

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

Injury No.: 11-053153

Employee: Rhonda Clark  
Employer: Dairy Farmers of America  
Insurer: Self-Insured

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

**Preliminaries**

The parties asked the administrative law judge to resolve the following issues: (1) whether employee sustained an injury by accident or occupational disease arising out of the course and scope of the employment; (2) whether employee's current physical condition was caused by the alleged accidental injury or occupational disease; (3) liability of the employer for past medical expenses; (4) liability of the employer for temporary total disability benefits from July 1, 2011, through April 8, 2013; (5) liability for future medical care; and (6) nature and extent of disability.

The administrative law judge concluded as follows: (1) employee did not suffer an injury under § 287.020 RSMo; (2) employee's shoveling was not the prevailing factor causing her fractured rib or any disability; and (3) employee's medical treatment did not flow from her work activity.

Employee filed a timely application for review alleging the administrative law judge erred: (1) in concluding that employee did not suffer an injury under § 287.020; and (2) in determining that employee's medical treatment did not flow from the work activities.

For the reasons set forth below, we reverse the award and decision of the administrative law judge.

**Findings of Fact**

Employer operates a plant producing dairy products. Employee began working in employer's cheese room in May 2011. Employee's work required her to stir curds stored in large metal vats. In the course of stirring the curds, employee leaned her ribs against the edge of the top of the vat, which came to approximately chest height, and reached both arms out in front of her. Employee used a shovel to stir the curds, exerting a pushing/pulling force of approximately thirty-five to forty pounds. This work activity was awkward, and the exertion involved was more than any exertion employee typically experienced in her normal, nonemployment life, in activities such as gardening.

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On June 20, 2011, employee was engaged in her normal work for employer, when she pulled back on a shovel full of curds, and felt a pop inside her chest, along with pain under her right arm. This occurred while she had her chest pressed against the side of the vat. Employee tried to continue working, but discovered that she could not lift her right arm. So, employee went to the emergency room, where an x-ray revealed a posterior fracture of employee's right fifth rib, as well as the presence of an unusual, possibly lytic lesion affecting the same area.

A bone scan of July 22, 2011, confirmed the irregularity affecting the right fifth rib, which appeared to involve a possible malignancy or metastatic disease. Employee's primary care physician, Dr. Mark Costley, referred employee to an oncologist, Dr. William Cunningham, who recommended a CT-guided needle biopsy. That study, performed on August 26, 2011, revealed that the lesion affecting employee's right fifth rib was the product of an underlying condition, Langerhans cell histiocytosis (hereinafter "LCH"), a rare, cancer-like disorder. Dr. Cunningham referred employee to another oncologist, Dr. Todd Fehniger, who recommended employee undergo radiation therapy rather than a surgery to excise the lesion.

Employee's date of birth is March 8, 1979. Beginning when she was about 25 years of age, employee smoked approximately one pack of cigarettes per day; she quit smoking in December 2014. Cigarette smoking is a known risk factor for the development of LCH. Prior to the incident at work of June 20, 2011, and her subsequent course of treatment, employee was wholly unaware she was suffering from LCH or the lesion affecting her right fifth rib, as she had not experienced any symptoms referable to these conditions.

Between February and March 2012, employee underwent the recommended course of radiation therapy. Her LCH appears to be in remission; the record suggests her prognosis is generally good in light of the fact she suffered from only a unifocal lesion behind the right fifth rib. In connection with her rib fracture and the slow healing process that resulted from the need to address the LCH and underlying lesion, employee continues to experience some chronic pain and difficulty holding her right arm out in front of her, and with lifting overhead. Employee uses over-the-counter pain medications to treat pain referable to her rib fracture.

Employee provided her medical treatment records and the bills she incurred for the disputed treatment. In her testimony, she identified the bills as having been received in connection with her treatment. Our own review of the bills suggests the following charges in connection with treatment for employee's rib fracture, as well as the treatment necessary to diagnose and treat her lesion referable to LCH: \$82,737.94 from Cox Health for dates of service between July 22, 2011, and September 18, 2015;<sup>1</sup> \$998.00 from Oncology-Hematology Associates for dates of service between August 4, 2011, and

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<sup>1</sup> We note that, in her brief, employee claims an additional \$1,788.00 in charges from Cox Health for an August 22, 2014, MRI of the lower extremity joint without contrast. This charge appears to correlate to employee's treatment for an August 2014 knee injury; accordingly, we have deducted it from employee's claimed charges.

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November 21, 2014; and \$32.14 from Wal-Mart Pharmacy. We find that employee incurred a total of \$83,768.08 in connection with the disputed treatment.

Expert medical opinion evidence

Employer presents the opinion of the occupational medicine specialist Dr. Allen Parmet, who believes employee suffered a fracture of the right fifth rib while in the course of her duties on June 20, 2011. Dr. Parmet explained that employee's underlying LCH caused a lesion that weakened the bone structure of employee's right fifth rib. While Dr. Parmet considered employee's work activity of shoveling curds sufficiently forceful to fracture the weakened bone in employee's rib, he declined to characterize such activity as involving any significant trauma. Instead, he considered employee's work activity and subsequent rib fracture as a serendipitous event that merely alerted her to the presence of the LCH. Ultimately, Dr. Parmet opined that employee's work activity was not the prevailing factor causing employee to suffer the rib fracture of June 20, 2011, because if the tumor had not existed and partly destroyed her rib, the fracture would not have occurred.

Interestingly, Dr. Parmet did not positively identify employee's preexisting lesion, or her condition of LCH, as the prevailing factor causing employee to suffer the rib fracture of June 20, 2011. Instead, it appears to us that he determined her work activity was not the prevailing factor causing her to suffer a rib fracture based on an implicit assumption that where any non-work-related, but-for cause of an injury is present, the accident cannot be deemed the prevailing factor. In other words, Dr. Parmet's theory in this case appears to involve a legal conclusion, as opposed to a purely medical opinion. As discussed more fully below, we do not endorse such a view of the statutory prevailing factor test under § 287.020.3(1) RSMo. Consequently, although we appreciate Dr. Parmet's persuasive commentary regarding LCH and its role in weakening the bone structure of employee's right fifth rib, we deem his ultimate causation opinion in this matter to be of limited assistance for our purposes.

Employee's primary care physician, Dr. Mark Costley, also provided his testimony in this matter. Dr. Costley agreed that the lesion caused by LCH significantly weakened the bone of employee's rib, and that employee's work activity of shoveling curds was also a contributing factor in causing her rib to fracture. However, he declined to identify either the lesion referable to LCH on the one hand, or employee's work activity on the other, as the prevailing cause of employee's rib fracture. Despite repeated questioning, he made clear that he was unable to assign a "percentage" of causation to either of these factors, or to identify one as any more important than the other.

Employee advances the opinion of the urgent care physician Dr. Mitchell Mullins, who believes that the force of employee's work activity of pulling the curds on June 20, 2011, was the most important factor contributing to her rib fracture. Dr. Mullins conceded that when a bone is markedly weakened by preexisting conditions such as the lesion referable to employee's LCH, a fracture can occur under a force load that is less than normal. However, Dr. Mullins believes that the force of employee's work activity was sufficient, standing alone, to cause a rib fracture, and because it was unknown how long employee had been suffering from the lytic lesion, the work activity was, in his view, the most

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important factor. Dr. Mullins rated employee's disability referable to the rib fracture at 18% permanent partial disability of the body as a whole, owing to employee's ongoing rib pain radiating into the shoulder and back.

After careful consideration, we find Dr. Mullins's medical causation theory to be more persuasive; especially where (as further discussed below) Dr. Parmet's competing theory appears to rely on what we perceive to be a misapprehension of the appropriate statutory test. Dr. Mullins also testified that employee's rib fracture would not have healed absent the treatment employee underwent to treat the lesion referable to her LCH, including the course of radiation therapy. On this point, employer did not offer any rebuttal evidence. We find Dr. Mullins's unrebutted opinion in this regard persuasive, and adopt it as our own. We find that employee's treatment to address the lesion referable to LCH was a necessary precursor to the healing of the bone fracture employee suffered on June 20, 2011.

In his report, Dr. Mullins opined that employee may benefit from intercostal nerve blocks at some point, as guided by her primary care physician. He did not, however, specify whether he believed such recommended treatment would be necessary to cure and relieve the effects of employee's rib fracture, or some other condition, such as complaints referable to LCH. Nor did he address this ambiguity at the hearing before the administrative law judge. In her brief, employee does not direct us to any other evidence suggesting there is a reasonable probability that she has a need for future medical treatment to cure and relieve the effects of her right fifth rib fracture. Accordingly, we find that employee will not need future medical treatment to cure and relieve the effects of her right fifth rib fracture.

At the hearing, the parties asked the administrative law judge to determine whether employee was entitled to temporary total disability benefits from July 1, 2011, through April 8, 2013. Although employee described the initial feelings of discomfort which prompted her to seek medical treatment following the incident of June 20, 2011, employee did not provide any testimony as to her general physical condition, or ability to work, during the specific time period from July 1, 2011, through April 8, 2013. Nor did any of the testifying medical experts address employee's physical condition, or ability to work, during this specific time period.

In her brief, employee, for the first time, requests an award of temporary total disability benefits from June 17, 2011, through March 6, 2012, relying on the assertion she was fired by employer on the former date, and was under a 10 pound lifting restriction from Dr. Costley through the latter date. Employee asserts employer fired her because she was unable to perform her work duties, and cites to her testimony for this proposition. However, the citation employee provides is incorrect, and a thorough review of employee's testimony does not include any indication that employer fired her owing to a physical inability to perform her work duties.

Employee failed to cite any treatment records that would demonstrate that any of her treating physicians restricted her from all work during the relevant time period, and our

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own review reveals none.<sup>2</sup> Employee apparently experienced some fatigue during the radiation treatments she underwent in early 2012, but the records fail to demonstrate that these symptoms alone would have prevented employee from working, and especially in the absence of any testimony from employee on the subject, we are not inclined to make such an inference. As noted, employee asserts Dr. Costley assigned a 10 pound lifting restriction, but fails to cite the record to permit us to identify the relevant dates during which such restriction might have been in place. Nor does employee explain why we should rely upon a 10 pound lifting restriction, standing alone, as persuasive evidence that employee was wholly unable to compete for work in the open labor market during the relevant time period.<sup>3</sup>

In light of these circumstances, it appears to us that to search the record for any other evidence to support employee's alternative claims for temporary total disability benefits between either July 1, 2011, through April 8, 2013, or June 17, 2011, through March 6, 2012, would require us to assume the role of advocates on her behalf. This, of course, we cannot do. Accordingly, we decline to make any finding that employee was unable to compete for work in the open labor market during the identified time periods.

### **Conclusions of Law**

#### *Injury by accident or occupational disease*

Employee seeks compensation on alternative theories of injury by accident and injury by occupational disease. Although there is some evidence to suggest that employee's repetitive work activity of shoveling curds exposed her to a risk of repetitive trauma, employee's expert, Dr. Mullins, focused on the specific event of June 20, 2011, in rendering his opinion in this matter. Accordingly, we will consider whether employee satisfied the statutory test for an "accident" set forth under § 287.020.2 RSMo:

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.

We have found that on June 20, 2011, during employee's work shift, she suffered an unexpected pop in her chest accompanied by symptoms of an injury including pain and an inability to raise her right arm. These facts satisfy each of the statutory criteria for an "accident" set forth above. We conclude that employee suffered an accident for purposes of Chapter 287.

#### *Medical causation*

The standard for medical causation applicable to an injury by accident is set forth under § 287.020.3(1) RSMo, which provides, in relevant part, as follows:

<sup>2</sup> In fact, certain records, such as an August 4, 2011, note from Oncology-Hematology Associates suggest employee was "working full time" during the relevant time period. See *Transcript*, page 588.

<sup>3</sup> For his part, Dr. Costley described his 10 pound lifting restriction as "modified duty," suggesting he did not contemplate that employee must refrain from all work as a result of this restriction. See, e.g., *Transcript*, page 129.

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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.

Additionally, § 287.020.2 provides that "[a]n injury is not compensable because work was a triggering or precipitating factor."

As we have noted, employee's expert, Dr. Mullins, opined that the accident, which involved employee's action of reaching and shoveling cheese curds on June 20, 2011, and feeling a sudden pop and pain in her chest, was the most important factor causing her to suffer the injury at issue. Dr. Mullins did not suggest that employee's work was merely a triggering or precipitating factor causing her to suffer an injury; instead, he persuasively testified that the forces involved in employee's work activity were sufficient, standing alone, to cause a rib fracture.

We have also noted that the alternative theory from employer's expert, Dr. Parmet, turns on the premise that employee's action of reaching and shoveling cheese curds could not be the prevailing factor causing her injury, because her rib likely would not have fractured absent the preexisting lesion which had weakened the structure of her rib bone. Dr. Parmet did not identify any other reason for rejecting the accident as the prevailing factor causing employee's rib fracture; accordingly, it appears that he relied on an assumption that where the circumstances of an injury involve any non-work-related, but-for cause, the accident cannot be deemed the prevailing factor causing the injury.<sup>4</sup>

We cannot endorse this assumption, as it runs contrary to the relevant Missouri case law. Even following the 2005 amendments to Chapter 287, the Missouri courts have consistently held that an employee is not barred from compensation solely owing to the existence of a preexisting, degenerative condition, so long as the accident is shown to be the prevailing factor causing a worsening, or aggravation, of such condition. See, e.g., *Maness v. City of De Soto*, 421 S.W.3d 532, 540 (Mo. App. 2014) and *Randolph County v. Moore-Ransdell*, 446 S.W.3d 699, 710 (Mo. App. 2014). As the Supreme Court of Missouri has recently made clear, this is the case even where the credible evidence suggests the injury might not have occurred absent the preexisting condition. *Malam v. Dep't of Corr.*, 492 S.W.3d 926 (Mo. 2016). Employee's right fifth rib was, undoubtedly, weakened when she went to work on the morning of June 20, 2011, owing to a preexisting degenerative condition, namely, the lesion referable to LCH. However, employee was not suffering from a broken right fifth rib until after she suffered the accident at work on that date. In other words, employee suffered an aggravation of her preexisting degenerative condition as a product of the work accident.

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<sup>4</sup> Employer does not argue that employee's injury resulted directly or indirectly from an idiopathic cause for purposes of the exclusion under § 287.020.3(3) RSMo. Nor did the parties identify such as an issue for our determination. Consequently, we are precluded from considering the issue. *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121 (Mo. App. 1991).

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In sum, because Dr. Parmet relied on what we deem to be an apparent misapprehension of the appropriate statutory standard, we have credited the alternative theory from Dr. Mullins that the accident was the prevailing factor causing employee's claimed injury. We conclude, therefore, that the accident was the prevailing factor in causing employee to suffer the resulting medical condition of a fractured right fifth rib, and an associated permanent partial disability of 10% of the body as a whole.

*Injury arising out of and in the course of the employment*

The parties ask us to determine whether employee's injury arose out of and in the course of employment. Section 287.020.3(2) RSMo provides as follows:

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.

We have concluded that the accident was the prevailing factor causing employee to suffer the injury at issue. As a result, subsection (a) above is satisfied. We turn now to subsection (b).

The risk or hazard from which employee's injuries came was that of using a shovel to stir cheese curds, exerting a pushing/pulling force of approximately thirty-five to forty pounds, while pressing her ribs against the hard edge of a metal vat. In other words, the relevant risk was employee's daily job duty. In light of these facts, we can easily conclude that the risk at issue was "related" to the employment. In the case of *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010), the court held that such a showing was sufficient to satisfy the employee's burden:

[T]he application of [§ 287.020.3(2)(b)] involves a two-step analysis. The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.

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*Id.* at 467.

We acknowledge that in the case of *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012), our Supreme Court focused on the unequal exposure requirement (or second step of the test under § 287.020.3(2)(b)), but we do not read the *Johme* decision to diminish the precedential value of *Pile*, for several reasons.

First, the *Johme* court could have overruled *Pile* if it had wished to do so, but did not. That our highest court declined to overrule a decision which the Missouri Court of Appeals, Eastern District, discussed at length in its decision ordering a transfer, see *Johme v. St. John's Mercy Healthcare*, ED96497 (Oct. 25, 2011), and upon which the Commission expressly relied in its award, strongly suggests to us that the Court saw wisdom in the *Pile* approach, and wished to leave that precedent undisturbed.

Second, the *Johme* court did not purport to shift the analysis away from the first-step *Pile* question whether a risk is related or unrelated to employment, but rather exhorted us to take better care in identifying the actual risk at issue: the Commission had considered the *Johme* employee's activity of making coffee as the risk that caused her injuries, and analyzed whether making coffee was "related" to her work, but the Court pointed out that the relevant risk from which the employee's fall came was the employee's "turning and twisting her ankle and falling off her shoe." *Id.* at 508, 511. Having appropriately defined the risk, the Court proceeded to the unequal exposure analysis, as there was no need to discuss the first-step *Pile* question whether the employee's turning and twisting her ankle was integral to her work as a billing representative: it clearly was not.

In contrast, here we are confronted with a risk source that was directly related to the specific circumstances of employee's work for employer. As a result, we conclude that employee's injury did 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)(b). We conclude, instead, that employee's injuries arose out of and in the course of the employment.<sup>5</sup>

#### Past medical expenses

Section 287.140.1 RSMo controls our determination with respect to the issue of past medical expenses, and provides, in relevant part, as follows:

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

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<sup>5</sup> Incidentally, we note that because employee's work activity of stirring curds was awkward, and the exertion involved more than any employee typically experienced in her normal, nonemployment life, it would appear that the unequal exposure requirement also would be satisfied in this case.

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We have resolved the foregoing issues of causation in favor of employee, and concluded that she suffered a compensable injury by accident on June 20, 2011. The parties specifically stipulated that the issue of past medical expenses would turn upon the resolution of the issues of causation. We conclude that the disputed treatment was reasonably required to cure and relieve from the effects of employee's compensable work injury of a right fifth rib fracture.<sup>6</sup>

The courts have consistently held that an award of past medical expenses is supported when the record includes (1) the bills themselves; (2) the medical records reflecting the treatment giving rise to the bills; and (3) testimony from the employee establishing the relationship between the bills and the disputed treatment. See *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. 1989). Here, employee provided her bills, the medical records reflecting the treatment giving rise to the bills, and testimony identifying the bills and establishing that she received them as a result of the disputed treatment. Employer, on the other hand, did not advance any evidence to suggest that employee's liability for the bills has been extinguished, or that the charges are not fair and reasonable. Nor does employer provide any argument or evidence to suggest an appropriate total other than the amount of \$83,768.08 that we have calculated based upon the submitted bills.<sup>7</sup> We conclude employee is entitled to her past medical expenses in the amount of \$83,768.08.

#### Future medical care

Section 287.140 provides for an award of future medical treatment where the employee can prove there is a reasonable probability of a need for future medical treatment that flows from the work injury. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51-4 (Mo. App. 2008). We have found, owing to employee's failure to identify or advance sufficient persuasive evidence with regard to the topic, that employee does not have a need for future medical treatment referable to her rib fracture. We conclude employee has failed to meet her burden of proof with respect to this issue. We conclude that employer is not obligated to provide future medical treatment under § 287.140.

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<sup>6</sup> We have credited Dr. Mullins's un rebutted testimony that the workup and radiation treatment to cure and relieve the specific lesion behind employee's right fifth rib was a necessary precursor to the healing of her work-related rib fracture; consequently, we can easily conclude that such expenses "flow" from the work injury. See *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. App. 2011). With regard to the numerous, additional diagnostic procedures intended to measure the extent and seriousness of the LCH itself (e.g. whether the condition had metastasized to different areas of employee's body) the work connection would seem more tenuous. However, given that the parties stipulated that the issue of past medical expenses would "rise and fall" with causation, and because we are bound by that stipulation, see *Hutson v. Treasurer of Mo.*, 365 S.W.3d 269, 273 (Mo. App. 2012), it appears that we are precluded from parsing such additional expenses or from even reaching the issue whether they must be denied.

<sup>7</sup> At the hearing, counsel for employer suggested employee had included bills for a hysterectomy, and other medical treatment unrelated to this proceeding, within her exhibits. This is indeed the case, however, employee's brief makes clear that she is not claiming these unrelated charges, and (apart from the obviously erroneous inclusion of the August 2014 lower extremity MRI charge from Cox Health) we found employee's brief to be accurate and helpful with regard to sorting through the disputed charges.

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Temporary total disability benefits

Section 287.170 RSMo provides for the payment of temporary total disability benefits during the rehabilitative process following a compensable work injury whenever an employee is temporarily unable to compete for work in the open labor market. *Greer v. Sysco Food Servs.*, 475 S.W.3d 655 (Mo. 2015). At the hearing before the administrative law judge, the parties asked the administrative law judge to determine whether employee was entitled to temporary total disability benefits from July 1, 2011, through April 8, 2013. In contrast, employee's brief requests an award of 29 weeks of temporary total disability benefits from June 17, 2011, through March 6, 2012.<sup>8</sup> We resolve the issue as follows.

First, we conclude that we are without authority to consider any claim for temporary total disability benefits before July 1, 2011, owing to the parties' stipulation of that date as the first date of any claimed temporary total disability. Second, as we have noted, employee and the testifying experts failed to specifically discuss or persuasively establish employee's physical condition and its impact upon any (claimed) inability to work during any portion of the claimed time periods, and our own review of the treatment records fails to demonstrate that any of employee's treating physicians restricted her from all work during the relevant time periods.

Consequently, we conclude that employee has failed to meet her burden of proof with respect to this issue. Employer is not liable for any temporary total disability benefits.

Nature and extent of disability.

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee suffered a 10% permanent partial disability of the body as a whole in connection with her rib fracture injury. We conclude that employer is liable for 40 weeks of permanent partial disability benefits at the stipulated weekly permanent partial disability benefit rate of \$280.00 for a total of \$11,200.00 in permanent partial disability benefits.

**Award**

We reverse the award of the administrative law judge. We conclude employee suffered a compensable injury by accident.

Employer is liable for, and is hereby ordered to pay, past medical expenses in the amount of \$83,768.08.

Employer is not obligated to provide future medical treatment under § 287.140 RSMo.

Employer is not liable for any temporary total disability benefits.

Employer is liable for, and is hereby ordered to pay, permanent partial disability benefits in the amount of \$11,200.00.

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<sup>8</sup> By our count, there were more than 37 weeks between the dates of June 17, 2011, and March 6, 2012. It is unclear which time period employee (apparently) abandons by requesting a total of only 29 weeks of compensation.

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The award and decision of Chief Administrative Law Judge Robert House, issued March 23, 2016, is attached hereto solely for reference.

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

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

Given at Jefferson City, State of Missouri, this 7<sup>th</sup> day of December 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## **AWARD**

**Employee:** Rhonda Clark **Injury No.:** 11-053153  
**Dependents:** N/A  
**Employer:** Dairy Farmers of America  
**Additional Party:** N/A  
**Insurer:** Self-Insured  
**Hearing Date:** January 9, 2016

### **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.
5. State location where accident occurred or occupational disease was contracted. The Employee alleges she suffered compensable injuries in Monett, Missouri.
6. Was above employee in the 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 employment? No.
9. Was Claim for Compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? The Employer was self-insured for liability.
11. Describe work being performed and how accident occurred or occupational disease contracted. The Employee shoveled curds and similar products.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease. Not applicable.
14. Nature and extent of any permanent disability. Not applicable.
15. Compensation paid to-date for temporary disability. None.
16. Value necessary medical aid paid to-date by employer/insurer? \$2,546.24.
17. Value necessary medical aid not furnished by employer/insurer?

18. Employee's average weekly wages: \$420.00.
19. Weekly compensation rate: \$280.00.
20. Method wages computation: Stipulation.
21. Compensation payable: Not applicable.  
  
Unpaid medical expenses:
22. Second Injury Fund Liability: Not applicable.
23. Future requirements awarded: Not applicable.
24. Attorneys' fees and expenses: Not applicable.

## **I. Introduction**

The parties presented evidence at a hearing held on Friday, January 9, 2016, for the purpose of entering a Final Award under *Section 287.460 RSMo*. Claimant, Rhonda Clark, appeared in person and by her counsel, Randy Alberhasky. Employer/Self-insurer, Dairy Farmers of America, appeared by its counsel, Patrick J. Platter. The record was left open for thirty (30) days so counsel could provide legal authorities supporting their positions.

The parties entered into the following stipulations:

- (1) That the Employer/Self-insurer paid medical expense totaling \$2,546.24;
- (2) That the Employer/Self-insurer paid no temporary total disability benefits;
- (3) That attorney, Randy Alberhasky, seeks an attorney's fee of 25 percent;
- (4) That there is a child support lien totaling \$11,271.29; and
- (5) That the compensation rate is \$280.00.

Only the following issues are disputed:

- (1) Whether the Employee suffered an injury by accident or occupational disease arising out of and in the course and scope of employment;
- (2) Whether Employee's injury was caused by her accidental injury or occupational disease;
- (3) The liability for past medical expense totaling \$85,556.08;
- (4) The liability of Employer/Self-insurer for temporary total disability benefits extending from July 1, 2011, to April 18, 2013, totaling \$25,880.00;
- (5) The liability of Employer/Self-insurer for future medical treatment;

- (6) And the nature and extent of permanent disability.

The parties agree that the issue of past medical and temporary total disability rises or falls on the issue of accident or occupational disease.

The following Exhibits were offered by the Claimant, Rhonda Clark:

- A Medical Records - Barnes Jewish Hospital
- B Medical Records – CoxHealth
- C Medical Records - Cox Monett Hospital
- D Medical Records - Cox Medical Center
- E Medical Records - Family & Occupational Medicine of Monett
- F Medical Records - Family & Occupational Medicine of Monett;
- G Medical Records - Oncology Hematology Associates
- H Medical Records – CoxHealth
- I Medical Bills – CoxHealth
- J Medical Bills – CoxHealth
- K Medical Bills – Oncology Hematology Associates
- L Medical Bills – Wal-Mart Pharmacy
- M Dr. Mitch Mullins’ report; N. Claim
- O Answer from Employer; P. Amended Claim
- Q *R.S.Mo* §287.210 letter
- R Disclosure of Medical Records to Opposing Counsel
- S *R.S.Mo* §287.210 letter
- T Disclosure of Medical Records to Opposing Counsel
- U Disclosure of Medical Records to Opposing Counsel
- V Disclosure of Medical Records to Opposing Counsel
- W Deposition of Dr. Mark Costley

The following Exhibits were offered and admitted into evidence on behalf of the Employer, Dairy Farmers of America:

- 1 Complete Medical Report of Dr. Allen Parmet
- 2 Medical records of Family & Occupational Medicine of Monett

This claim centers upon Claimant’s work duties at the Monett plant of Dairy Farmers of America and the Langerhan’s cell histiocytosis from which she suffered. Medical causation is the primary disputed issue.

## **II. Findings of Fact**

### **A. Personal Background of Rhonda Clark**

#### **Work Activity**

Rhonda Clark started employment at the Monett plant of DFA in May 2011. She worked in the room where cheese was made. She worked next to vats and a mixer on top of a table.

Most of her work concerned making cheese in vats. She would lean against the vat and shovel the curds up and down, lifting the curds and the cheese from underneath so it would not curdle. The top of the vat was rib height for her. She is 5 foot 2½ inches tall. She used a light plastic shovel to stir the cheese to make sure it did not coalesce. She used a plastic shovel weighing five to six pounds to stir the ends of the mixer to mix the curds. This required a pushing force of approximately forty to fifty pounds. She also had to pick up stirring blades although these were not as heavy as the force required for shoveling. She usually worked eight to nine hours a day, forty hours per week. The exertion she used while working with the cheese was more than what she did for her gardening and other activities outside of work. She had no overhead activities, and her ribs rarely pressed against the vats.

### **B. Circumstances of Claim**

On June 20, 2011, Claimant was making her rounds on the vats, stirring the cheese, when she pulled back and felt a pop. She heard a pop, and she could not lift her right arm. She reported this to her supervisor who advised her to “take it easy.” She could not lift her right arm, and her husband took her to the emergency room. Claimant’s testimony at the hearing generally corresponds to the activities and injury she described to her medical providers.

### **C. Medical Treatment**

Claimant’s medical treatment is composed of two basic parts. The first part concerned diagnostic testing after she complained of pain under her right arm and right side after shoveling cheese. The second part concerned radiation therapy for the Langerhan’s cell histiocytosis.

Claimant first went to the emergency room and underwent an x-ray for the right side of her ribs. The radiologist found an irregularity of the right fifth rib posteriorly, which was read as a possible fracture or possible lytic lesion. Later, Dr. Costley recommended a bone scan. This was performed on July 22, 2011. The bone scan demonstrated an intense area in the right posterior lateral fifth rib. This corresponded to the possible lytic lesion noted on the chest x-rays. This was, according to the radiologist, atypical for a simple fracture. The radiologist stated that malignancy or metastatic disease needed to be considered, along with the recommendation of a CT scan. Dr. Costley conferred with Dr. Ellis, an oncologist. Dr. Ellis recommended a CT scan for the lesion and her rib along with a mammogram. The CT scan indicated a “destructive lesion” in the right posterior lateral fifth rib measuring two centimeters by one centimeter with an associated soft tissue mass.

Dr. William Cunningham, an oncologist, evaluated Claimant on August 4, 2011. He recommended a CT-guided needle biopsy. This biopsy demonstrated Langerhan’s cell histiocytosis (LHC). Dr. Cunningham saw Claimant after this test and noted the condition was a “benign disorder, quite rare.” He referred her to an oncologist in St. Louis. She saw Dr. Todd Fehniger, an oncologist affiliated with Washington University in St. Louis, on January 5, 2012. He recommended that claimant receive radiation therapy. He noted “previously it was thought to be a benign disorder; however, more recent studies over the last ten years have revealed that most LCH constitutes a clonal malignancy.”

Claimant underwent the recommended radiation therapy. Her condition apparently is in remission. She did not testify to any ongoing problems with this disorder. She identified no treatment she needs either for her fracture or the LCH in the reasonably near future.

**D. Dr. Allen Parmet**

Dr. Allen Parmet was the examining physician for the Employer. He examined Claimant on December 12, 2014. His complete medical report was admitted into evidence as Exhibit 1. Dr. Parmet is board certified in occupational and aviation medicine. He practices, teaches and publishes in both occupational and aviation medicine.

Relevant passages from Dr. Parmet's report are quoted as follows:

Ms. Clark suffered a pathological fracture through a malignant tumor in her right fifth rib in the course of her duties while employed at Dairy Farmers of America. Her activities were not extraordinary but they were sufficiently forceful enough to fracture the weakened bone of the rib in the presence of the malignant lesion.

Ms. Clark's fracture occurred without significant trauma. That is to say that her activities have been performed hundreds of times before by herself and others without injury. Fractures without significant trauma are defined as to whether there is normal or abnormal bone present. If abnormal bone is present, this condition is defined as a pathological fracture with the most common cause being an underlying tumor (*University of Washington, Department of Radiology, Academic Teaching Materials, December 12, 2014*).

A pathological fracture occurs when normal bone is weakened by a lesion that is destroying the bone structure. Such lesions may be a cancer, as in the case of Ms. Clark, a benign tumor or cysts that expands and destroys bone, or an infection. In any of these situations, the bone is markedly weakened, to the point that it fails under a load much, much less than normal. The nature of malignant lesions such as Langerhans cell histiocytosis is that they will eventually progress, expand and destroy the surrounding bone and activities of daily living eventually cause a fracture to occur. In cases of rib lesions, individuals may simply take a deep breath and fracture the rib.

In the case of Ms. Clark, her routine physical activities at work caused the weakened rib to fracture, and this alerted her to the presence of the cancer. In effect, it was the identifying event that would have eventually occurred. Had the fracture not occurred under these circumstances, she might have had the fracture at a later time when the cancer had eroded further into the lung or even metastasized and spread throughout the body. Effectively, the occupational event was serendipitous. . . .

In conclusion, Claimant's underlying condition was a malignant tumor, Langerhans cell histiocytosis, which was appropriately treated. She developed a pathological fracture through the tumor but the work activities were not the prevailing cause. If the tumor had not existed and partly destroyed her rib then the fracture would not have occurred. There is no occupational connection to her tumor, and the fracture would have eventually occurred, regardless, as the tumor slowly eroded her bone.

**E. Dr. Mitchell Mullins**

Dr. Mitchell Mullins examined Claimant on her behalf on April 8, 2013. His complete medical report was admitted into evidence as Exhibit "M." He also testified at the hearing. Dr. Mullins is an urgent care physician with Mercy Medical Systems in Springfield and evaluates claimants and plaintiffs in workers' compensation and personal injury litigation.

Dr. Mullins, after his evaluation, stated the following in his report:

The clinical course of Langerhans cell histiocytosis (LCH) is variable. Patients with unifocal disease generally have an excellent prognosis. After initial bone scanning and radiographic survey to assess the extent of the disease, follow-up studies after treatment should be performed at 6-month intervals for 3 years. If no additional lesions are present at 1 year, the development of subsequent lesions is unlikely. A full recovery is also expected in cases of solitary lymph node involvement or isolated skin disease.

The rib fracture sustained while working has caused ongoing pain making it difficult for her to do any type of upper body work due to fear of refracture. It has been especially difficult to recover as this is not a typical fracture and will not heal in a typical fashion. There have been no studies to confirm a completed, healed fracture to this point.

The radiation to that area has caused scarring and apparent nerve irritation which persists to date.

The patient may benefit from intercostal nerve blocks at some point as guided by her primary care physician.

Permanent work restrictions should be followed.

Dr. Mullins concluded that the work Claimant did was of sufficient force to cause a rib fracture. He questioned why a worker could perform such work 500 times before and not have a rib fracture. He stated that people who cough can develop rib fractures, and he believed the Claimant's force used at work was "sufficient enough alone to cause a rib fracture." He could not deny that the lytic lesion contributed to her injury, but he felt that the forces of her work were sufficient to cause the fracture, and were work related.

He further testified there was little known about LCH. He compared the LCH and the work factors to determine prevailing factor. However, he stated we did not know the

“frequency,” or how long she had it, though he would say that her work and the force she used, being known, were the most important factors.

Last, he testified the LCH prevented the fracture from healing. He compared Claimant’s condition to degenerative joint disease or osteoporosis in which an injury alone may produce a small fracture, but that injury accelerated degenerative processes which continued and would require a “total knee.” The total knee may not have been needed had there not been a work-related accident; so he believed this was a similar situation because, had the rib fracture not occurred, the LCH might have gone undiagnosed and never needed treatment. He opined that people live with a condition and have no issues until a work-related accident occurs, which requires testing and other treatment to fix the underlying problem.

On cross examination, Dr. Mullins agreed that a pathological fracture happens when normal bone is weakened by a lesion destroying the bone structure. A tumor can expand and destroy bone. A pathological fracture can be moth-eaten bone, and he specified the diagnosis of a pathological fracture was the ER physician’s, not his. He admitted a pathological fracture happens when a bone is markedly weakened and it would be weakened to where it can fail under a force load that is less than normal.

He opined that Claimant’s tumor was close to her fracture site. Further, he noted that the shoveling created no abnormalities in the rotator cuff or labrum of the shoulder or in the scapula or neck.

He opined that all of Claimant’s treatment concerned her LCH, not the rib fracture itself.

Dr. Mullins opined that he had no reason to quarrel with the portion of Dr. Parmet’s report citing the National Cancer Institute: “Langerhan’s cell histiocytosis is a malignancy without known cause, but most closely associated with smoking in adults. Six percent of bone involvement in adults involves the ribs, and most adult cases are polyclonal, not monoclonal, a factor which would only affect their spread in chemotherapy but not the use of radiation.”

Dr. Mullins admitted that neither Dr. Parmet nor Dr. Costley documented a specific incident from shoveling on June 20, 2011, which led to Claimant’s rib pain. He did not either, but instead he considered her shoveling a “micro trauma.” He did not know how many employees shoveled cheese at the Monett plant nor if any others suffered rib fractures like hers. He also did not know how many employees shoveled 35 to 40 pounds. He compared Claimant’s condition to “clay shoveler’s syndrome.”

#### **F. Dr. Mark Costley**

Dr. Mark Costley was Claimant’s first treating physician concerning this claim. She came to Dr. Costley because she felt a burning pain underneath her right arm while she was lifting at work. The x-ray taken at Aurora Community Hospital indicated a fracture, but also indicated it was possible there was a lytic lesion in the bone. A lytic lesion is a thinning of the bone secondary to what turned out to be an unusual form of cancer. Dr. Costley recommended a bone scan. The bone scan showed an intense activity in the right postural lateral fifth rib corresponding to a lytic lesion. All examinations were atypical for a simple fracture.

Claimant also had a biopsy. The radiologist considered a malignancy or metastatic disease and recommended a further CT scan. Dr. Costley conferred with an oncologist, Dr. Ellis, who recommended a serum protein electrophoresis, a breast exam, mammogram and full body CT scan. This testing indicated the cancer at the right fifth rib. The CT scan indicated the destruction of the right postural lateral rib with soft tissue mass and a two centimeter by one centimeter dimension. This indicated cancer. Oncologists, both in Springfield and St. Louis, diagnosed Claimant as suffering from Langerhan's cell histiocytosis (LCH).

Dr. Costley testified the source of Claimant's abnormal fifth rib was the cancer. Claimant had pain from the lytic lesion and also pain from the fracture. He opined later that the shoveling at work was not the source of her abnormal rib, but he opined that the fracture contributed to Claimant's pain. He testified the shoveling was a circumstance, but not the prevailing cause of the disorder of her rib. However, he opined that the cancer caused the need for further medical treatment and that the shoveling was not the cause of the need for treatment for the cancer. He noted that it is common for a patient suffering from cancer to have a mass at a rib and to notice that discomfort during physical activity. This does not mean the physical activity caused the pain. When identifying the causes of the rib fracture, Dr. Costley believed it was a combination of Claimant's work and the lytic lesion (evidencing the cancer), but he could not apportion what percentage would be from either. He further believed that both contributed, and he would not opine which was the prevailing factor in causing the injury.

### **III. Rulings of Law**

I find and conclude that Claimant did not suffer an injury under *Section 287.020*. Her shoveling was not the prevailing factor causing her fractured rib or any disability from that rib fracture. In addition, her medical treatment did not flow from her work activity.

I find and conclude that the greater weight of the evidence supports the conclusion that Claimant suffered a pathological fracture from Langerhan's cell histiocytosis the prevailing factor in causing her condition and disability . rather than from her shoveling at work. Claimant's fracture matches the profile of a pathological fracture. Her tumor was close to the fracture site on the fifth rib. The bone was weakened by her LCH. The rib failed by fracturing at or near the site of the LCH lesion under a load less than normal force. Tumors eventually progress, expand and destroy surrounding bone. While Dr. Parmet and Dr. Mullins disagreed upon whether Claimant's condition was malignant, the oncologist, Dr. Fehniger, stated in the Washington University records that more recent research studies indicated most LCH cases concerned malignancies. Dr. Mullins did not quarrel with the National Cancer Institute stating radiation could likely effectively treat a malignant LCH where chemotherapy may not. Claimant underwent radiation treatment which has, to all accounts, been successful for her LCH. This points to Claimant's case more likely being malignant and requiring radiation treatment. While this claim presents a close question upon medical causation, especially since LCH is a rare disorder, I find and conclude that Dr. Parmet's explanation of Claimant 's disorder is more persuasive when viewed in light of the whole record.

A claimant can recover medical treatment by proving one of two propositions. First, a

clamant can prove that either an accident or work environment was the prevailing factor causing the medical condition and disability. *Section 287.020.3 RSMo*. Second, a claimant can prove the need for treatment posed from a compensable work injury. *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 634-635 (Mo banc 2012) citing *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. S.D. 2006) and *Tillotson v. St. Joseph's Medical Center*, 347 S.W.3d 511, 518-19 (Mo.App. W.D. 2011). I find Claimant meets neither proposition based on Dr. Parmet's opinion which I find to be more persuasive.

I also find and conclude that the shoveling performed by Claimant was not the prevailing factor in causing this injury leading to her rib fracture nor any disability from this injury under *Section 287.020*. While shoveling was sufficiently forceful to fracture weakened bone, I agree with Dr. Parmet that the fracture would not have occurred without the weakening of the bone by the tumor because of the LCH. Neither Dr. Mullins, nor other testimony produced by Claimant, explained why her activities performed hundreds of times did not fracture her or others before. Moreover, even though Dr. Mullins opined that Claimant's work was the prevailing factor in causing her rib fracture, he testified at hearing that her stirring the cheese curds with the pressure she used would be uncommon in causing a rib fracture in someone who did not have LCH. Thus, I find and conclude that Claimant's medical profile fits that of a pathological fracture. Further, her profile indicates her condition was malignant and not an autoimmune disorder. Further, the medical treatment did not flow from a work related injury, a situation which would otherwise justify the award of medical treatment as in *Tillotson*. I find and conclude that there was no work-related injury in this case. See, *Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d 466, 472-473 (Mo.App. S.D. 2012). Claimant having suffered no work-related injury, I find and conclude that no medical treatment flows from her activities at work and, further, that all of her medical treatment was directed toward her underlying malignancy (LCH), which her work did not cause. In short, Claimant has not sustained her burden of proof as required in *Section 287.808 RSMo Supp 2005*.

I deny the claim and I order no benefits or compensation.

Made by: \_\_\_\_\_  
Honorable Robert House  
Chief Administrative Law Judge  
Division of Workers' Compensation  
Signed 3/21/16