

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

Injury No.: 08-123984

Employee: Elizabeth Blake
Employer: Best Buy
Insurer: New Hampshire Insurance Co.

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 briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties submitted the following issues for determination by the administrative law judge: (1) accident or occupational disease; (2) notice; (3) medical causation; (4) liability for past medical expenses in the amount of \$86,867.70; (5) past temporary total disability for a period covering March 10, 2009, through April 22, 2009; and (6) nature and extent of permanent partial disability.

The administrative law judge rendered the following findings and conclusions: (1) employee's alleged injury is properly characterized as an accident; (2) Dr. Kitchens's opinion is credible; and (3) employee's work-related lifting activities on September 5, 2008, were a triggering or precipitating factor in her need for treatment and therefore employee's claim is not compensable.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in making selective use of portions of physical therapy notes while ignoring the medical opinions from both treating doctors; (2) in asserting her own medical conclusions based on her misreading of the MRIs; and (3) because her conclusion fails to take into account the uncontested nature of the factual assertion that employee was capable of work without restrictions or medications in the months leading up to the work injury.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

In March 2006, employee saw her family practitioner, Dr. Douglas Pogue, for neck pain and occasional numbness in her hands. An MRI of March 17, 2006, revealed a left-sided disc herniation at C4-5, encroaching upon the cervical subarachnoid space, abutting the anterolateral surface of the spinal cord on the left, and encroaching on the left-sided foramen, as well as some disc bulging posterolaterally to the right, causing mild foraminal encroachment. The MRI also revealed a symmetric Luschka joint degenerative change with some foraminal narrowing bilaterally at C5-6, but no soft disc herniation or encroachment of the spinal canal at that level. For about three months, employee

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received physical therapy and chiropractic treatments, after which her symptoms resolved. Employee sought no further treatment for her neck until September 2008.

Employee worked for employer as a sales associate. On September 5, 2008, employee was working for employer performing a task called "down-stacking," which involved moving merchandise from overhead racks onto lower shelving so that the merchandise could be accessed by customers. On this occasion, employee was down-stacking microwave ovens, which employee believes weighed between 50 and 100 pounds. After employee down-stacked 4 or 5 microwaves, she began to feel pain at the base of her neck.

Employee worked the next few days but continued to have problems in her neck. By September 8, 2008, employee's condition deteriorated to the point she began to feel numbness in her arms. On September 9, 2008, employee saw Dr. Pogue, who diagnosed an overhead lifting injury, took employee off work for 4 days, and prescribed Vicodin and Medrol for pain. Dr. Pogue restricted employee from performing lifting work until her neck was pain free.

On September 10, 2008, employee took the work restrictions from Dr. Pogue to the store manager. Employee informed the store manager that she was experiencing pain in her neck as a result of her down-stacking work. The store manager did not fill out a Report of Injury, nor did he direct employee to any particular medical provider for evaluation and treatment. As a result, employee continued to see medical providers of her own choosing. Employer permitted employee to work light duty up until sometime in December 2008, after which employee returned to full duty work and experienced a return of neck pain and related symptoms.

On December 16, 2008, employee saw a nurse practitioner in Dr. Pogue's office who recorded employee's neck pain was worse after returning to full duty work. The nurse practitioner ordered physical therapy, but this did not provide any significant relief to employee. On February 27, 2009, an MRI revealed a small right posterolateral disc herniation at C4-5, as well as a moderate broad-based right posterolateral disc herniation at C5-6. Employee sought a surgical consultation with Dr. David Raskas, who ordered a myelogram which confirmed the disc protrusions at both C4-5 and C5-6. Dr. Raskas opined that employee's work activities in September 2008 were the prevailing factor causing employee's neck pain and the conditions requiring surgical intervention. Employee subsequently underwent a two-level discectomy, partial vertebrectomy, and fusion at C4-5 and C5-6. Dr. Raskas took employee off work from March 10, 2009, the date of the surgery, through April 22, 2009, the date he released her to return to work with a 20-pound lifting restriction.

Employee provided her medical bills incurred in the course of the above-described treatment for her cervical spine condition, the medical records reflecting the treatments giving rise to the bills, and provided her own testimony describing her course of treatment. Employer did not provide any evidence that would suggest employee is not liable to pay the charges reflected in the bills.

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We note that employee's Exhibit N, containing employee's medical bills, also includes a document entitled "Medical Bill Summary" which lists certain bills that are not included in the exhibit. Specifically, the "Medical Bill Summary" claims employee incurred \$396.00 in charges from "Gateway ER Physicians" and \$441.00 in charges from "St. Luke's CDI," but Exhibit N does not contain bills in these amounts from these providers. After our own careful review of the medical bills themselves, we find that the total amount of employee's past medical expenses is \$86,030.70, rather than the amount of \$86,867.70 claimed by employee in the "Medical Bill Summary" and at the hearing before the administrative law judge.

Employee discontinued her work for employer following her cervical spine surgery, because she no longer felt comfortable moving merchandise down from overhead racks, and feared she would injure herself again. Employee continues to experience pain in her neck and a recurring numbness in her hands. Employee also experiences difficulty sleeping owing to her neck symptoms. Employee can no longer push a lawnmower, and must rely on her husband's help to perform basic household chores. Employee feels a sharp pain in her neck whenever she attempts to reach overhead.

Expert medical opinion evidence

Dr. Daniel Kitchens evaluated employee at the request of employer. Dr. Kitchens opined that employee suffered from preexisting degenerative disc disease of the cervical spine, and that employee's work activities did not cause her symptoms. Dr. Kitchens appears to have premised his opinion on a belief that Dr. Pogue's records do not confirm a specific incident or injury that occurred at work. When confronted, on cross-examination, with a note from Dr. Pogue identifying specific lifting activities at work as a source of employee's complaints, Dr. Kitchens announced his belief that overhead lifting activities cannot cause neck pain.

Dr. David Volarich provided an independent medical examination on behalf of the employee. Dr. Volarich opined that employee's work of down-stacking microwaves in September 2008 was the prevailing factor causing her to suffer cervical bilateral upper extremity radiculopathy that required surgical intervention at both C4-5 and C5-6. Dr. Volarich explained that the type of overhead lifting employee was performing for employer is non-ergonomic, and can put stress on the neck and back. Dr. Volarich pointed to the February 2009 MRI, which revealed a somewhat larger herniation at C4-5 than shown on the previous MRI of March 2006, and also revealed a new right-sided herniation at C5-6 causing C6 nerve root impingement. Dr. Volarich rated employee's disability resulting from the September 2008 injury at 40% of the body as a whole referable to the cervical spine. Dr. Volarich opined that, as a result of the work injury, there is a reasonable probability employee will require future treatment in the form of prescription medications, muscle relaxants, trigger point injections, and physical therapy.

We have found, based on employee's credible testimony, that she suffered a specific lifting incident at work on September 5, 2008, that coincided with the onset of neck pain. In light of our findings, Dr. Kitchens's emphasis on the purported absence of a specific incident or injury at work tends to undermine the probative force of his opinions. Nor are we at all persuaded by Dr. Kitchens's testimony that overhead lifting cannot cause

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neck pain. Especially in light of the changes seen on the February 2009 MRI, we find Dr. Volarich's opinions more persuasive.

Accordingly, we adopt Dr. Volarich's opinion (and so find) that employee's work of down-stacking microwaves on September 5, 2008, was the prevailing factor causing her to suffer cervical bilateral upper extremity radiculopathy that required surgical intervention at both C4-5 and C5-6. We also adopt Dr. Volarich's opinion (and so find) that there is a reasonable probability employee will require future treatment in the form of prescription medications, muscle relaxants, trigger point injections, and physical therapy.

Conclusions of Law

Accident or occupational disease

Section 287.020.2 RSMo provides, as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

We have found, based on employee's credible testimony, that on September 5, 2008, employee was performing down-stacking duties for employer when she experienced the onset of pain at the base of her neck. We are persuaded that these facts satisfy each of the foregoing criteria set forth above, and we therefore conclude that employee suffered an "accident" for purposes of § 287.020.2.

Notice

Section 287.420 RSMo sets forth the requirements for the notice employees must provide employers regarding a work injury, and provides, in relevant part, as follows:

No proceedings for compensation for any accident 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, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

Employee did not advance any evidence to suggest that she provided to employer a written notice meeting all of the requirements of the above-quoted section no later than thirty days after September 5, 2008. Accordingly, the next question is whether employee proved that employer was not prejudiced by her failure to provide the written notice specified by statute. We have found that on September 10, 2008, employee told the store manager that she'd hurt her neck performing down-stacking duties, and that she was receiving treatment and had work restrictions from Dr. Pogue.

It is well settled in Missouri that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994). We conclude that employer had actual

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notice of employee's cervical spine injury when employee informed the store manager that her down-stacking duties had caused her neck pain so severe that she'd needed to consult a physician.

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.

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

Because employee has demonstrated that employer had actual notice of the accident on September 10, 2008, employee has made a prima facie showing of absence of prejudice and the burden shifts to employer to show that it was prejudiced.

We note that employer failed to brief the issue of notice or to provide any argument that would support a finding it was prejudiced by employee's failure to provide the written notice described in the statute. After a careful review of the record, we can find no evidence to suggest that employer was prejudiced. Employer had an opportunity to investigate the accident and to send employee for evaluation and treatment mere days after the accident occurred. We are convinced employee's failure to provide a written notice did not deprive employer the opportunity to investigate employee's claim, have her treated to minimize her injuries, or gather evidence for its defense. For the foregoing reasons, we conclude that employee's claim is not barred by § 287.420.

Medical causation

Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

We have found persuasive and adopted the opinion from Dr. Volarich that employee's work of down-stacking microwaves on September 5, 2008, was the prevailing factor causing her to suffer cervical bilateral upper extremity radiculopathy that required surgical intervention at both C4-5 and C5-6. We conclude that the accident is the prevailing factor causing both the resulting medical condition of bilateral upper extremity radiculopathy requiring surgical intervention at C4-5 and C5-6, and permanent partial disability to the extent of 20% of the body as a whole referable to the cervical spine.

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Past medical expenses

Section 287.140.1 RSMo provides, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Employer has an “absolute and unqualified duty” to furnish medical care under § 287.140 RSMo; once a compensable injury is shown (as it was here) employee needs only to prove that the disputed treatments “flow” from the work injury. See *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007); *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo. App. 2011). The courts have consistently held that an award of past medical expenses is supported when the employee provides (1) the bills themselves; (2) the medical records reflecting the treatment giving rise to the bill; and (3) testimony sufficient to identify the bills as incurred during the course of treatment for the work-related injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. 1989).

We have determined that on September 10, 2008, employee provided actual notice to employer of a work injury requiring medical treatment, but that employer did not provide employee with medical treatment. We have adopted the opinion from Dr. Volarich that employee’s work injury resulted in a medical condition requiring surgical intervention. We have noted that employee provided her past medical bills, the medical records reflecting the treatments giving rise to the bills, and testimony describing her treatment, and that employer did not provide any evidence to suggest employee is not liable for the charges reflected in the bills. We conclude employee is entitled to her past medical expenses in the amount of \$86,030.70.

Future medical treatment

Section 287.140.1 RSMo provides for an award of future medical treatment where the employee can prove a reasonable probability that she has a need for future medical treatment that flows from the work injury. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51-54 (Mo. App. 2008). We have found persuasive and adopted Dr. Volarich’s opinion that there is a reasonable probability employee will require future treatment in the form of prescription medications, muscle relaxants, trigger point injections, and physical therapy. We conclude that employer is obligated to furnish any and all future medical treatments that may reasonably be required to cure and relieve the effects of her compensable work injury.

Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee’s healing period following a compensable work injury. The test for temporary total disability 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). We have noted that Dr. Raskas, the treating surgeon, took employee off work from March 10, 2009, through April 22, 2009, following the bi-level cervical fusion surgery. We conclude employee

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was temporarily and totally disabled for 6 and 1/7 weeks. At the stipulated rate of \$307.56, employer is liable for \$1,889.30 in temporary total disability benefits.

Permanent partial disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee sustained a 20% permanent partial disability of the body as a whole referable to the cervical spine as a result of the work injury. This amounts to 80 weeks of permanent partial disability at the rate of \$307.56. We conclude, therefore, that employer is liable for \$24,604.80 in permanent partial disability benefits.

Award

We reverse the award of the administrative law judge. Employer is liable for, and is hereby ordered to pay to the employee, \$86,030.70 in past medical expenses, \$1,889.30 in temporary total disability benefits, and \$24,604.80 in permanent partial disability benefits. Employer is ordered to furnish any and all future medical treatments that may reasonably be required to cure and relieve the effects of employee's compensable work injury.

This award is subject to a lien in favor of David J. Jerome, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Linda J. Wenman, issued March 5, 2013, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 19th day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Elizabeth Blake

Injury No.: 08-123984

Dependents: N/A

Employer: Best Buy

Additional Party: N/A

Insurer: New Hampshire Insurance Co.

Hearing Date: February 5, 2013

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

Checked by: LJW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged as September 5, 2008
5. State location where accident occurred or occupational disease was alleged: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Not determined
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident or occupational disease was alleged: Employee alleges she developed neck and arm pain after moving microwave ovens from a shelf to the floor.
12. Did accident or occupational disease cause death? No
13. Part(s) of body alleged injured by accident or occupational disease: Cervical spine
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Issued by DIVISION OF WORKERS' COMPENSATION

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$466.00
- 19. Weekly compensation rate: \$307.56 / \$307.56
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: None

TOTAL: - 0 -

23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Elizabeth Blake	Injury No.:	08-123984
Dependents:	N/A	Before the	
Employer:	Best Buy	Division of Workers'	
Additional Party:	N/A	Compensation	
		Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
Insurer:	New Hampshire Insurance Co.	Checked by:	LJW

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on February 5, 2013. Post-trial briefs were received from the parties on February 19, 2013. Attorney David Jerome represented Elizabeth Blake (Claimant). Best Buy (Employer) is insured by New Hampshire Insurance Company, and represented by Attorney Peggy Hecht.

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: accident vs. occupational disease; notice; medical causation; liability of Employer for past medical expenses; liability of Employer for past temporary total disability (TTD); and liability of Employer for permanent partial disability (PPD) benefits. Claimant offered Exhibits A-N, and Employer offered Exhibits 1-3. All exhibits were admitted into the record without objection, with the exception of Exhibit N, and the objection to Exhibit N was overruled. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Claimant is 42 years old and worked for Employer in the appliance department for approximately one month prior to her alleged date of injury. Claimant's job duties included interacting with customers, arranging appliances in the department, and moving appliances from storage areas into display areas.
2. On Friday, September 5, 2008, Claimant was instructed to "downstack" or move microwave ovens from department overhead storage to floor level. Each microwave weighed approximately 50-100 pounds and required Claimant use a ladder to reach the microwave, lift the microwave, and carry it down the ladder. After moving approximately 4-5 microwaves, Claimant developed pain at the base of her neck. Claimant continued to work the remainder of her shift and did not

report her discomfort to any Employer representative. Over the weekend, Claimant continued to experience neck discomfort, so she contacted her primary physician, Dr. Pogue, and was provided an appointment for Tuesday, September 9, 2008.

3. Claimant has a preexisting cervical spine condition. During 2006, Claimant had developed neck pain that radiated into her left shoulder and she sought care with Dr. Pogue. A cervical MRI was obtained that demonstrated degenerative disc disease, a C4-5 disc herniation to the left that abutted the anterolateral surface of her spinal cord along with disc bulging posterolaterally to the right, and C5-6 degenerative joint changes with some foraminal narrowing, but “no soft disc herniation.” Claimant underwent conservative medical treatment that included chiropractic care, physical therapy, and acupuncture. Claimant testified her symptoms resolved after receiving treatment.

4. On September 9, 2008, Claimant was examined by Dr. Pogue. Dr. Pogue’s office note indicated Claimant’s location of pain was her upper back, there was no radiation of pain, and her condition was aggravated by lifting and lifting overhead. Dr. Pogue indicated the “context” of the pain was “lifting”.¹ Upon physical examination, Dr. Pogue noted tightness in Claimant’s left trapezius along with tenderness and spasm. Dr. Pogue diagnosed an acute sprain, placed Claimant on medication, advised her to stretch, took her off work for four days, and upon her return to work restricted her ability to lift. On September 11, 2008, Claimant telephoned Dr. Pogue due to worsening of her symptoms, and reporting new symptoms of tingling of her fingers. Dr. Pogue prescribed steroids and a stronger muscle relaxant.

5. Claimant’s next contact with Dr. Pogue regarding her neck occurred on December 15, 2008. On that date, Dr. Pogue’s office notes reflect Claimant called reporting Employer was requiring her to perform heavy lifting and the lifting was aggravating her neck symptoms. Claimant requested a letter to Employer restricting her lifting. Claimant was advised she must be seen to provide a work modification letter. On December 16, 2008, Claimant was seen by Dr. Pogue’s nurse practitioner who noted that since September Claimant’s symptoms had improved until she went back to unrestricted duty at work and then her neck symptoms returned with pain that radiated into her left arm and numbness into her right arm and middle finger. Claimant was provided work restrictions for four weeks, pain medication, and given an order for physical therapy. Claimant was to advise if symptoms continued or worsened.

6. On January 8, 2009, Claimant began physical therapy and the therapist noted: “had diagnosis of HNP a couple of years ago per MRI. Has had symptoms on and off since then. Much worse last 6 months - began a new job where a lot of lifting, pushing, pulling required.”

7. Claimant returned to Dr. Pogue on February 27, 2009, with complaints of left shoulder pain that radiated into her left arm. Claimant reported no injury associated with her shoulder symptoms. Dr. Pogue diagnosed an acute thoracic sprain, but ordered MRIs of Claimant’s cervical spine and left shoulder. Claimant’s MRIs were done on the same day, and at the same facility that had performed her cervical spine MRI in 2006. The left shoulder MRI was normal. The cervical spine MRI was interpreted as follows:

Scoliosis, disc bulging and degenerative changes, as described, resulting

¹ Only Dr. Pogue’s office records are available for review, Dr. Pogue was not deposed.

in foraminal narrowing at multiple levels. In addition, there is small right and moderate sized left posterolateral disc herniation at the C4-5 level, as well as moderate sized broad-based right posterolateral disc herniation at the C5-6 level. Mild spinal stenosis is also noted at the C4-5 and C5-6 levels. The above findings are similar in appearance to the prior study dated 3/15/06.

On March 2, 2009, Dr. Pogue noted he had discussed the MRI findings with Claimant, and he noted Claimant had a “big disc herniation C4.”

8. On March 3, 2009, Claimant sought medical treatment with Dr. Doll, a physiatrist.² In addition to his physical examination, Dr. Doll reviewed Claimant’s medical history and made the following comments regarding Claimant’s cervical spine MRI:

An MRI of the cervical spine performed on 2/27/09 revealed scoliosis, disc bulging, and degenerative changes resulting in foraminal narrowing at multiple levels. A small right and moderate-sized left posterolateral disc herniation at the C4-5 level as well as a moderate-sized broad-based right posterolateral disc herniation at the C5-6 level was identified. Mild spinal stenosis was also noted C4-5 and C5-6. These findings were similar in appearance to the prior study dated 3/15/06.³

Dr. Doll recommended Claimant be urgently evaluated by a spinal surgeon. Dr. Doll recommended Claimant to Dr. Raskas, who is a spinal surgeon and Dr. Doll’s medical partner.

9. Dr. Raskas initially examined Claimant on March 4, 2009. In addition to reviewing her medical history and physical examination, Dr. Raskas reviewed Claimant’s 2009 MRI and noted as follows:

I reviewed her MRI scan. She has a disk herniation at C4-5 lateralizing to the left with severe foraminal stenosis. The MRI is a .7 Tesla magnet scan. There looks like there is spinal cord compression on the sagittal images. At this point, it is my impression the patient had cervical HNP with stenosis, myelopathy, radiculopathy also. I think she needs an anterior decompression/fusion likely at C4-5 and C5-6. I am recommending the 5-6 level be done because of the history of the prior problem 3 years ago and the changes on the MR[I]. We are going to get a myelogram/CAT scan to check things prior to proceeding with surgical intervention.

The myelogram/CAT scan was performed on March 5, 2009, and the post-myelogram CAT scan demonstrated “focal disc protrusion on the left at C4-5 with non-filling of the left C5 nerve root sleeve, and degenerative disc disease and degenerative uncinat joint change at C4-5 and C5-6.”

² Dr. Doll is Claimant’s cousin.

³ It is unclear from Dr. Doll’s progress note if he personally compared the 2006 and 2009 MRIs, or if he reviewed only the radiology reports.

10. On March 10, 2009, Claimant underwent a C4-5 and C5-6 discectomy with anterior fusion. Dr. Raskas' postoperative diagnosis was cervical herniated disc spondylosis with spinal stenosis and myelopathy. On April 22, 2009, Dr. Raskas released Claimant to return to work with restrictions. On April 22, 2010, Dr. Raskas noted Claimant had a solid fusion, and released her from his medical care.

11. On February 1, 2010, Claimant was re-examined by Dr. Doll at her request. Upon physical examination Dr. Doll noted the following: mildly reduced cervical range of motion; full upper extremity strength; intact deep tendon reflexes; and slightly decreased left index fingertip sensation. Dr. Doll reviewed Claimant's medical history and opined Claimant "has described a significant work event leading to the onset of significant cervical symptomatology which required surgical intervention to alleviate those symptoms and to return her to full function." Dr. Doll noted Claimant had a preexisting cervical condition in 2006, and she had resolution of the symptoms following treatment. Dr. Doll opined Claimant's "work activities during September 2008 were the prevailing factor in the medical causation, causation of her symptoms, examination findings, and need for treatment." On May 13, 2010, Dr. Raskas concurred with Dr. Doll's causation opinion, and opined "I do believe her work activities of September 2008 were the prevailing factor in the medical causation of her symptoms, examination findings and the need for the surgical intervention of which I performed."⁴

12. On January 12, 2012, Claimant was examined by Dr. Volarich at her request. Dr. Volarich is board certified in nuclear medicine, occupational medicine, and as an independent medical examiner. Dr. Volarich reviewed Claimant's medical records and her 2006 and 2009 MRI's along with her CT/myelogram. In regard to the 2006 MRI, Dr. Volarich noted a disc herniation at C4-5 that lateralized to the left causing C5 nerve root impingement, mild bulging at C5-6, and he noted mild degenerative changes at both levels. In regard to the 2009 MRI, Dr. Volarich noted a larger disc herniation at C4-5 causing significant compression of the C5 nerve root, and a right-sided herniation of C5-6 that impinged on the right C6 nerve root. In regard to the 2009 CT/myelogram, Dr. Volarich noted a C4-5 disc herniation to the left with non-filling of the C5 nerve root, and a C5-6 disc herniation to the right. Upon physical examination, Dr. Volarich noted the following abnormal findings regarding Claimant's cervical spine: weakness of the left shoulder girdle; weakness of the right biceps and triceps muscles; diminished pinprick sensation along the C5 dermatome; decreased cervical spine range of motion; and pain to palpation of bilateral trapezius muscles. Dr. Volarich rated Claimant's overall cervical spine disability at 55% BAW PPD, with 40% BAW PPD referable to the September 5, 2008 injury⁵ and 15% BAW PPD preexisting. Dr. Volarich opined Claimant's work activities on September 5, 2008 were "the substantial contributing factor, as well as the prevailing or primary factor causing the cervical bilateral upper extremity radiculopathy that required anterior cervical discectomy with fusion and instrumentation at both C4-5 and C5-6." Dr. Volarich further opined that although the C4-5 disc herniation was present in 2006, it was "essentially asymptomatic" prior the September 5, 2008 injury, and the right disc bulge at C5-6 present in 2006 had caused no radicular symptoms, other than "some occasional" finger tip tingling, prior to the 2008 injury. During deposition testimony, Dr. Volarich testified as follows regarding the 2006 and 2009 MRI comparison:

⁴ Neither Dr. Doll nor Dr. Raskas were deposed.

⁵ Dr. Volarich references a September 9, 2008 date of injury, but the claim was amended to reflect a September 5, 2008 date of injury and will be referenced here as September 5, 2008.

In this case, because she was lifting with her arms away overhead and handling that heavy weight, she injured her neck. She caused a disc herniation, new disc herniation at C5-6 to the right and aggravated the old one to the left at C4-5.

(Exhibit D, pg.18)

Upon cross-examination questioning, Dr. Volarich acknowledged Dr. Doll and the radiologist who read Claimant's 2009 MRI reported the 2009 MRI was "essentially" the same as the 2006 MRI. Dr. Volarich also acknowledged Claimant's medical records demonstrated Claimant had some cervical spine symptoms on and off between 2006 and 2008. (Exhibit D, pgs. 38-40)

13. On July 5, 2011, Claimant was examined by Dr. Kitchens at the request of Employer. Dr. Kitchens is a board certified neurosurgeon. Dr. Kitchens reviewed Claimant's medical records and her 2006 and 2009 MRI's along with her CT/myelogram. In regard to the 2006 MRI, Dr. Kitchens noted degenerative changes throughout the cervical spine, greater at C4-5 and C5-6, with a C4-5 posterior disc protrusion to the left and uncinat process spurring at C4-5 and C5-6. In regard to the 2009 MRI, Dr. Kitchens noted degenerative changes of the cervical spine "with persistence of a disc protrusion to the left side at C4-5 and a broad-based disc protrusion somewhat to the right side at C5-6." Dr. Kitchens also noted "uncinac process spurs are still evident and have not changed significantly since her MRI in 2006." Dr. Kitchens testified he did not find any significant changes when he compared her 2006 and 2009 MRIs. (Exhibit 1, pg. 8) In regard to the 2009 CT/myelogram, Dr. Kitchens noted a disc protrusion to the left side at C4-5, with uncinac process spurring, and significant neural foraminal narrowing left worse than right. At C5-6, Dr. Kitchens noted a broad-based disc protrusion to the right, bilateral uncinac process spurring, and foraminal narrowing with right worse than left. Upon physical examination, Dr. Kitchens noted Claimant had decreased range of motion when looking to the left, but an otherwise normal physical exam. Dr. Kitchens opined Claimant's need for treatment was related to her cervical spine degenerative disc disease, rather than her work activities with Employer. During deposition testimony, Dr. Kitchens explained his opinion as follows:

A. . . . She had symptoms related to cervical degenerative disc disease in 2006. She had treatment work-up which revealed cervical degenerative disc disease at C4-5, C5-6, uncinac process spurring. Her symptoms subsequently improved, which is typical for cervical degenerative disc disease, improved for some time and then her symptoms returned in 2008. There was no specific incident at work. Mrs. Blake did not recall a traumatic event at work. Her symptoms returned. She had additional work-up, including an MRI in February of 2009, which did not reveal any significant change. There's no objective finding of a worsening or an acceleration or an aggravation of her cervical degenerative disc disease based on the objective review of the MRI in comparison with the two MRIs. The degenerative disc disease occurred before her work activities at Best Buy, therefore, it's impossible for work activities in 2008 to cause degenerative disc disease, which was diagnosed in 2006.

(Exhibit 1, pgs. 9-10)

Dr. Kitchens further testified that re-development of symptoms following an absence of symptoms happens naturally as a consequence of degenerative disc disease. (Exhibit 1, pg. 20)

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Under the 2005 Amendments to the Missouri Workers' Compensation Law is the case at bar properly characterized as an "accident"?

Claimant alleges she sustained an injury to her cervical spine after lifting 4-5 microwaves while working on September 5, 2008. During the 2005 legislative session the definition of "accident" changed. Prior to the 2005 amendments the definition of "accident" included an "identifiable event or *series of events*" that happened suddenly. The 2005 amendments also require the statutory application of strict construction. Section 287.020.2 RSMo 2010⁶ now defines the term "accident" as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Applying this definition to the case at bar, the facts as alleged in this case demonstrate Claimant alleges an *unusual strain* (lifting) identified by *time* (9/5/08) and *place of occurrence* (Best Buy) producing *objective symptoms* (neck pain) caused by a *specific event* during a *single work shift* (the shift Claimant worked on 9/5/08). Except for the term *specific event*, all the terms used in the definition of accident support a finding of accident. Applying the principles of strict construction, and giving a plain and ordinary meaning to the two words "*specific event*," the Oxford American Desk Dictionary (Dictionary) defines "*specific*" as *clearly defined, definite, relating to a particular subject*. The Dictionary defines "*event*" as *a thing that happens, esp. one of importance, fact or outcome of a thing's occurring*. Claimant testified after she had moved 4-5 microwaves she developed pain. Applying the Dictionary's definition to the words "*specific event*" as used in the definition of "accident," Claimant's lifting of 4-5 microwaves was the specific event required by the statute. The act of moving the microwaves was part of one continuous event or occurrence during a single work shift. Accordingly, I find Claimant's alleged injury is properly characterized as an "accident."

However, for an "accident" to be compensable under §287.020.2 RSMo the definition requires that the work not be a triggering or precipitating factor, and §287.020.3 RSMo requires the "accident" to be the prevailing factor in causing the medical condition and disability. These requirements involve an element of medical causation and necessitate expert medical opinion.

⁶ Unless otherwise indicated, all further references will refer to §287.020 RSMo 2010.

Issues relating to medical causation

To be medically causally related the work must be the prevailing factor in the cause of the resulting medical condition and disability. §287.020.3 RSMo. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by 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 (Mo.App. 1991) (overruled on other grounds).

A total of four physicians, Drs. Doll, Raskas, Volarich and Kitchens, commented regarding the relationship between Claimant's work activities and her need for medical treatment. Two of the physicians, Dr. Doll and Dr. Raskas were not deposed. Dr. Raskas simply adopted the opinion contained in Dr. Doll's report. Dr. Doll found Claimant's work to be "the prevailing factor in the medical causation of her symptoms, examination findings, and need for treatment" despite his March 3, 2009, diagnoses of "severe neck pain with left upper extremity pain and multilevel cervical spondylosis/spinal stenosis with moderate-sided left posterolateral disc herniation at C4-5," a diagnosis almost identical to Claimant's 2006 MRI, and the acknowledgement that Claimant's 2006 MRI findings were "similar in appearance" to the 2009 MRI findings. Dr. Doll acknowledged Claimant had a preexisting condition in 2006, but she "reported a resolution of those symptoms" until 2008. This assertion is undercut by the Claimant's January 2009 physical therapy record reporting Claimant had "symptoms on and off" since 2006, but worse in the last 6 months. I do not find Dr. Doll's medical causation opinion credible.

Dr. Volarich and Dr. Kitchens offer contrasting medical causation opinions and differing interpretations of Claimant's 2009 MRI as compared to her 2006 MRI. Dr. Volarich opined his review of the two MRI's showed changes in 2009, with a larger disc herniation at C4-5 causing compression of the C5 nerve root, and a new herniation at C5-6 which appeared to be a non-lateralizing bulge in 2006. Dr. Volarich acknowledged both the 2009 reviewing radiologist and Dr. Doll felt the 2009 MRI was similar in appearance to the 2006 MRI. Like Dr. Doll, Dr. Volarich relied on Claimant's assertion that she was asymptomatic following her treatment in 2006 until 2008, despite (unlike Dr. Doll) reviewing the physical therapy record that disputed Claimant's assertion. (Exhibit D, pgs.40-41) Dr. Kitchens opined after reviewing the 2006 and 2009 MRIs, he saw no significant changes between the films. Further, Dr. Kitchens testified Claimant was unable to point to what he would consider a traumatic event that occurred at work. Dr. Kitchens opined Claimant had typical cervical degenerative disc disease, her symptoms improved after 2006 and returned in 2008, which happens naturally as a consequence of degenerative disc disease. (Exhibit 1, pgs. 9, 20) Dr. Kitchens opinion is further bolstered by Dr. Pogue's medical records that demonstrate a gap in medical treatment between September 2008 and December 2008, during which time Claimant reported to the nurse practitioner that her neck pain had gotten better, but got worse after she resumed full work activities. (Exhibit E)

The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993). Based on the foregoing discussion, after considering Dr. Volarich and Dr. Kitchens opinions, and applying the definition of "accident" set

forth in §287.020.2 and §287.020.3 RSMo, I find the opinion of Dr. Kitchens to be credible and persuasive, and do not find Claimant's work to have been the prevailing factor in causing her medical condition and disability. I further find Claimant's work related lifting activities on September 5, 2008 were a triggering or precipitating factor in her need for treatment and therefore not compensable.

CONCLUSION

Claimant's claim is not compensable under §287.020 RSMo. Employer owes no benefits. The remaining issues in dispute are moot.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation