss one way or the whether the need for treatment was work related.

Employee then went to Dr. Jolly for a 2nd opinion. As noted earlier for some unexplained reason, those records are not available. However, from employee's testimony and the references throughout the medical records to Dr. Jolly's records it is apparent the doctor at a minimum felt employee's condition might be work related in that he discussed filing a workers' compensation claim for the November 11, 2003 incident. Dr. Jolly also apparently performed an injection and discussed surgery as well. The testimony and evidence indicates Dr. Jolly's records were sent to the insurer's 3rd party administrator.

The insurer or their designated 3rd party administrator then sent the employee to Dr. Jeffries on March 7, 2005, for an IME. Dr. Jeffries obtained a history, reviewed medical records and the May 2004 MRI as well as performing an examination of the employee . The doctor issued a report and in response to subsequent inquiries also issued a supplemental report dated April 2, 2005 and an addendum dated April 25, 2005.

Dr. Jeffries concluded employee had a diffuse disc bulge at L5-S1 with a larger component to the right side with a slight posterior displacement of the descending nerve root on the right side. In addition he recommended an MRI which he compared to the May 2004 MRI and noted no significant difference between the earlier MRI and the one taken after the February 2005 events. He noted the abnormality on both MRI's was to the right side and therefore he had no explanation for employee's new complaints of left lower extremity pain.

In response to an inquiry from the insurer, the doctor stated that based upon the continuum of symptoms dating from November 2003, if the employee were to become a surgical candidate the necessity for the surgery would substantially be the result of the November 2003 injury. The February 2005 events merely aggravated the pre-existing condition.

Based on his review of the medical records as well as the history obtained from the employee, Dr. Jeffries opined that the employee did suffer an injury on November 11, 2003 and that injury was clearly work related as well as a substantial factor in the cause of the resulting medical condition or disability. (Employer's Exhibit 4, p.54).

After seeing Dr. Jeffries the employee was sent to Dr. Miles who felt the employee was a candidate for surgery be it a total disc replacement or a fusion. Dr. Miles records indicate two insurance companies had accepted liability for treatment, one for non-surgical treatment and the other for surgical treatment, and did not offer an opinion on causation.

Employee was then sent to Dr. Mirkin who opined the substantial cause for the need for treatment was degenerative disc disease that was symptomatic prior to November 2003. Dr. Mirkin's opinion is suspect in two respects. First, there is no evidence of any back complaints requiring treatment between 1997 and March of 2003 when she contacted her doctor with complaints of a sore back for which she was given a 10 day prescription which she did not refill. Secondly, the doctor acknowledged during his deposition that his opinion was at least to some extent based on there being no indication of a herniated disc prior to the March 16, 2005 MRI. On cross examination the doctor acknowledged that was incorrect as the earlier MRI (May 2004) did reveal a disc herniation. Consequently, Dr. Mirkin's opinion must be discounted.

Finally, Dr. Bernardi also saw the employee in July 2006 and while acknowledging employee might have a disc "bulge" he did not believe there was a herniation and that employee's symptoms were the result of degenerative disc disease. When asked if he was disagreeing with Dr. Trecha's diagnosis of a herniated disc, Dr. Bernardi responded that he wasn't necessarily disagreeing with that diagnosis but simply saying he had not seen those films.

When asked during his deposition about Dr. Mirkin and Dr. Bernardi's conclusions, Dr. Jeffries noted he frequently has agreed with Dr. Mirkin's opinion in the past and that neither of the doctors' opinions was unreasonable. However, Dr. Jeffries noted that he would have to respectfully disagree with both opinions and sets out in detail his reasoning on pages 33 through 39 of his deposition. (Employer/Insurer's Exhibit 4).

After careful review, I conclude Dr. Jeffries opinion is insightful, well reasoned and is more credible than the opinions to the contrary from Drs. Mirkin and Bernardi. Considering the competent and substantial evidence, I find the Employee has met her burden of proving that she did suffer an injury on November 11, 2003 and that injury was clearly work related as well as a substantial factor in the cause of the resulting medical condition or disability.

Issue 4: Is Employee entitled to additional medical treatment?

Section 287.140, RSMo, requires an employer/insurer to provide medical treatment as reasonably may be required to cure and relieve an employee from the effects of the injury. Such medical treatment includes treatment "which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail." *Mathia v. Contract Freighters, Inc*., 929 S.W.2d 271 (Mo. App. 1996) quoting *Williams v. A.B. Chance Co*., 676 S.W.2d 1, 4 (Mo. App. 1984). The claimant must prove the need for treatment by "reasonable probability" rather than "reasonable certainty." *Downing v. Willamette Industries, Inc*., 895 S.W.2d 650, 655 (Mo. App. 1995) (citations omitted). "Probable" means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. *Sifferman v. Sears, Roebuck & Co*., 906 S.W.2d 823, 828 (Mo. App. 1995) (citations omitted).

Virtually all of the doctors have stated employee may be a surgical candidate, with Dr. Jeffries indicating he would recommend pursuing other conservative options first. The problem is it has now been some 3 years since Dr. Miles discussed and was prepared to perform surgery. In his deposition in October of 2006, Dr. Jeffries noted he would need to see the employee before he could determine what treatment to recommend. Considering the time that has lapsed, that would seem to be a reasonable approach. Having found that Dr. Jeffries appears to have the best understanding of the employee's condition, the employer is directed to send employee back to Dr. Jeffries and then to provide whatever treatment or referral for treatment Dr. Jeffries makes with respect to treatment for the November 2003 injury.

CONCLUSION

Employee met her burden of proving that she sustained a compensable injury arising out of and in the course of her employment for Employer, and which was medically causally connected to it. Employer/Insurer shall return

Employee to Dr. Jeffries and provide whatever treatment or referral for treatment the doctor makes to treat the injury sustained as a result of the November 11, 2003 accident.

Employee's attorney requests a fee of 25%. However, since this award only addresses medical treatment the attorney's fee will be addressed at a future date.

This award is temporary or partial in nature, is subject to further order, and the proceedings are hereby continued and left open until a final award can be made.

Date: _____ Made by: _____

Ronald F. Harris
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Jeffrey Buker
Director

Employee testified that she sent Dr. Jolly's records to Ms. Suzie Billiard, the case manager assigned to handle the claim. Dr. Jolly's records are not in evidence, but there are references to them in the correspondence in the record.
Employee testified she personally sent Dr. Jolly's records to Ms. Suzie Billiard, the case manager assigned by Gallagher Bassett to handle this claim. Although correspondence in the evidence refers to Dr. Jolly's records, apparently those records are nowhere to be found.
Dr. Jeffries report indicates he reviewed something referencing Dr. Jolly's visit and treatment though apparently not the formal progress note.