

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Separate Opinion)

Injury No.: 05-139899

Employee: Selina Burgess
Employer: R&T Janitorial
Insurer: New Hampshire Insurance Co.
c/o Chartis Claims, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we affirm the award of the administrative law judge by separate opinion. The award and decision of Administrative Law Judge John A. Tackes, issued November 24, 2010, is attached solely for reference and is not incorporated by this decision.

Preliminaries

The seven issues stipulated at the hearing were: (1) whether employee sustained a compensable injury by accident arising out of and in the course of employment on November 29, 2005; (2) notice; (3) medical causation; (4) liability for past medical expenses; (5) nature and extent of temporary disability; (6) nature and extent of permanent disability; and (7) liability of the Second Injury Fund.

The administrative law judge found the following: (1) there was no accident at work on or about November 29, 2005, resulting in an injury as alleged by employee; (2) employee failed to provide timely written notice to employer and also failed to prove that employer had actual notice or that employer was not prejudiced by her failure to provide timely notice; and (3) all other issues are moot.

Employee submitted a timely Application for Review with the Commission alleging the administrative law judge erred and listing nineteen different grounds of error.

For the reasons set forth in this award and decision, the Commission affirms the award of the administrative law judge by separate opinion.

Findings of Fact

Employee alleges she hurt her back at work while throwing approximately 50 trash bags into a dumpster on either November 28 or 29, 2005. It is uncontested that employee did not provide written notice to the employer of the time, place, and nature of her injury, until March 17, 2006, when employee filled out the employer's injury reporting form and provided it to employer. Meanwhile, employee had been pursuing self-directed medical

Employee: Selina Burgess

- 2 -

treatment for her alleged injuries at the Family Care Health Center and St. Louis University Hospital.

Employee testified that the pain she felt after tossing trash bags on November 28 or 29, 2005, was worse than having a baby. Employee also testified that she just took some pain medication she had in her purse and then went on working for an hour, and didn't tell anyone what happened to her that night. Employee testified that she told a supervisor named Ms. Evelyn a couple of weeks after the alleged event that she had hurt herself after she finished doing some trash at work. Employee testified Ms. Evelyn said nothing in response. When asked why, if the pain was more intense than having a baby, employee waited a couple of weeks to tell her supervisor she was hurt, employee answered that it was because she had a lot of other medical issues, and by the time she got around to talking to Ms. Evelyn, a couple of weeks had gone by.

We find employee lacking credibility. We find that employee did not notify a supervisor named Ms. Evelyn of her alleged injuries a couple weeks after November 28 or 29, 2005. We find that employer had no notice that employee was claiming to have been injured at work until March 17, 2006.

Conclusions of Law

Section 287.420 RSMo, deals with the notice an injured employee must give to her employer and provides, in pertinent 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.

The purpose of the foregoing section is to give the employer a timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003). The statute sets forth six requirements: (1) written notice, (2) of the time, (3) place, and (4) nature of the injury, and (5) the name and address of the person injured, (6) given to the employer no later than thirty days after the diagnosis of the condition. *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. App. 2009).

We conclude that employee did not provide employer with a written notice that meets the requirements of § 287.420 RSMo. It is uncontested that employee did not provide any kind of written notice to employer until March 17, 2006. This is beyond the thirty days provided for in the statute. Thus, we proceed to the question whether employee demonstrated that employer was not prejudiced by her failure to provide written notice.

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

Employee: Selina Burgess

- 3 -

accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.

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

Soos, 19 S.W.3d at 686 (citations omitted).

It is well settled 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). Employee testified that she told a supervisor named Ms. Evelyn about her injuries a couple of weeks after she sustained them, but we have found employee's testimony lacking credibility on this point, and there is no other evidence that employee told a supervisor about her injuries. We conclude that employee has failed to prove that employer had actual notice, before March 17, 2006, that she claimed to have sustained low back and right leg injuries on or about November 28 or 29, 2005, in the course of performing her work duties. We find no other evidence supplied by employee to demonstrate employer was not prejudiced as a result of her failure to provide written or actual notice to employer until several months after her alleged accident. Accordingly, we will presume employer was prejudiced.

Employee sought treatment on her own until March 17, 2006. Employer was deprived the chance to promptly investigate the accident and provide immediate treatment in order to minimize the effects of the work injury, and was also deprived the opportunity to secure a contemporary evaluation of the nature and extent of the injuries employee suffered in the alleged accident. In a case such as this, where accident is at issue and the parties contest whether employee's injuries resulted from degenerative processes or a traumatic event, we cannot say that employer was not prejudiced when it was deprived the opportunity to promptly investigate the circumstances of the alleged event.

Given the foregoing, we conclude that employer was prejudiced by employee's failure to provide written notice.

Conclusion

Based on the foregoing, the Commission concludes that employee did not provide employer with the notice required under § 287.420 RSMo, and that employer was prejudiced as a result. Accordingly, employee's claim for benefits is denied. All other issues are moot.

Employee: Selina Burgess

- 4 -

The award and decision of Administrative Law Judge John A. Tackes, issued November 24, 2010, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 6th day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Selina Burgess

Injury No.: 05-139899

Dependents: N/A

Employer: R&T Janitorial

Additional Party: Second Injury Fund

Insurer: New Hampshire Ins. Co.
SCO: Chartis Claims Inc.

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

Hearing Date: August 25, 2010

Checked by: JAT

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: November 29, 2005 (alleged)
5. State location where accident occurred or occupational disease was contracted: St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
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 occurred or occupational disease contracted: Emptying trash into a dumpster (alleged)
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: low back and right leg (alleged)
14. Nature and extent of any permanent disability: n/a
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer: \$0.00

Employee: Selina Burgess

Injury No.: 05-139899

- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$478.11
- 19. Weekly compensation rate: \$318.74
- 20. Method wages computation: By statute

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: None
- TOTAL: \$0.00
- 23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of n/a of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: n/a

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Selina Burgess

Injury No.: 05-139899

Dependents: N/A

Employer: R&T Janitorial

Additional Party: Second Injury Fund

Insurer: New Hampshire Ins. Co.
SCO: Chartis Claims Inc.

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

Hearing Date: August 25, 2010

Checked by: JAT

A hearing in this Matter was held in the City of St. Louis at the Division of Workers' Compensation by Administrative Law Judge John A. Tackes. Selina Burgess (Claimant) personally appeared and testified. Claimant was represented by attorney Frank Niesen. R&T Janitorial (Employer) appeared through counsel, attorney Julie Madsen. The Second Injury Fund (SIF) was represented by Assistant Attorney General Kevin Nelson.

Exhibits

Claimant

- A. Deposition of Robert Poetz, D.O.
- B. Deposition of Robert Stock, M.A.
- C. Records of Adelu Lipede, M.D.
- D. Records of SLU Hospital
- E. Records of Family Care Health Centers
- F. Record of Florissant Open MRI & Bill
- G. Records of Connectcare Records & Bill
- H. Record of Barnes Hospital & Bill
- I. Family Care Health Centers Note (1/23/06)
- J. Family Care Health Centers Note (3/15/06 & 3/16/06)
- K. Southeast Missouri Community Treatment Center
- L. Report of Job Accident
- M. Report of John Rabun, M.D. (6/19/06)

Employer

1. Deposition of Sherwyn Wayne, M.D.
2. Deposition of Selina Burgess
3. Deposition of Selina Burgess
4. Report of Injury
5. Social Security Decision¹
6. SLU Care Records
7. Concentra Records²

SIF No exhibits

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

Stipulations

The parties stipulated prior to hearing that the Missouri Division of Workers' Compensation has jurisdiction to hear this matter; Venue in the City of St. Louis is proper; Employer's liability at the time of injury was fully insured by its Insurer; Claimant filed a timely claim; Claimant's average weekly wage is \$478.11 resulting in a compensation rate of \$318.74 for both temporary benefits (TTD) and permanent partial disability (PPD); Employer paid no TTD or medical benefits.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Accident on November 29, 2005
2. Arising out of and in the course of employment
3. Notice
4. Medical causation
5. Liability for past medical expense
6. Liability for future medical expense
7. Nature and extent of TTD, PPD, and PTD
8. Liability of the Second Injury Fund

FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial, I find:

1. Claimant lives in St. Louis, Missouri with her teenage granddaughter. At the time of the hearing Claimant was 49 years old and unemployed. She is married but separated from her husband. She has three children, all of whom are deceased. Claimant was educated through the ninth grade and has worked a variety of jobs including janitorial, cleaning, housekeeping, piece work at a uniform company, general labor, fast food, cooking, and cashier. She is able to read and write fairly well and has limited math skills.
2. Claimant has had substance abuse problems for twenty years. She received treatment for substance abuse three times and has been sober since 2002. Claimant describes herself as "depressed" every time she thinks about the death of her 14 year old daughter who was murdered in 1998. She has been treated for depression and has tried to take her own life on two occasions. The first time she tried to hurt herself was during her school years when she was involved with an abusive boyfriend and the second time when her kids were young.
3. Claimant worked for an employer at the St. Louis airport for about one year before being hired in 2005 by R&T Janitorial (Employer). She took the job with the Employer in

August, 2005 because it paid several dollars more per hour than the job she was working, and offered benefits. Claimant worked 7:00 a.m. to 3:00 p.m. five days a week. Her duties included cleaning 18 restroom stalls, filling soap dispensers and paper towels, cleaning mirrors, emptying ashtrays and trash cans.

4. Claimant believes she injured herself at work on November 29, 2005. She estimates that she put about 50 trash bags, each weighing 40 pounds, in a dumpster. To place the bags in the dumpster she had to lift them about five feet off the ground. Claimant used both hands to lift and “sling” them into the dumpster. Claimant estimates this took about 40 minutes to finish. Up to November 29, 2005, Claimant was able to perform her full duties without restrictions or limitations.
5. After Claimant finished putting the trash in the dumpster and while walking out of the dumpster room, a sudden sharp pain was felt in her buttock, lower back, and right leg. Claimant testified that the pain she felt was the worst pain she ever felt, even worse than childbirth. Right after this she returned to her duties and continued to work. She finished her shift and then went home. To get home she took a train and two buses. The next day, Claimant sought medical treatment at Family Care Health Center(s) (Clinic) before going to St. Louis University Hospital emergency room. Claimant testified that she was told she needed to get an MRI for her low back and physical therapy but that they were just going to focus on her blood clots because she had “a lot going on.” This is not credible. According to Claimant, she continued to report for work and did not mention anything to a supervisor for several weeks about an incident at work on November 29, 2005. Claimant believes she spoke with Evelyn about her back and legs hurting her, but that Evelyn said nothing by way of response. Evelyn is a supervisor and the person who hired Claimant for the position.
6. Medical records from SLU Hospital (Exhibit D) indicate Claimant was seen on November 28, 2005 for symptoms which began two weeks earlier on November 14³, 2005. Her chief complaint was vaginal bleeding. No history of job related injury or back pain is indicated in the history taken from the Claimant. This history indicates the severity of pain could not be described. No associated symptoms were indicated including low back comfort which is an option on the form.
7. Claimant was seen at SLU on or about November 28, 2005 for vaginal bleeding, cramping, and pressure. She had been passing blood clots vaginally for two weeks. Claimant gave a history of pain with walking and pressure in her buttocks with pain in both legs that started in the last week. Claimant also admitted to hurting her upper back earlier in the year. A family history of clotting problems is noted and as was a family history of fibroids. The clinical impression is dysfunctional uterine bleeding. Claimant was prescribed Ibuprofen 800 mg. for pain and to follow up with an OB/GYN as scheduled or sooner if symptoms worsened.
8. On November 29, 2005, Claimant was seen at the Clinic for an emergency room follow up. She was again treated for gynecological bleeding and released to return to work the next day. There is no reference or notation in the records of a low back injury as described by Claimant in her testimony at hearing.

9. Employer discharged Claimant March 28, 2006. From November 29, 2005 to March 28, 2006, Claimant only missed a few days of work. Other than her testimony, there is no contemporaneous record indicating why Claimant was absent on these days. She was absent January 24, 2006, February 6, 2006 and March 22, 2006. The only record of dates missed by Claimant was from Claimant's personal notes. Claimant acknowledges that she tried to get the dates right but admitted she may have written at least one day down incorrectly.
10. After her injury, Claimant found it hard to keep up with the rest of the workers and noted an increase in her depression because other workers made fun of her for coming in early to work. She continued to seek medical care at the Clinic. Her doctor at the clinic referred her for an MRI at Barnes Hospital. She had some physical therapy through Alexis Hospital and received several injections in her back to help with pain. Claimant began seeing Dr. Lipede for blood pressure, cholesterol, back pain, leg pain, and depression.
11. Claimant still complains about her back and right leg. She limits her standing to 30 minutes and does not walk very far. She uses a can to lean on when she walks. Claimant also complains that the pain she has from sitting has never gone away from the time of injury.
12. Claimant is able to tend to some activities of daily living such as getting dressed, bathing, and combing her hair. She gets assistance from the State for things like shopping, laundry, going to appointments, and cleaning her home. Claimant received medical treatment as reflected in exhibits F, G, H.
13. In a letter dated February 27, 2006, Dr. B. Kirke Bieneman, SLU Department of OB/GYN wrote a letter (Exhibit 6) to Dr. Blaskiewicz in which he indicates Claimant was seen in his office ten days earlier for "complaints of heavy menstrual bleeding, back pain and right lower extremity pain which *she perceived to be related to a diagnosis of uterine leiomyomata*" (emphasis mine).
14. Claimant was having leg pain and numbness prior to the date of injury. On October 20, 2005, five weeks before her alleged accident at work on November 29, 2005, Claimant was seen at SLU for swelling lymph node and gave a history of intermittent left leg numbness.
15. On March 15, 2006, while at the Clinic, Claimant had a conversation with her doctor who indicated she should file a claim for workers' compensation if her injury was work related. On March 17, 2006, Claimant filled out a report of job accident. In this report she indicated the injury occurred on November 29, 2005 at 1:50 p.m. and that she reported this to her supervisor. This is the first written notice Employer had that Claimant was alleging a workplace injury.

16. On March 21, 2006, Employer sent Claimant to be seen at Concentra where she gave a history of injury indicating that she started having pain in the right buttock and left side going down the leg and throbbing because of pulling trash and pushing her cart.
17. Claimant gave inconsistent and contradictory testimony regarding whether or not she has an ulcer. In an earlier deposition from 2009, Claimant testified that she took medicine for an ulcer. She later testified that she did not recall if she had one or not before denying she ever had an ulcer. This difference in testimony cannot be reconciled. Based in part on this testimony and other findings by experts and myself herein, Claimant's testimony is not found credible.

Expert Testimony

18. **Robert P. Poetz, D.O.:** Dr. Poetz, an Osteopathic Physician and Surgeon, examined Claimant on September 14, 2006 and the Claimant's request. For his exam he reviewed records from the Family Care Health Center from January 4, 2005 through March 16, 2005 and SLU Hospital records from November 28, 2005. Dr. Poetz examined Claimant for complaints of lower back and right leg pain. He took a history of present illness and reviewed medical records covering treatment from January 4, 2006 to March 21, 2006. He also reviewed her employment history, past medical history, social history and performed a physical examination.
19. Referable to the primary injury of November 29, 2005, Dr. Poetz diagnosed Claimant with lumbar strain with radiculopathy and gave a guarded prognosis given the length of time which had elapsed since the injury. Dr. Poetz opined with a reasonable degree of medical certainty that the injury which occurred on or about November 29, 2005 is the substantial and prevailing factor in causing Claimant's disability. He rates this disability as 20% PPD of the body as a whole (BAW) measured at the lumbar spine.
20. In his deposition, Dr. Poetz gave a history of the injury at the beginning of his testimony which completely omits Claimant's treatment at the Clinic and at the emergency room of SLU. When asked if he was aware of the first time the medical records reflected a history of a work related accident occurring on or about November 29, 2005, Dr. Poetz responded, "I don't know." His testimony regarding the diagnosis and disability rating is not credible because it is inconsistent with the findings of fact made herein and is based on limited medical information as well as the unreliable subjective input from the Claimant.
21. **Sherwyn J Wayne, M.D.:** Dr. Wayne is a board certified orthopedic surgeon who examined Claimant at the request of the Employer on November 3, 2008. For this IME he reviewed the medical records from on or about November 29, 2005 and found no history of low back pain going down Claimant's right leg. Dr. Wayne testified that her complaints regarding November 29, 2005 were primarily gynecological. Much of Dr. Wayne's report centers around the inconsistencies between Claimant's actions and statements compared with the objective medical findings and medical records.

22. Claimant indicated that a surgeon had recommended surgery but Dr. Wayne noted no such advice in the records. Dr. Wayne also described Claimant's complaints of pain moving from one leg to another as highly unusual. He noted MRI findings were degenerative in nature and that Claimant unnecessarily uses a cane for ambulation and had no demonstrable limp. Dr. Wayne noted no atrophy in the lower extremities was found indicating no evidence of disuse in the lower extremities or evidence of wasting of the muscles secondary to vascular or neurologic deficit.
23. Claimant's reactions to his examination were found to be exaggerated and unusual. She had inappropriate response for example when barely touched. Claimant went through histrionics of discomfort that had no physiologic relationship to a back complaint. Dr. Wayne performed a test using a pin-wheel device to test hypoesthesia (numbness) wherein Claimant complained of numbness from the mid thoracic level down through her legs. Dr. Wayne testified that she would have to be a quadriplegic to have a sensory deficit consistent with this reaction. He described the response as non physiologic and bizarre.
24. Dr. Wayne's impression was that Claimant had chronic back and lower extremity complaints along with evidence of a psychiatric diagnosis and a past history of drug addiction, and multilevel degenerative disk disease and spondylosis combining to produce a moderate central canal stenosis. Dr. Wayne opined with a reasonable degree of medical certainty that Claimant's back condition was not related in any way to her work duties with the employer or with any incident occurring on or about November 29, 2005.
25. **Vincent Stock, MA:** Mr. Stock examined Claimant on September 29, 2008 for the purpose of a vocational and psychological examination. He is a vocational rehabilitation counselor and licensed psychologist. Mr. Stock took a history from Claimant and reviewed medical records for the period of January, 2000 through March, 2008 from St. Louis Connectcare, Family Care Health Centers, SLU Hospital, Concentra, Dr. John Rabun, Dr. Robert Poetz, and Barnes Jewish Hospital. Mr. Stock's report includes findings on his behavioral observations of Claimant and her mental status.
26. Mr. Stock noted Claimant was friendly and cooperative at the exam but also disoriented. He indicates that her motor activity was agitated, she did not maintain eye contact and her speech was pressured and loud. Claimant described herself as depressed, nervous, and tense, noting that she cries daily and trusts no one. Based on his review of the records as well as his own clinical examination, Mr. Stock opines based on a reasonable degree of psychological certainty, that Claimant has significant anxiety and depression *since her injury* (emphasis mine). He opines that 50% of her mental and emotional problems preexisted her primary injury and 50% from the injuries of November 29, 2005. He then rates her at 40% PPPD (psychological PPD) referable to the BAW with 20% of that due to preexisting PPPD and 20% PPPD referable to her depression and mental limitations as a result of the November 29, 2005 injury. Other than his conclusory opinions dividing the disability, no explanation is given for why or how he came to this amount or division. He places her at psychological MMI and recommends continued treatment with psychiatric medication.

27. Mr. Stock does not place Claimant at PTD based on her psychological condition in the absence of a physician combining the psychological and physiological ratings but he goes on to opine that Claimant is permanently and totally disabled from all work on the open labor market based on a combination of her physical and emotional limitations. This is not found credible.

RULINGS OF LAW

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

Claimant is requesting the Division award benefits under the Workers' Compensation system for an accident she alleges occurred on or about November 29, 2005. She is requesting past and future medical treatment, temporary total disability benefits, permanent partial disability benefits, and permanent total disability benefits against her Employer and/or the Second Injury Fund.

A significant portion of the findings of fact in this award turns on the credibility and veracity of the Claimant's testimony. Her testimony that the pain she felt on November 29, 2005 was the worst she had ever experienced but that she returned to work and finished her duties is not credible. Her testimony that she told Evelyn of her injury but that Evelyn failed to respond is also not credible.

Claimant's "mention" of aches and pains in her back are not necessarily unusual given her occupation. Neither are they necessarily a report of injury. Given the credibility findings made herein, I do not find that a report of injury was made to a supervisor (Evelyn) by the Claimant within 30 days of November 29, 2005. Even if Claimant did tell her supervisor that she was hurt, she did not do so for several weeks, post her emergency room visits, and did not file an actual report of injury for purposes of workers' compensation until advised to do so by a physician several months later.

Claimant's testimony surrounding her medical history of an ulcer is also not credible. Likewise, Dr. Wayne's evaluation and examination of Claimant revealed serious inconsistencies between Claimant's subjective complaints including her reactions when examined with the objective medical findings of the physician.

I do not find the testimony of the Claimant to be credible. It is exaggerated, inconsistent, and self serving. Likewise, to the extent the experts relied on her subjective complaints, I do not find their opinions persuasive or convincing.

Accident

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. §287.020.2 RSMo.

In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. 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. §287.020.3(1)

An injury shall be deemed to arise out of and in the course of the employment only if: (a) it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. §287.020.3(2)(a)(b).

There was no accident at work on or about November 29, 2005 resulting in an injury as alleged by Claimant. According to Claimant’s testimony, it took her forty minutes to put fifty bags in the dumpster which is 48 seconds per bag. This is not an unexpected traumatic event or an unusual strain. Claimant did however go to the emergency room on or about his date but not for her back but rather for a gynecological issue. The medical records are clear as to why Claimant was seen at both the hospital and the Clinic near the alleged date of accident. She had an OB/GYN issue and not a workers’ compensation injury.

Notice

It is the burden of the Employee to produce competent and substantial evidence that timely notice was provided to the Employer. Where neither written notice nor actual knowledge on the part of the Employer is shown by the Employee, the burden rests on him to supply evidence and obtain a commission’s finding that no prejudice to the Employer resulted. *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498 (Mo.App. 1968).

“Where...the employer does not admit that he had actual knowledge the issue becomes one of fact; if the employee produces substantial evidence that the employer had such knowledge he thereby makes a prima facie showing of want of prejudice, and the burden of bringing forth evidence to prove he was prejudiced shifts to the employer. But Section 287.420 places the burden of proof upon the claimant to produce competent and substantial evidence that the written notice was given...; and where neither written notice or actual knowledge is shown by a claimant the burden rests on him to supply evidence and obtain the Commission’s finding that no prejudice to the employer resulted. *Klopstein* at 503-504 (internal citations omitted).

Employer in the present case does not admit actual knowledge of the injury. Claimant has not produced substantial evidence that Employer had such knowledge. Claimant’s testimony that she told “Evelyn” her back hurt three weeks after the incident is not substantial evidence even if I find that the statement was a report of her injury rather than a mere complaint of discomfort. I do not find that this conversation occurred. No timely written notice was provided and no actual knowledge has been shown by

Claimant. The initial written notice occurred March 16, 2006 when an accident report was completed by Claimant.

Notice enables the Employer to “protect himself by prompting investigation of the accident and treatment of the injury.” *Reichert v. Jerry Reece, Inc.*, 504 S.W.2d 182 (Mo.App. 1973). Where the employee fails to adduce evidence of lack of prejudice, the Court will “presume that the Employer was prejudiced by the lack of notice because it was not able to make a timely investigation.” *Soos v. Mallinckrodt Chemical Co.*, 19 S.W.3d 683, 686 (Mo.App. 2000). Claimant has failed to prove Employer was not prejudiced by the lack of notice. Employer was prejudiced by Claimant’s lack of timely notice.

Having thus found that no work related accident arising out of and in the course of her employment occurred and that the claim is barred for lack of timely notice which prejudiced the Employer, all other issues raised by Claimant are moot. For lack of compensable primary accident on or about November 29, 2005, the claim against the Second Injury Fund is dismissed.

CONCLUSION

Claimant’s claim for benefits is denied for lack of evidence proving an accident arising out of and in the course of her employment on or about November 29, 2005 resulted in a compensable injury. Even if an accident had occurred the claim is barred for lack of timely notice.

Date: _____

John A. Tackes
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest

Naomi Pearson
Division of Workers' Compensation

¹ SIF objection that the evidence violates the Collateral Source Rule is overruled.

² The record of the hearing was left open until Friday, September 3, 2010 to allow Employer an opportunity to submit a more legible copy of exhibit #7. The record closed on September 3, 2010. The “clean” copy of the exhibit was submitted with the Employer’s proposed award and was not reviewed by the trier of fact in connection with the review of the evidence.

³ The onset of Claimant’s complaint is hand written “11/14”. The numeral four in fourteen compared to other 9’s and 4’s on the same page indicate a “4” is intended and not a “9” which is how the trier of fact reads the notation.