

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

Injury No.: 09-110920

Employee: Gina Burkes
Employer: Laurie Knolls Care Center
Insurer: Health Care Facilities of Missouri
c/o Sedgwick Claims Management Services

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 6, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued December 6, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of April 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Gina Burkes

Injury No.: 09-110920

Dependents: N/A

Employer: Laurie Knolls Care Center

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Health Care Facilities of Missouri
c/o Sedgwick Claims Management Services

Hearing Date: November 18, 2011

Checked by: HDF/scb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged May 24, 2009.
5. State location where accident occurred or occupational disease was contracted: Alleged Morgan 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? No.
8. Did accident or occupational disease arise out of and in the course of the employment? ----
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:
See award.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: ----
14. Nature and extent of any permanent disability: ----
15. Compensation paid to-date for temporary disability: ----
16. Value necessary medical aid paid to date by employer/insurer? ----

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17. Value necessary medical aid not furnished by employer/insurer? ----
18. Employee's average weekly wages: \$193.98.
19. Weekly compensation rate: \$129.32 per week for temporary total disability benefits;
\$163.41 per week for permanent partial disability benefits.
20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: - 0 -.
22. Second Injury Fund liability:
23. Future Requirements Awarded: - 0 -

Employee: Gina Burkes

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Gina Burkes

Injury No: 09-110920

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Laurie Knolls Care Center

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of the State of Missouri,
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Insurer: Health Care Facilities of Missouri
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Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on November 18, 2011. Memoranda were submitted by December 2, 2011.

The parties stipulated that on or about May 23 and 24, 2009, the claimant, Gina Burkes, was in the employment of the Laurie Knolls Care Center. The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was insured by the Health Care Facilities of Missouri c/o Sedgwick Claims Management Services. A claim for compensation was timely filed. The average weekly wage is \$193.98; the agreed upon rate of compensation is \$129.32 per week for temporary total disability benefits and \$163.41 per week for permanent partial disability benefits, utilizing a 30 hour work week.

No medical aid has been provided; no temporary disability benefits have been paid.

The issues to be resolved by hearing include 1) the occurrence of an accident, 2) whether the alleged accident arose out of and in the course of employment, 3) whether appropriate notice was given, 4) the causation of the injuries alleged, 5) the liability of the employer/insurer for additional medical treatment, 6) the liability of the employer/insurer for past temporary total disability benefits from May 31, 2009, through to the present, 7) the liability of the employer/insurer for past medical treatment alleged to be in the amount of \$38,234.37, and 8) the nature and extent of permanent disability.

The parties agreed during the course of the hearing to allow the amendment of the alleged date of accident to reflect a date of May 23 and 24, 2009.

FACTS

The claimant, Gina Burkes, began her employment with the Laurie Knolls Care Center around the end of April or beginning of May of 2009. Ms. Burkes worked at the Laurie Knolls Care

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Center as a certified nurse's aide when she allegedly injured her back on the May 23 to May 24 night shift while transferring an elderly heavy woman from her wheelchair to the toilet with the help of the charge nurse on duty. Ms. Burkes said nothing about a work accident to the charge nurse with whom she was working. Ms. Burkes testified that she only said that she was sore and took some Tylenol because she thought she was only suffering from fatigue. At the end of her shift, Ms. Burkes drove home to Gravois Mills; Ms. Burkes described additional pain as she was driving home and while getting out of her car. Ms. Burkes testified that she spent the day trying to sleep and in the bathtub because of her back pain. Ms. Burkes went on to testify that by dinnertime she had her fiancé, Scott, drive her to Lake Regional Hospital, where they told her not to work for the next two days. Ms. Burkes said that on the way home from the hospital she called in to the Laurie Knolls Care Center and advised the charge nurse that she would not be in and the charge nurse responded by saying that she would report Ms. Burkes' conversation. On a following Monday, Ms. Burkes called in to the Laurie Knolls Care Center to advise them that she would not be in and she was advised by Donna Byersdorfer that she was terminated for failing to show up for work. Laurie Knolls Care Center records reflect that Ms. Burkes was terminated on June 1, 2009. Ms. Burkes admitted that she did not tell anyone at the Laurie Knolls Care Center about a work-related back injury and that she did not seek treatment for a work-related back injury from the Laurie Knolls Care Center, but later in her testimony said that she told Donna Byersdorfer, the person who hired her at the Laurie Knolls Care Center, that she had sustained a work-related back injury during the conversation in which she was terminated.

Records from the Lake Regional Health System document Ms. Burkes' admission to the emergency room for low back pain. Specifically, the records reflect that there was "no injury." The records for May 24, 2009, go on to state that Ms. Burkes was the "historian" and that she reported no injury but did report "2 days ago, getting out of car, felt it catch, pain lower back." The May 24, 2009, "emergency room physician documentation" indicates that Ms. Burkes reported an injury at home as well as the low back pain two days prior while getting out of the car. Records of Lake Regional Health System document treatment through October of 2009, for low back pain without any mention of a May 23 or 24, 2009 work injury or any mention of a work injury at any other time. There are multiple references in the Lake Regional Health System records to Ms. Burkes' statements that she injured herself at home and that she described the back pain as a "non injury" rather than an injury.

Ms. Burkes then sought treatment for back complaints with the Eldon Clinic, Dr. Paul Bernabe. Records of the Eldon Clinic reflect no mention of a work injury. Care at the clinic was terminated due to Ms. Burkes' positive test for marijuana use. Eldon Clinic treatment was from August 4, 2009, through September 24, 2009; an MRI performed at Dr. Bernabe's request on August 10, 2009, reflects a "large left paracentral and foraminal disc protrusion at L5-S1 resulting in mid left lateral recess stenosis with displacement of the nerve root and mild left foraminal stenosis" as well as "mild disc degeneration from L2 through S1."

Ms. Burkes went on to have an L5-S1 discectomy performed by Dr. Sami Khoshyomn, a neurosurgeon, at St. John's Hospital on December 9, 2009. There is no mention in the records of Dr. Khoshyomn or the records of St. John's Health System of Ms. Burkes' report of a work related back injury.

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Joann Oakes, the director of nursing at the Laurie Knolls Care Center for 15 years, was at the Laurie Knolls Care Center between May of 2009 and December of 2009, and prepared Ms. Burkes' termination record dated June 1, 2009. Ms. Oakes testified that she was aware of workers' compensation claims by the nursing staff and that she was not made aware of any claim by Ms. Burkes and that she did not know of a claim by Ms. Burkes until her claim was filed.

Dr. David Volarich, occupational medicine physician, evaluated Ms. Burkes on June 8, 2011, and issued a report of the same date. Dr. Volarich recited a history from Ms. Burkes that she injured her low back when "Ms. Burkes and the charge nurse picked up and assisted the resident to a standing position while pulling up on the gait belt." Dr. Volarich opined that the "work accident that occurred 5/24/09, when Ms. Burkes was helping a coworker transfer a patient from bed to wheelchair and then from wheelchair to the bathroom toilet and as they were lifting the patient to put them on a toilet, felt a burning pain in her low back that began to radiate to the left leg, is the substantial contributing factor as well as the prevailing or primary factor causing the disc herniations at L4-5 and L5-S1 to the left that required laminectomy, discectomy and decompression at both levels."

Dr. Eddie Runde, occupational medicine physician, testified by deposition that he evaluated Ms. Burkes on September 30, 2011. Dr. Runde said that Ms. Burkes gave him a history of assisting a nurse equipped with a gait belt in helping a resident of the Laurie Knolls Care Center in toileting on May 24, 2011, when the resident started to fall and Ms. Burkes helped "pull up on the resident to keep him or her from falling, and then after she [Ms. Burkes] started having some back pain." Dr. Runde opined that Ms. Burkes "by her description of the incident she could have had a lumbar strain, but other than that all of her history and records of her evaluations were consistent with degenerative joint disease of the spine."

APPLICABLE LAW

RSMo 287.020.2. 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.

AWARD

The claimant, Gina Burkes, has failed to sustain her burden of proof that she sustained an accident while employed by the Laurie Knolls Care Center during her May 23 and 24, 2009 shift. Ms. Burkes provided conflicting narratives during her testimony with regard to what she told Donna Byersdorfer at the Laurie Knolls Care Center the evening her employment was terminated, at one point testifying that she was going to tell Ms. Byersdorfer of her injury by accident, but was terminated before she could report the injury, then at another point in her testimony stating that she never told Donna Byersdorfer that she had sustained a work injury. Therefore, I find that Ms. Burkes told no one at the Laurie Knolls Care Center of her alleged

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work-related accident and, importantly, never reported a work accident to any of the multiple medical providers that she saw up to and including her back surgery in December of 2009. To the contrary, Ms. Burkes repeatedly reported an injury at home as she was getting out of her car as she initially sought medical care. Thus, I find Ms. Burkes' claim of a work-related back injury not credible.

All other issues raised for resolution are hereby rendered moot.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation