

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No. 05-144425

Employee: Jennifer R. Brown
Employer: Nestle Purina PetCare Company
Insurer: American Home Assurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Notice

The parties dispute whether employee satisfied the notice requirements set forth under § 287.420 RSMo, which provides, in relevant part, as follows:

No proceedings for compensation for any occupational disease or repetitive trauma 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 diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

In the case of *Allcorn v. Tap Enters.*, 277 S.W.3d 823 (Mo. App. 2009), the court held that “a person cannot be diagnosed with an ‘occupational disease or repetitive trauma’ until a diagnostician makes a causal connection between the *underlying medical condition* and some work-related activity or exposure.” *Id.* at 829 (emphasis added). Employer argues that Dr. McCants’s October 26, 2005, diagnosis of “restrictive lung disease” triggered the 30-day period for providing written notice to the employer. Setting aside the question whether Dr. McCants’s suspicion that employee’s pulmonary condition was “most likely occupational [sic] related” satisfied the causal connection requirement as stated in *Allcorn*, we note that her diagnosis of restrictive lung disease runs contrary to the diagnoses rendered by the testifying pulmonary specialists. Specifically, Drs. Hyers and Tepper agree that employee suffers from asthma, while Dr. Tuteur provided the more specific diagnosis of irritant induced bronchial reactivity disease. We agree with the administrative law judge’s finding that the evidence best supports a finding that employee suffered asthma with bronchial reactivity as a result of her work exposure.

It follows that the underlying medical condition (or injury) of which employee complains is asthma with bronchial reactivity, not restrictive lung disease. As Dr. Tuteur credibly explained in his deposition, these conditions constitute an *obstructive* disease of the lungs (as opposed to the *restrictive* disease diagnosed by Dr. McCants). Especially where § 287.420 specifically requires employee to provide notice to the employer of the “nature of the injury,” we are not persuaded that Dr. McCants’s incorrect diagnosis triggered the 30-day notice period.

Employee: Jennifer R. Brown

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Instead, we find that the 30-day notice period was triggered on December 19, 2008, when Dr. Tuteur first identified the causal connection between the underlying medical condition of irritant induced bronchial reactivity and employee's work-related activity or exposures. Employee's claim for compensation of October 26, 2007, satisfied each of the elements of the written notice required under § 287.420, and was filed well before expiration of the 30-day notice period. See *Allcorn*, 277 S.W.3d at 830, noting that "the statute does not require that the notice be given after the diagnosis, but only that it be given 'no later than thirty days after the diagnosis of the condition'" (emphasis in original). We conclude, for the foregoing reasons, that employee's claim is not barred by § 287.420.

Corrections

In the second full paragraph on page 7 of his award, the administrative law judge states that Dr. Tepper examined employee at the request of her employer. This statement is incorrect; it was employee's attorney who requested that Dr. Tepper examine employee. See *Transcript*, page 328. Similarly, the administrative law judge states in the fourth full paragraph on page 21 of his award: "It is interesting to note that in this case the doctors who evaluated the employee were all retained by the employer-insurer." This statement is also incorrect, and we must therefore disclaim it and the administrative law judge's analysis that cites or relies upon it.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Gary L. Robbins, issued September 12, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 16th day of April 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

INTER-OFFICE COMMUNICATIONS

DIVISION OF WORKERS' COMPENSATION

September 10, 2014

Ms. Naomi Pearson
Division of Workers' Compensation
PO Box 58
Jefferson City, Missouri 65102-0058

In Re: Injury Number: 05-144425
 Employee: Jennifer R. Brown
 Employer: Nestle Purina PetCare Company
 Insurer: American Home Assurance Company

Dear Ms. Pearson:

Enclosed please find a final award in the above referenced workers' compensation case. The Court found that the employee had a compensable accident/occupational disease. The employer-insurer was ordered to pay benefits.

Sincerely,

Gary L. Robbins
Administrative Law Judge
Cape Girardeau, Missouri

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Jennifer R. Brown Injury No. 05-144425
Dependents: N/A
Employer: Nestle Purina PetCare Company
Insurer: American Home Assurance Company
Appearances: Mark E. Moreland, attorney for the employee.
Richard A. Day, attorney for the employer-insurer.
Hearing Date: June 16, 2014 Checked by: GLR/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? October 26, 2005.
5. State location where accident occurred or occupational disease contracted: Stoddard County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee claims that she developed breathing problems due to inhaling pollutants at her work site.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Lungs.
14. Nature and extent of any permanent disability: See Award.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$4,908.33.
17. Value necessary medical aid not furnished by employer-insurer: See Award.
18. Employee's average weekly wage: \$973.10.
19. Weekly compensation rate: \$648.73 per week for temporary total disability and \$365.08 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: Yes. See Award.

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

The Compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Mark E. Moreland.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On June 16, 2014, the employee, Jennifer R. Brown, appeared in person and with her attorney, Mark E. Moreland for a hearing for a final award. The employer-insurer was represented at the hearing by their attorney, Richard A. Day. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Nestle Purina PetCare Company was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by American Home Assurance Company.
2. On October 26, 2005, Jennifer R. Brown was an employee of Nestle Purina PetCare Company and was working under the Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The Jennifer R. Brown's average weekly wage was \$973.10, resulting in a compensation rate of \$648.73 per week for temporary total disability benefits and \$365.08 per week for permanent partial disability benefits.
5. The employer-insurer paid \$4,908.33 in medical aid.
6. The employer-insurer paid zero dollars in temporary disability benefits.
7. The employee has no claim for mileage.
8. The employee has no claim for any temporary disability benefits.
9. The employee has no claim for permanent total disability.

ISSUES:

1. Whether the employee sustained an occupational disease that arose out of and in the course of her employment.
2. Notice.
3. Medical causation.
4. Previously incurred medical bills.
5. Additional medical care.
6. Permanent partial disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Deposition of Peter G. Tuteur, M.D.
- B. Deposition of Arnold S. Tepper, M.D.
- C. Medical records from Ferguson Medical Group.

- D. Medical records from Missouri Delta Medical Center.
- E. Medical records from SEMO Health Network.
- F. Medical records of Rahat Salamat, M.D.
- G. Black Hills Bentonite, LLC Material Safety and Transportation Data Sheet.
- H. Industrial Hygiene Report of Nestle Purina PetCare Company.
- I. Records from Medical Arts Pharmacy.

Employer-insurer Exhibits:

- 1. Deposition of Thomas M. Hyers, M.D.
- 2. Medical records from Missouri Delta Medical Center.
- 3. Medical records from Ferguson Medical Group.
- 4. Post-Offer Medical Questionnaire.
- 5. Health Questionnaire.
- 6. E-mail from Kelly Hindman.
- 7. E-mail from Wes Lemons.
- 8. E-mail from Rob Taylor.
- 9. Statement of Manuel Wiley, Jr. dated 10-24-08
- 10. Statement of Manuel Wiley, Jr. dated 2-6-09.
- 11. Statement of Larry Daniel dated 4-10-10.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT:

The employee, Jennifer R. Brown, Kelly Hindman, Manuel Wiley Jr., and Larry Daniel personally testified at trial. All other evidence was presented in the form of written reports, medical reports, or deposition testimony.

Jennifer R. Brown

The employee is a 48-year-old single woman who lives in Sikeston, Missouri. She has two adult children and one child who is still dependent for support. Both her daughter and sister have been diagnosed with asthma and are currently receiving treatment for their condition. The employee has never smoked.

The employee worked for Nestle USA at their facility near Bloomfield, Missouri. She testified Nestle manufactured kitty litter at this facility. She began her employment with Nestle in August of 2003 and eventually resigned her position in late April 2012. She testified that she was going to leave in 2008, but her daughter got sick and she needed the work and the insurance. The employee did not work for any other employer during this period of time. She worked full time for Nestle as a machine operator. She predominately worked third shift which was from 11:00 p.m. to 7:00 a.m., with two 10-15 minute breaks and one 20 minute lunch break. She also worked on second shift which was from 3:00 p.m. to 11:00 p.m., with the same breaks. She testified on average she worked 10-20 hours of overtime per week, but on cross-examination she

acknowledged pursuant to her deposition testimony, she only worked about 8-12 hours of overtime.

The employee worked for Essex Wire in Sikeston, Missouri, prior to working for Nestle. She worked there for a period of four years and eight months and may have been exposed to asbestos. She also comments about this in her Post-Offer Medical Questionnaire she completed for Nestle on August 15, 2003. The employee testified that she had not been diagnosed with asthma or any lung problems which required the use of medications prior to working at Nestle.

When the employee started working at Nestle she worked as a machine operator in the conventional department. In this department she and 6-7 other employees would assist in putting kitty litter in bags. She would load a table with bags and a machine would dump the kitty litter into the bags. She testified spills would occur which required her to sweep and shovel the spilled kitty litter and put it in a dumpster. She testified she was exposed to granules of clay with additives already in it while working in the conventional department. She also stated she could see dust in the air from the clay as the kitty litter was being dumped into the bags. The employee agreed that there was a ventilation system in this area and fans blew the dust around, but there was no air conditioning. She testified that employees were not required to wear masks/respirators while working in this department.

After working in the conventional department, the employee began working in the clumping/packing department. She worked in this department until she resigned in April 2012. Again, she worked as a machine operator. She testified that large machines would put the kitty litter into jugs or buckets. She testified that she noticed a difference in the fragrances used in the kitty litter while working in the clumping department versus when she worked in the conventional department.

As a machine operator in the clumping department the employee was exposed to the finished product before it was packaged. She did not have any direct exposure to chemicals, except for what was contained in the finished product. She testified that as a machine operator she would come into contact with the finished product when there was some overfill or spillage on the floor. She would then have to clean up the spilled product and place it in a dumpster. She would also have to perform a "sniff test" each hour on the product after it was placed into the jug or bucket. She would randomly pull out some jugs or buckets and would check the color of the clay and the fragrance to make sure it was strong enough.

She again testified that there was dust in the air while she worked in the clumping department. She acknowledged that the area was ventilated. She was not required to wear masks or respirators, but they were available for her use. She indicated that Nestle made available to its employees a N95 respirator. The use of this respirator was discussed at safety meetings that were held one to two times per year.

The employee testified her respiratory symptoms started in 2005. She was experiencing wheezing, shortness of breath and burning in her chest. She testified that she was seen by multiple doctors over the years for her respiratory/health problems. Some of those records are

discussed later in this award. She indicated that before she started working at Nestle she had not been diagnosed with asthma or any other respiratory condition. She indicated that Dr. Jones said that she might have adult onset asthma, however no records were read that supports this. She also testified that she saw Dr. McCants in October 2005 and at that time she was told that her respiratory condition was most likely occupationally related. She also agreed that she was advised that preventing exposure would be her best course, or at a minimum, she should wear a mask and inform her employer about her problems.

The employee recalled developing additional problems with her lungs in January 2007. She stated both her lungs filled with fluid and she had to have them drained. She testified that she has continued to see Dr. Critchlow for her lung condition and he continues to prescribe her medication.

She testified that Nestle sent her to see Dr. Tuteur. His opinions are summarized later in this award. She also testified that Dr. Tuteur informed her that her respiratory condition was work related.

The employee agreed that prior to seeing Dr. Tuteur she began wearing a N95 respirator while at work. She indicated that her respiratory symptoms were better while she was not at work, i.e. on the weekends. When she went to work at Nestle, she noticed her symptoms worsened. She testified while she was at work, she would occasionally wear her mask and that Dr. Tuteur told her to wear it at all times

The employee eventually left Nestle in April 2012 due to health reasons. She testified she had been off work beginning in February 2012 due to having a hysterectomy and noticed her breathing improved while she was off work. She also testified while she was off work recovering from her hysterectomy, she started looking for another job. She went back to work at Nestle for approximately three weeks and then resigned. She testified that she was offered a job at Faurecia. She testified she started working at Faurecia in late April 2012 right after she left Nestle.

Faurecia is a muffler plant. The employee's job involved cutting and shaping pipes. She also did some spot welding. She acknowledged she had some breathing problems while working at Faurecia. She also acknowledged being exposed to smoke and other chemicals while working at Faurecia which caused her to experience some wheezing, shortness of breath and coughing. Throughout the time she worked at Faurecia, she continued using her inhalers. She worked full time for Faurecia until she left in May 2013.

In May 2013, the employee began working for her current employer, Allen Wire. She testified she works full time operating a machine which puts stripes on wire jackets. While operating her machine, she is exposed to paint which is used to place the stripe on a wire jacket. She testified that paint is in a can which on occasion needs to be filled or changed out to a different color, depending on the type of wire they are running. She also mentioned having to clean out the paint cans on a weekly basis. When she cleans out the paint cans, she is exposed to chemicals from a

paint cleaner. The employee testified that her respiratory symptoms are not as affected since she has worked at Allen Wire.

The employee continues to use her Advair inhaler twice a day and Pro Air once or twice daily. She has also been prescribed high blood pressure medication which she has taken for quite some time. She sees Dr. Critchlow and Dr. Najjar for her medications. She reported that she continues to experience some wheezing and shortness of breath. She experiences shortness of breath a couple of times per week. She also notices a difference while walking and that it is a little more difficult to breathe. However, she testified she felt her respiratory condition has improved since leaving Nestle.

Dr. Tepper

Dr. Tepper is a physician who examined the employee for her respiratory problems. Dr. Tepper is board certified in internal medicine and geriatrics. He deals with pulmonary problems as part of his practice with the majority of his treatment involving treatment for breathing problems due to chemical exposure. He testified that he has experience treating people with occupational induced asthma where the treatment is for people who have been exposed in the workplace to either high or low concentrations of pollutants. He indicated that 95% of his practice is for such cases.

Dr. Tepper evaluated the employee on September 3, 2009, at the request of her employer. Dr. Tepper took a history from the employee, performed a physical examination, conducted tests and reviewed records as part of his examination. He provided no treatment. The employee reported that she worked at a place that made kitty litter. She indicated that she was on the production line and inhaled various fumes including perfumed and clay-like material. She also reported that she developed coughing and shortness of breath, chest pain, wheezes that went back at least to 2005; and that she continues to have problems while working there. Dr. Tepper reported that by history the employee was told that she had bronchitis, pneumonia and asthma. Her symptoms got worse but she was better on weekends.

He reported that:

- in 2005 the employee started having trouble with coughing, shortness of breath, chest pains, wheezes and was told that she had bronchitis, pneumonia and asthma.
- the employee never had a history of asthma in the past.
- in 2007 the employee developed pleural effusion that had to be drained.
- the employee has been on Advair and Albuterol since 2007 and maybe before.
- the employee reported she wore a mask at work.
- the employee weighed 238 pounds.
- he performed a pulmonary function test that was consistent with the employee having mild obstruction.

Dr. Tepper also reviewed the records of Dr. Tuteur.

Dr. Tepper provided a diagnosis of occupational induced asthma. He said that this is asthma that is caused by the employee's workplace and most likely is from all the pollutants that she inhaled. He opined that the employee's work activities were the prevailing cause in her current complaints and medical condition. He rated the employee as having a 25% permanent partial disability. He also stated that with medical certainty the employee has occupational induced asthma. He indicated that the employee will continue to have symptoms but they are controlled on current medications. He also indicated that the employee will need to take medications for possibly the rest of her life and will need to avoid triggers of her asthma. She also needs to continue to wear her mask in the work environment.

After his evaluation, Dr. Tepper testified that he was given the report of Dr. Hyers to review. He reviewed it and testified that it did not change his opinions.

During cross examination Dr. Tepper indicated that:

- he is not certified in pulmonary medicine.
- most of his pulmonary examinations are done on behalf of the plaintiff.
- he had the employee fill out a questionnaire but is had no questions about pulmonary or asthmatic issues.
- his notes indicate that the employee has a history of asthma and that the employee's sister and daughter have asthma.
- he reviewed the employee's job description and thought that the employee wore a mask while working.
- he reviewed medical records from Ferguson Medical that went back to 1999 or 2000 and noted that in July 2005 Dr. McCants diagnosed an asthmatic-type illness.
- he agreed that from the records the employee had sinus problems, bronchitis and did have pneumonia after employment with Nestle.
- he had the reports that identified materials that the employee worked with but had no reports of air testing that was done at the workplace around the time of the employee's exposure.
- he does not agree that staying in the same work environment should cause a worsening of symptoms as a person can desensitize herself and medications could help.
- Advair will actually keep a person from having reactions.
- the employee's treatment was necessary and reasonable.

The evidence contains some records wherein the employee received medical care for "pulmonary type problems". Employee's Exhibit C is medical records from Ferguson Medical Group.

On February 28, 2001, Dr. Krausz saw the employee with flu symptoms. The doctor reported that the employee's lungs were clear and that she had a past history of sinus problems. The employee was diagnosed with flu symptoms.

On July 12, 2002, Dr. Jones saw the employee due to headaches. The doctor's assessment was chronic sinusitis. He reported that the employee's lungs were clear. She was given Rhinocort Aqua spray.

On December 17, 2002, Dr. Reed treated the employee for headaches, generalized fatigue and for a pretty regular cough with chronic sinus drainage and congestion. The record reported “no history of asthma” and indicated that the employee worked at a factory where she is exposed to a lot of chemicals. The doctor’s assessment was underlying sinusitis and allergic rhinitis.

On February 27, 2003, Dr. Jones saw the employee for irregular periods and reported that her lungs were clear.

On February 12, 2004, Dr. Jones saw the employee as she felt like she got acid in her chest. Testing showed that her lungs were clear with an assessment of possible gastroesophageal reflux disease.

On March 23, 2004, Dr. Askew performed an exam that revealed findings compatible with upper respiratory infection, occasional slight wheeze; otherwise chest clear.

On June 4, 2004, Dr. Reed saw the employee for a dry hacky cough that she has had all winter long. Report was that she felt wheezy at night. The doctor reported that the employee’s lungs were clear to auscultation, no rales, rhonchi, or wheezing heard with cough. The assessment was sinusitis with allergic rhinitis and inflammation of the nasal mucous.

On November 29, 2004, the employee was seen for congestion. Radiology report of Dr. Schwartz, stated “The findings suggestive of tracheobronchitis. No evidence of infiltrate or effusion.”

On November 29, 2004, Dr. Reed saw the employee for cough and cold symptoms. The assessment was fever with acute bronchitis. The doctor reported that the employee has had bronchitis in the past but no history of asthma or pneumonia.

On January 14, 2005, the x-ray report of Dr. Johnson indicated no active infiltrates were seen.

On January 14, 2005, Dr. Jones saw the employee due to cough and congestion with some wheezing. The doctor’s assessment was bronchitis with bronchospasm and sinusitis.

On July 25, 2005, the employee saw Dr. McCants. The employee was there for left knee pain. The doctor reported “a 39-year-old woman who was recently diagnosed with an asthmatic-type illness. She was started on Zyrtec and an inhaler.” The doctor reported that the employee “started having difficulty with her breathing with wheezing for approximately two years. At that time she started working at a kitty litter place. No problems before that. This year she has had recurrent bouts of bronchitis. She is a nonsmoker”. The doctor also reported that the employee’s sister and daughter have asthma and that the employee weighed 248 pounds. The doctor’s assessment was: Wheeze, although this can be asthma, other illnesses need to be ruled out. A peak flow test scored 300 and the employee began to cough quite a bit after making the effort. The doctor was arranging for pulmonary function tests.

On October 26, 2005, Dr. McCants reported that the employee had a recent exacerbation of pulmonary symptoms. Dr. McCants reported "I diagnosed her with restrictive lung disease. I told her this is most likely occupational related, since she did not have symptoms before she started working and since working has developed restrictive lung disease. ... I told her the medications I give her are symptomatic only and will not modify the course of the illness. Preventing exposure would be the best course, which she understands. At minimum, I asked her to wear a mask while at work and let her job know about her lung illness."

On August 21, 2006, Dr. Critchlow saw the employee as, she ran out of her Advair inhaler. The doctor reported that the employee is quite obese and has diminished breath sounds. He gave the employee a prescription for Prednisone and Advair Diskus.

Dr. Salamat treated the employee in 2007.

On July 27, 2007 he reported that:

- the employee's chest was drained by needle due to parapneumonic effusion.
- the employee has a past history for asthma.
- the employee's shortness of breath started 2-3 weeks ago.
- the employee had multiple symptoms including wheezing.
- the employee had been working for four years at a plant that makes kitty litter and has been exposed to silica and clay.
- diagnosed with asthma 1½ years ago with shortness of breath and wheezing.
- employee is a nonsmoker. Mother had COPD and sister has asthma. One of her daughters has asthma.
- employee weighed 254 pounds and was 5'5".
- x-ray showed right sided pleural effusion.

On August 16, 2007, his record says that the employee had pneumonia. On August 7th and 10th the employee's chest had to be drained.

On September 24, 2007 Dr. Salamat's impressions were:

- right-sided parapneumonic effusion with right lower lobe infiltrate, on antibiotics for more than a month.
- questionable history of asthma.
- allergic rhinitis.
- obesity.
- it has been 3 months since her pneumonia and pleural effusion that began in July 2007.
- Rotonya McCants is the employee's primary care physician.
- the employee had wheezing and was given prednisone. Singulair continued.

On September 26, 2007, testing by thorax CT scan indicated: report has other x-ray and CT reports and removal of liquid from right lung. Left was clear.

Employee's Exhibit G is a Black Hills Bentonite Material Safety and Transportation Data Sheet. It is the Court's impression that this report analyzes some of the contents of the kitty litter in the instant case: crystalline silica in the form of quartz.

In part the report indicates that:

Inhalation: Breathing prolonged and excessive amounts of bentonite dust may not cause noticeable injury or illness even though permanent lung damage may be occurring. Inhalation of dust may have the following serious chronic health effects: Pneumoconiosis-Excessive inhalation of respirable dust may cause pneumoconiosis, a respirator disease, which can result in delayed progressive, disabling and sometimes fatal lung injury. Symptoms include cough, shortness of breath, wheezing, non-specific chest illness and reduced pulmonary function. This disease is exacerbated by smoking. Individuals with pneumoconiosis are predisposed to develop tuberculosis.

Dr. Tuteur

Dr. Tuteur is a physician that was retained by the employer-insurer to perform an independent medical exam of the employee. The records that Dr. Tuteur was provided to review were all supplied by the employer-insurer. He testified by deposition on February 25, 2013, and prepared reports dated October 3, 2008, December 19, 2008, and July 28, 2009.

Dr. Tuteur is an Associate Professor of Medicine at Washington University. He is board certified in pulmonary diseases and internal medicine. Dr. Tuteur testified that he limits his practice to pulmonary diseases.

Dr. Tuteur met with the employee, performed a physical examination, reviewed medical records, performed testing and provided his opinions in multiple written reports and deposition testimony.

Dr. Tuteur met with the employee on October 3, 2008 and prepared a written report indicating that:

- the employee was 42 years old.
- the employee reported increasing pulmonary symptomology-particularly reduced exercise tolerance and wheezing that occurred with increasing frequency and severity since she began working at Nestle Purina after 2003.
- these symptoms, aggravated by the workplace environment and other irritants, initiated a desire for medical attention which was done with multiple diagnoses and incomplete response to administration of medicine.
- in 2007 the employee had pneumonia with pleural effusion that required antibiotics and drainage that was identified correctly as parapneumonic effusion. The employee received treatment and had a reasonable good recovery.
- the employee's daughter and sister had asthma.
- the employee never smoked.

- from 1999 to 2004 the employee was seen on multiple occasions for a variety of complaints including respiratory complaints which were not associated with any objective abnormality on physical exam.
- the employee indicated that her work environment and also solvents and cleaning solutions at home, e.g. Clorox, aggravated her symptoms.
- physical exam was abnormal due to wheezes heard on forced expiratory volume maneuver.
- the employee was obese.
- pulmonary function studies demonstrated a moderate obstructive abnormality that did not clearly improve following administration of aerosolized bronchodilator.
- chest radiograph was normal.
- at that time the working diagnosis that was made was chemically induced bronchial reactivity which means “twitchy airways”.
- people who have bronchial reactivity experience respiratory symptoms to a wide variety of irritants or environments such as fumes, dust, solvents, cleaning solutions, perfumes, extremes of temperature, extremes of humidity and a wide variety of other irritants sometimes called “triggers”.
- not everybody with this condition responds adversely to everything.
- the bronchial hyperreactivity/twitchy airways is induced by exposure to material in the environment that can occur with a single massive exposure or recurrent submassive exposure over time.
- the employee’s symptoms started when she began working at Nestle where she was working with kitty litter which is made with clay which is bentonite that was altered with various additives to make the product smell good.
- a methacholine challenge test was performed to measure bronchial reactivity. The employee had a very positive test.
- a Material Safety Data Sheet was provided and it confirmed that the presence of bentonite and various scented materials and substances such as heptanes.
- when reviewing the medical records prior to 2003, there was not ever an objective finding that the employee had airway obstruction or airway twitchiness.

After the October 3, 2008, Dr. Tuteur opined that “Clearly, the onset of clinical symptomatology is temporally associated with working the Nestle/Purina assembly plant for over one year. She has continued working there to present. These symptoms of exercise intolerance and wheezing are worse when exposed to the environment of the workplace and improved with elimination of that environment for several days and associated with objectivity demonstrated airflow obstruction and mild impairment ... Silica exposure can result in airflow obstruction even in the absence of silicosis, the interstitial pulmonary process initiated by silica exposure”.

At that time, Dr. Tuteur was unsure as to whether silica was present in the workplace therefore he asked for the Material Data Sheets that he reviewed. Dr. Tuteur received and reviewed that information and prepared a second report dated December 19, 2008. In that report he opined “Based on a totality of medical data as well as a review of the material data safety sheet subsequently submitted it is with reasonable medical certainty that Jennifer Brown has irritant induced bronchial reactivity associated with the exposures that she has in the workplace. It was important to recognize that now with appropriate medication, Advair, albuterol, and occasional

ipratropium bromide as well as the regular use of an N95 or similar mask symptoms have improved. Obviously there is not reversible baseline obstruction.” It is recommended that she continue the use of Advair, albuterol and continue the regular use of a mask in a workplace or other situations where symptoms are aggravated and maximize environmental control by avoiding those conditions, when possible, that trigger symptoms.

Dr. Tuteur was supplied additional materials and prepared a third report dated July 28, 2009. In this report he again provided his medical opinions: “After two medical consultative visits and advanced testing, I made a diagnosis of irritant induced bronchial reactivity in Ms. Jennifer Brown. Furthermore, I opined that it was the environment of her workplace that contained the offending agents(s). In part, this conclusion was reached because she has no significant respiratory health problems or symptoms prior to working at Nestle, symptoms progressed with continued workplace exposure that included perfumes and bentonite clay, symptoms tended to improve on weekends and when not at work, objective data confirmed airflow obstruction (wheezing on physical exam, obstructive abnormality on pulmonary function testing associated with a markedly positive methacholine challenge test conforming bronchial reactivity) and a characteristic, albeit incomplete) improvement with a therapeutic regimen based on aggressive bronchodilator and anti-inflammatory inhaled medication coupled with improved environmental control. ... The fact that Mr. Wiley observed Ms. Brown not wearing a dusk (sic) mask on 13 occasions during the six months between April 9, 2008, and October 10, 2008, does not weaken this conclusion. ... Mr. Cochran submitted an Industrial Hygiene Assessment on May 29, 2009, reporting his observations and testing conducted on April 21, 2009. He indicated that not only did employees complain “about the odors.” Mr. Cochran observed these odors “to be prevalent throughout the packaging and associated areas of the plant.” He also confirmed that bulk fragrances “are strong and can be irritating to ... lungs...”. ... He was unable to obtain a complete list of chemical formulation used and thus was unable to test specifically for these agents qualitatively or quantitatively. ... Heptane was detected. ... Thus a careful review of Mr. Cochran’s report provides no information that in any way weakens or alters the conclusions reached by me as reported on December 19, 2008. Specifically, Ms. Brown’s respiratory condition is causally related to her work environment. The industrial condition is the prevailing factor in the development of her current respiratory condition. Finally, as indicated above, Ms. Brown’s refusal to wear a dust mask did not impact her condition.”

Counsel for the employer-insurer vigorously cross examined Dr. Tuteur challenging his findings and medical opinions. In response to the questions posed to him, Dr. Tuteur responded that:

- all of the materials he received were supplied by the employer-insurer.
- he agreed that all medical records are important in arriving at a conclusion.
- he agreed that testing does not give the cause.
- he agreed that at Nestle the employee was exposed to chemicals in their raw form-heptane or bentonite that were coupled with additives.
- he agreed that the MSDS sheets show a percentage or concentration of the raw material that is in the product.
- from a medical point of view, based on the totality of all available data including the Material Safety Data sheets that it is that environment in her workplace that produced over time worsening reactivity.

- he was not aware of the concentrations as that wasn't provided and that does not influence the medical judgment and medical conclusions.
- he admitted that he did not know the level of heptanes that was contained in any of the fragrance that was on the kitty litter that the employee was exposed to. He said that the levels of exposure change over minutes, hours, days and weeks.
- he defended his position regarding levels of heptanes indicating that the point of the article was that heptanes is not necessarily innocuous. He stated that heptane is a chemical which could be responsible in whole or part to the response the employee had.
- the things that the employee was exposed to could cause the hyperactivity condition that he found in the employee. He said "it was the environment of the workplace over time which was the etiologic factor that produced her clinical state."
- by history the employee reported that her symptoms began in late 2004 or early 2005. She did not claim symptoms when she first started in 2003.
- counsel pointed out that prior medical records back to 1998 talked about issues with bronchitis-type symptoms, shortness of breath, chest pain and chronic sinusitis. Dr. Tuteur pointed that counsel was almost right but with distinctly important questions required in that the records show symptoms but the subsequent data rejects the conditions. He responded that the records show that the employee was treated for sinusitis but not chronic sinusitis. He says that the employee had upper respiratory congestion a/k/a a cold and she had slight wheezing on one occasion and that was in 2004. She never had any pneumonia, received any bronchoactive medication or was hospitalized for any pulmonary condition.
- the employee's prior problems are not indicative of hyperactive airways.
- having episodes several years apart does not make the condition chronic. The prior records do not make a diagnosis of chronic asthma or chronic sinusitis with confirmatory data. In records the employee reported that she had been told she had bronchitis but the records never confirm that she had it.
- he assumed that counsel gave him all of the employee's records and that the records do not have a pre-employment documented history of recurrent pulmonary problems of either an infectious or inflammatory nature involving the airways or a history of asthma.
- the employee may have developed problems in response to the work environment when other workers did not.
- he agrees that you can develop adult onset asthma gradually but by definition is the development of bronchial reactivity in an adult with no prior history without identifiable cause, but that in this case the cause is known, i.e. exposure at work.
- the employee had increasing visits for pulmonary problems after she started work at Nestle. He said that the key to his diagnosis that the employee's symptomatology increases in frequency and severity over time.
- he agreed that if the employee had no workplace exposure then her symptoms could be explained by adult onset asthma.
- that prior to 2003 the employee had some respiratory problems such as nasal congestion but she did not have asthma. She had wheezing that was transitory one time.
- the employee's prior symptoms in conjunction with the objective data provided by the physicians did not in any way indicate that she had an asthmatic condition at that time prior to the commencement of work at Nestle.

- the employee should wear a mask as much as possible, but that if the employee wore her mask intermittently that would influence him in that she would recognize when conditions were such which indicated an acute exacerbation and that she would control that by wearing the mask.
- the condition of hyperactivity is permanent, but it can be controlled. He says it never goes away and generally gets worse. The employee's workplace caused the development of chemically induced bronchial reactivity. He says the workplace exacerbated it in the times prior to 2008.

Dr. Hyers

Dr. Hyers is a physician that was retained by the employer-insurer to initially review records and then perform an independent medical exam of the employee. The records that Dr. Hyers was provided to review were all supplied by the employer-insurer. He testified by deposition on January 17, 2011, and had prepared reports dated December 11, 2009, and April 27, 2010.

Dr. Hyers is board certified in pulmonary diseases and internal medicine and practices pulmonary medicine and pulmonary occupational medicine.

Dr. Hyers initially reviewed medical records and reports provided by the employer-insurer including the reports and articles that were prepared and utilized by Dr. Tuteur. At that time Dr. Hyers had not met with the employee. He prepared his report dated December 11, 2009. Dr. Hyers met with the employee on April 27, 2010, for what he coined was an independent medical examination and prepared his report of the same date. Dr. Hyers met with the employee, had the employee fill out a health questionnaire, performed a spirometry/pulmonary function test prior to preparing his last report and providing his opinions.

Dr. Hyers provided medical opinions in his report of December 11, 2009. In total he said: "In summary, it is my opinion expressed within reasonable medical certainty that Ms. Brown suffers from allergic asthma that was not caused by a workplace exposure. Her clinical picture is entirely consistent with adult-onset asthma that was provoked by a respiratory infection suffered during November of 2004. She has a strong family history of asthma, had typical prodrome of recurrent sinusitis and bronchitis dating back at least to 1998, and has had elevated plasma eosinophils on at least two occasions. All of the historical evidence and laboratory findings support the diagnosis of adult-onset asthma. Thus, Ms. Brown's workplace exposures were not the prevailing factor in causing her asthma. Many asthmatics notice sensitivity to a number of factors including fumes, fragrances, dust and smoke. She has reached maximum medical improvement from any exposures that occurred in 2004 and 2005. She will more likely than not require continued treatment for her asthma. I am not able to establish a disability rating without examining her and assessing her current condition".

Dr. Hyers met with the employee on April 27, 2010, and prepared a report that day. He performed a physical assessment and performed a Spirometry test. He reported that:

- the employee has moderately severe airways obstruction.
- the employee was assessed to have extrinsic asthma that is not work related.

- the employee should continue her current medications and should continue to work.
- the employee has a 25% permanent partial disability of the whole body on the basis of her respiratory system that is not work related.
- the employee's paper mask at work does not effectively block any exposures to fumes and dust particles that she may have at work.
- the fact that her condition appears not to have worsened while working in the same environment argues against any aggravating effect of her workplace exposure.

Dr. Hyers also testified by deposition on January 17, 2011. At that time some of the information that he provided was that:

- He testified that it is important that the employee had a history of respiratory problems dating back to at least 1998. He says they were called bronchitis, sinusitis, upper airway congestion and cough. The employee reported a past history of bronchitis. She also had a family history of asthma. Testing typically does not show cause. He says that you have to go through the medical records and the medical history to try to establish what may have caused the condition.
- bronchitis is an important past marker as it is a chronic cough and is a marker of airway obstruction. It can be associated with asthma. Asthma seems to be an inherited condition. If it runs in your family, you are more likely to develop it yourself.
- the above listed factors were important in evaluating what occurred to the employee prior to exposures at the worksite.
- he believes that the employee contracted her asthmatic condition sometime in November 2004 when she was treated for a respiratory infection. A respiratory infection seems to trigger clinical asthma in people who are predisposed. Based on the medical records, the employee was predisposed to this condition.
- there was nothing significant from the MSDS sheets. The industrial hygienist report from his viewpoint was negative from a dust or odor sampling standpoint.
- he reviewed the reports and articles from Dr. Tuteur. He agrees that both he and Dr. Tuteur found airways obstructions. He says they both found evidence to support a diagnosis of asthma. He testified that the difference in the two doctors' opinions is that Dr. Tuteur concluded that the asthma was related to a work exposure and he did not.
- the employee's family history, obesity and the condition in November 2004 caused adult onset asthma, not the workplace. Dr. Tuteur says the employee's exposure at the workplace caused her asthma.
- the employee's workplace exposure was not the prevailing factor in the cause of her asthmatic condition and her subsequent disability.
- the employee is at MMI.
- obesity is a marker for increased risk of asthma.
- he ran a spirometry test and said the results showed airway obstruction that was similar to what Dr. Tuteur found earlier. He said this is associated with asthma.
- if a person develops an asthmatic condition associated with workplace exposure, and that person continues to expose themselves in the workplace then he would anticipate that their condition could get worse.
- He says that his spirometry testing in 2010 had similar results to Dr. Tuteur's results in 2008. If the employee continued to work in the same workplace environment without

appreciable worsening of her spirometry condition, this would argue against the workplace exposure causing the problem.

- the employee has a 25% disability based on her respiratory system that is not related to her work activity.

During cross examination Dr. Hyers indicated that:

- the employee's asthma medications need to be continued
- his ultimate opinion was that the employee had adult onset asthma, asthma that becomes manifested in adulthood. He indicated that the employee had a tendency to asthma early- she didn't really develop clinical asthma until the end of 2004 or the first part of 2005.
- he agreed that it is possible to incur occupational induced asthma, but added that he does not think that the development of adult onset asthma was caused by the employee's work environment. He specifically said "No, I think it was the precipitating factor that caused her clinical asthma. She had a predisposition based on her family history and her history of bronchitis and sinus problem, but I think the respiratory infection in November of 04 is what triggered her asthma."
- he reviewed Dr. Tepper's report where he found that the employee's condition was caused by the workplace environment and provided a 25% permanent partial disability of the body as a whole. He agreed that causation was the essential difference.
- he agreed that chronic bronchitis doesn't always develop into adult-onset asthma. It is a marker for airway inflammation. "It's simply a chronic cough for several months over at least two years. In a person who is susceptible to asthma, such as a lady with a positive family history, then it can occasionally develop into clinical asthma".
- he does think that the workplace condition did not contribute to the medical condition that the employee is suffering from. He says he doesn't think it contributed in the sense that she continues to work there without worsening of her spirometry symptoms.
- asthma can be aggravated by any number of things: fumes, dust, smoke, small particles in the air. But based on what I saw in the records, I saw no evidence that the workplace contributed to aggravate her asthma.
- he disagrees with Dr. Tuteur as to causation.

Kelly Hindman

Mr. Hindman testified that he is the safety supervisor for the Nestle Purina PetCare facility in Bloomfield, Missouri. He has been the safety supervisor since 2001 and has worked for Nestle for the past 22 years. Mr. Hindman testified that part of his job duties involve dealing with work-related injuries.

Besides dealing with work injuries, Mr. Hindman testified his job duties also involve ensuring employees wear personal protective equipment. He testified employees who work in the clumping department are required to have a hard hat, safety glasses, ear plugs and steel-toed shoes. Employees also have available to them a N95 respirator/mask. Mr. Hindman testified use of the N95 respirator is optional. He also stated the N95 respirator is 95% effective in filtering out dust and other particulate.

With regard to dust and noise exposures, Mr. Hindman stated Nestle conducts yearly tests and has done so since approximately 2001. An industrial hygienist comes into the plant and tests for dust and noise levels. Mr. Hindman testified the Bloomfield plant has always been below the accepted threshold levels for dust and noise. He further stated the Bloomfield facility has never had problems with dust. He acknowledged though that the plant is more dusty at times than at other times, but there never has been a reported problem involving dust.

Mr. Hindman testified the Nestle Bloomfield facility manufactures and packages kitty litter. He stated Nestle transports in the clay which is used for the kitty litter. They also ship in the pre-made fragrances that are then applied to the clay. Mr. Hindman testified fragrances are a combination of chemicals which are prepared elsewhere and then are shipped to the Bloomfield facility and that while at the Bloomfield facility the fragrances go through the additive process where they are diluted with water. The diluted fragrances are called additives. Mr. Hindman testified the Bloomfield facility has both liquid and powder additives. The clay used for the kitty litter can be mixed with the powder additive or mixed with the liquid additive. Mr. Hindman testified none of the liquid or powder additives are stored near the clumping department. Further, the additive process, i.e. the mixing of additives with the clay, is not performed anywhere in close proximity to the clumping department. Mr. Hindman testified employees in the clumping/packaging department only see the finished product. There are no vapors from the finished product, but it does have a fragrance. Mr. Hindman testified there are no chemicals kept in the clumping department which are used in producing the kitty litter.

With regard to the size of the clumping department, Mr. Hindman testified it is similar to a warehouse-type environment. There are tall ceilings and open areas. He testified they have a positive ventilation system where air is pulled in and out of the plant. They also have vents and fans which move the air around, so there is no stagnant air.

Mr. Hindman testified that the employee worked in the clumping/packing department, predominantly on the third shift. She worked in the area where the kitty litter was being placed into jugs. He acknowledged they would have some spillage of the product which the employee would then have to clean up. He also acknowledged that the employee would perform a sniff test of the product on an hourly basis. Mr. Hindman testified that the employee never worked around chemicals in their raw form, nor did she work in or around the additive process while at Nestle.

Mr. Hindman testified he first learned of the employee's breathing problems on or about July 16, 2007. He met with her as she was completing an incident report for an alleged injury to her arm. At the same time, he noticed that the employee had breathing problems and she mentioned a doctor had diagnosed her with asthma. She thought it may be work related. Mr. Hindman advised her he would need to see documentation from a doctor saying he thought her condition was work related before he could submit a claim. Mr. Hindman testified that he referred the employee to a doctor at St. Francis Medical Center in Cape Girardeau to evaluate the arm claim she was reporting. He subsequently learned the doctor who evaluated her did not feel her alleged arm injury was work related. Mr. Hindman testified shortly thereafter he informed the employee that she would need to provide documentation from a doctor indicating her illness was work

related before proceeding further. Thereafter, he did not hear anything further from her until he received the Claim for Compensation filed on her behalf concerning the injury in question.

After reviewing the Claim for Compensation, Mr. Hindman stated he asked the employee's supervisors, Wes Lemons and Rob Taylor, via email, whether the employee had reported having difficulty breathing and thought it was work related. Both Mr. Lemons and Mr. Taylor responded via email that the employee did not mention anything to them about any breathing issues. Mr. Hindman testified if the employee would have informed him of her breathing problems and provided the requested documentation, he would have looked into finding a more suitable position for her within the plant.

Mr. Hindman testified he was aware the employee had been given a N95 respirator/mask to use some time after receipt of the Claim for Compensation. Between 2007 and 2012, Mr. Hindman questioned whether the employee was using a N95 respirator. In an effort to further investigate the employee's use of a respirator, he had her supervisors at certain times specifically note her use of the respirator. Mr. Hindman testified he received reports from Manuel Wiley Jr. and Larry David with regard to claimant's use of her N95 respirator.

Mr. Hindman testified after he received the employee's Claim for Compensation, she did not report any specific problems with her breathing, such as an increase in her breathing problems. He also testified that she did not ask to be placed elsewhere. She continued working in the clumping department until she resigned in April 2012.

Manuel Wiley, Jr.

Manuel Wiley, Jr. is a third shift supervisor in the clumping department at the Nestle facility. He has been the third shift supervisor for the past seven years. Mr. Wiley described the clumping department as an area where the finished product, that being kitty litter, is placed in jugs and packaged for shipment. He mentioned there are several machines in the clumping department that accomplish this task.

Mr. Wiley testified that the employee was already a team member in the clumping department when he started in 2007. He testified that the employee worked mainly on line 8, where she would monitor the jugs as they were filled with kitty litter. She would be responsible for cleaning up any over-fill and would also perform a sniff test hourly.

Mr. Wiley testified when he started in 2007, he was not aware of the employee's breathing problems. She never mentioned to him that the fragrance from the kitty litter was causing her breathing problems. Mr. Wiley first became aware of her breathing issues when he was asked to monitor her use of her N95 respirator/mask. He was asked to observe her use of the mask on two occasions, the first being in April 2008. Mr. Wiley documented his observance of the employee in a memo he prepared and which was admitted into evidence as Employer-Insurer Exhibits 9 and 10. In his first memo dated October 24, 2008, Mr. Wiley mentions he witnessed the employee on several occasions not wearing her protective mask. Mr. Wiley specifically mentions he had issued the employee a mask on September 29, 2008, and she placed it on her

helmet and did not wear it. On October 1, 2008, the employee asked for another mask due to the fact the strap on hers had broken.

In one report Mr. Wiley only identifies two dates out of 13 wherein the employee even wore her mask. He mentions on September 30, 2008, she wore her mask at times during her shift. Then on October 10, 2008, she wore her mask for an hour and then placed it on her helmet for the rest of the shift.

In his second report, Mr. Wiley observed the employee's use of her N95 respirator/mask. Of the nine dates, Mr. Wiley noted that the employee wore her mask for 30 minutes on October 29, 2008, and while doing some sweeping during LLOC production on November 24, 2008.

Mr. Wiley testified he was the employee's supervisor until she transferred to second shift in approximately 2010. During the entire time he was her supervisor, Mr. Wiley testified that the employee did not complain about the fragrances in the kitty litter affecting her breathing.

Larry Daniel

Larry Daniel testified he is the second shift supervisor at the Nestle facility. He was the employee's supervisor when she transferred to second shift in 2010. Mr. Daniel testified that she never complained to him about breathing problems she may have been experiencing due to the fragrances in the kitty litter.

Mr. Daniel testified he was also asked by Mr. Hindman to observe the employee's use of her N95 respirator/mask. He documented the occasions in which he observed the employee's use of her mask. He said that he observed the employee for one week beginning April 5, 2010, through April 9, 2010. During this one-week period of time, the employee was not wearing her N95 respirator as it was either on her chin or on her hat while the line was running.

Mr. Daniel testified he was the employee's second shift supervisor until he transferred out of the department and went to the conventional department in 2011.

RULINGS OF LAW:

Occupational Disease, Notice and Medical Causation

Section 287.067.1 defines the term "occupational disease" is defined as "an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the public is equally exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this Section. The disease need not have to have been foreseen or expected, but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence." Missouri Courts have determined that "arising out of" and "in the course of employment" are two tests that both must be met before an employee is entitled to compensation. **Simmons v. Bob Mears Wholesale Florist,**

167 S.W.3d 222, 225 (Mo. App. 2005). In order for an injury to be found as “arising out of” the employment, the injury must be a natural and reasonable incident of the employment, and there must be a causal connection between the nature of the job duties or conditions under which the employee is required to perform and the resulting injury. Id. “In the course of employment” refers to the time, place and circumstances of an employee’s injury. Id.

Pursuant to Section 287.067.2 states “an injury...by occupational disease is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable”.

The burden of proof is upon the claimant to prove all elements of a claim for benefits. Chatmon v. St. Charles County Ambulance, 55 S.W.3rd 451 (Mo. App. E.D. 2001). The claimant however does not have to establish the elements of their case on the basis of absolute certainty. It is sufficient if they are established by reasonable probability. Moreland vs. Eagle Picher Technologies, LLC, 362 S.W.3rd 491 (Mo. App. S.D. 2012).

In proving a causal connection between the conditions of employment and the occupational disease, the Claimant bears the burden of proof. Jacobs v. City of Jefferson, 991 S.W.2d 693 (Mo. App. 1999) There must be medical evidence of a direct causal connection. Id. at 698. “The question of causation is one for medical testimony, without which a finding for Claimant would be based on mere conjecture and speculation and not on substantial evidence”. Id. at 696.

It is interesting to note that in this case the doctors who evaluated the employee were all retained by the employer-insurer. The first mention of work-related respiratory problems came from Dr. McCants in 2005. She indicated that the employee’s respiratory condition was most likely occupationally related. The employee testified that she had a discussion with her supervisor in July 2007 and advised him that she was diagnosed with asthma earlier and it was thought to be work related. She was told she needed a doctor’s confirmation. The employee filed her claim on October 26, 2007.

The employer initially sent the employee to see doctors at St. Francis Medical Center. The diagnosis was generally bronchitis and sinusitis. The employer chose not to investigate the case as they determined that the employee’s respiratory problems were not work related.

The employer-insurer sent the employee to Dr. Tuteur for an independent medical examination. He saw the employee on October 3, 2008. His working diagnosis was chemically induced bronchial reactivity/twitch airways. After further testing and review, Dr. Tuteur’s medical opinion was that the employee had irritant induced bronchial reactivity and it was the work place that exposed her to the irritating agents. He reported that “it was the environment of the workplace over time which was the etiologic factor that produced her clinical state.” Dr. Tuteur rejected the employer-insurer’s theory of adult onset asthma and defended his opinion even though he was vigorously challenged by the employer insurer. He testified that the employee’s

prior problems are not indicative of hyperactive airways. His final opinion was that the employee had irritant induced bronchial reactivity associated with the exposures that she had in the workplace. Despite Dr. Tuteur's findings, the employer-insurer chose not to take any steps concerning the employee's working situation, nor did they send her for any medical treatment.

Instead, the employer-insurer sent the employee to Dr. Tepper for another independent medical examination. He saw the employee on September 3, 2009. His medical opinion was that the employee had occupational induced asthma that was caused by her workplace and her asthma most likely came from the pollutants that she inhaled at the workplace. He opined that the employee's work activities were the prevailing factor in her current complaints and medical condition. Dr. Tepper was supplied with the records of Dr. Tuteur. They did not change his opinions.

Apparently not satisfied with the opinions they had received, the employer next sent the employee to see Dr. Hyer for another independent medical examination. Dr. Hyer provided his initial opinion without meeting with the employee. He met with the employee on April 27, 2010. His ultimate opinion was that the employee suffers from allergic asthma that was not caused by a workplace exposure. He opines that the employee's clinical picture is consistent with adult onset asthma that was provoked by a respiratory infection that the employee suffered in November 2004. He further opined that the employee's workplace exposures were not the prevailing factor in causing her asthma.

Interestingly, both Dr. Tuteur and Dr. Hyer indicate that the employee suffers from asthma. Both doctors agree that she needs additional medical care. As Dr. Hyer testified, they disagree as to causation. He says the employee's adult onset asthma came after a bout with pneumonia in 2004 and her family history and weight. Dr. Tuteur's opinion was bronchial reactivity caused by exposure to irritants at the workplace. Both doctor's opinions were fully developed earlier in this award.

The Court has carefully reviewed all medical opinions and records in this case and finds that the totality of the medical evidence supports the opinions of Dr. McCants, Dr. Tuteur and Dr. Tepper and not the medial opinion of Dr. Hyer. The Court finds that the combined opinions of Dr. McCants, Dr. Tepper and Dr. Tuteur are more persuasive than the medical opinion of Dr. Hyer. The Court also finds that the employee's testimony was credible and consistent with medical records.

Based on a consideration of all of the evidence in this case, the Court further finds that the employee has met her burden of proof to show that her occupational exposure at Nestle was the prevailing factor in causing both her resulting medical condition and disability. The employee's injury arose out of and in the course of her employment as she was exposed to harmful irritants while working at Nestle which caused the development of her asthma/respiratory problems. The employee notified her employer of the continuing development of her asthma. The employer-insurer chose to perform three independent medical examinations. Apparently not satisfied with the opinions of Dr. Tuteur and Dr. Tepper, the employer-insurer sought another opinion until they got an opinion denying causation. The evidence shows that there is no prejudice that

resulted to Nestle due to a lack of written notice as even with specific medical documentation that the workplace caused the employee's problems; they chose to do nothing. They sought additional evaluations even when they had written, professional opinions documenting occupational induced asthma. The employer-insurer chose to deny the employee's claim, even when multiple independent medical exams, all retained at the request of the employer-insurer, indicated that the employee's respiratory problems were work related. The evidence in the case does not justify the employer-insurer's claim of potential prejudice. The purpose of the written notice requirement is to give the employer a timely opportunity to investigate the facts surrounding an accident and to provide medical attention in order to minimize the disability. Once there is evidence that the employer had actual notice of an injury, the burden of showing prejudice shifts to the employer. The Court finds no such prejudice in this case.

The Court further finds that the medical evidence documents that there is a direct causal connection between her workplace exposure and the development of bronchial hyperactivity, thus, the employee's injury was medically causally related to her occupational disease.

Previously incurred medical bills

At trial the employee offered into evidence Employee Exhibit I which is a list of medical bills from Medical Arts Pharmacy. The exhibit was received into evidence. No objection was made as to authorization, reasonableness, necessity or causal relationship. During the pre-trial conference, it was agreed that the parties would work together and submit documentation as to which bills and the proper amount of the pre-existing medical bills that were related to this case as the exhibit also listed bills that are not related to this case.

The Court notes that this matter was not addressed in the employee's "Employee's Trial Brief". The employer-insurer also did not address this matter in their trial brief as they felt that the matter was moot. Counsel did not follow through as indicated above.

In reviewing the record, the Court notes that the employee testified that she reviewed Employee Exhibit 1 and "lined out" the charges that are not related to her case. There are items on Employee Exhibit I that are lined out.

The Court finds that the employee has offered credible evidence on this issue. The employer-insurer is ordered to pay \$1,755.45 to the employee for previously incurred medical bills.

Additional Medical Care

Section 287.140.1 R.S. Mo. 2013 requires that:

. . . 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, medicines as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Future medical benefits may be awarded if an employee proves to a reasonable degree of probability that such benefits are necessary and directly result from a work-related injury. Rana v. Land Star TLC, 46 S.W.3rd 614 (Mo. App. W.D. 2001). The employee must prove that the need for future medical aid flows from a work-related accident or exposure to occupational disease. Lawson v. Ford Motor Company, 217 S.W.3rd 345 (Mo. App. E.D. 2007).

The evidence supporting the employee's position is crystal clear. While Dr. Tuteur and Dr. Hyer disagreed as to what caused the employee's respiratory problems, all medical experts testified that the employee needs medications to cure her from the effects of her respiratory problems. The employee has been taking medications to relieve her respiratory problems for years and is still being prescribed such medication.

Based on a consideration of all of the evidence in this case, the Court finds that the employee is in need of medical care to cure and relieve her from the effects of her injury. The Courts orders that the employer-insurer provide such medication and treatment that is required to cure and relieve the employee from the effects of her occupational injury.

Permanent Partial Disability

Dr. Hyers' opinion was that the employee's respiratory problems were the result of adult onset asthma and not the result of the working environment at Nestle. While the Court did not find his opinion persuasive when compared to the underlying medical records and the medical opinions of Dr. Tuteur, Dr. Hyer did provide his opinion that the employee has a 25% permanent partial disability of the whole body on the basis of her respiratory system that is not work related. Dr. Tepper also opined that the employee has a 25% permanent partial disability of the body as a whole. Dr. Tuteur did not provide an actual disability rating.

Based on a consideration of all of the evidence in this case the Court finds that the employee has a 25% permanent partial disability to her body as a whole due to the respiratory problems that were caused by her employment at Nestle. The Court orders that the employer-insurer pay the employee \$36, 508.00 as a result of her occupationally induced injury.

ATTORNEY'S FEE:

Mark E. Moreland, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein. Mr. Moreland indicated, and it is the Court's intent that he would resolve Andrew Tarry's attorney's lien.

INTEREST:

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

Made by:

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

CASE SUMMARY			
INJURY NUMBER		ALJ	
05-144425		Gary L. Robbins	
EMPLOYEE		EE'S ATTORNEY	
Jennifer R. Brown		Mark E. Moreland	
EMPLOYER		ER'S ATTORNEY	
Nestle Purina PetCare Company		Richard A. Day	
INSURER		INS ATTORNEY	
American Home Assurance Company		Richard A. Day	
SIF		SIF ATTORNEY	
DATE OF INJURY	HEARING DATE	DATE AWARD WRITTEN	TYPE OF AWARD
October 26, 2005	June 16, 2014	September 10, 2014	Final
RULING			
The Court found that the EE sustained an occupational injury due to the inhalation of irritants at the kitty liter plant where she worked.			
STATEMENT OF FACTS			
The EE worked at a kitty liter plant where she worked on an assembly line preparing and packaging kitty liter.			
POINTS OF INTEREST			
Dr. Tuteur v. Dr. Hyers. Both doctors are well qualified. They disagreed on causation. Court found that Dr. Tuteur was more persuasive than Dr. Hyers.			
KEY WORDS FOR INDEX TOPICS			
Occupational Disease			
Notice			
Medical Causation			
Previously incurred medical bills			
Additional Medical Care			
Permanent Partial Disability			