

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

Injury No.: 04-148156

Employee: Pamela Cotter  
Employer: Bakersfield R-IV School  
Insurer: Missouri United School Insurance  
c/o Gallagher Bassett Services

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 17, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Victorine R. Mahon, issued June 17, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15<sup>th</sup> day of December 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

# AWARD

Employee: Pamela Cotter

Injury No. 04-148156

Dependents: Not Applicable

Employer: Bakersfield R-IV School

Additional Party: Not Applicable.

Insurer: Missouri United School Insurance  
c/o Gallagher Bassett Services

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and  
Industrial Relations of Missouri  
Jefferson City, Missouri

Hearing Date: May 3, 2010

Checked by: VRM/DB

## 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? Yes.
4. Date of accident or onset of occupational disease: October 18, 2004.
5. State location where accident occurred or occupational disease was contracted: Bakersfield, Ozark 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? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Alleged herniated disc from lifting.
12. Did accident or occupational disease cause death? No. Date of death? Not applicable.

13. Part(s) of body injured by accident or occupational disease: Alleged cervical spine.
14. Nature and extent of any permanent disability: None Awarded.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$290.92.
19. Weekly compensation rate: \$194.00.
20. Method wage computation: Agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None.
22. Second Injury Fund liability: No.

TOTAL: NONE.

23. Future requirements awarded: None.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: No Lien Awarded.

**FINDINGS OF FACT AND RULINGS OF LAW:**

Employee: Pamela Cotter

Injury No. 04-148156

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Additional Party: Not Applicable.

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Before the  
**DIVISION OF WORKERS'  
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**INTRODUCTION**

The undersigned Administrative Law Judge convened the final hearing in this case on May 3, 2010. Pamela Cotter (Claimant) appeared at the hearing in person and by her attorney, Randy Alberhasky, who has requested a 25 percent fee. Attorney Catherine Goodnight appeared on behalf of Bakersfield R-IV School, its insurer Missouri United School Insurance Company, and its third party administrator, Gallagher Bassett Services (hereafter referenced collectively as Employer). The parties stipulated to the following facts.

**STIPULATIONS**

1. On or about October 18, 2004, Pamela Cotter had an accident that arose out of and in the course of employment with Bakersfield R-IV School.
2. Pamela Cotter was an employee of Bakersfield R-IV School, working under the protections of the Missouri Workers' Compensation Act.
3. Bakersfield R-IV School was fully insured and subject to the Missouri Workers' Compensation Act.
4. The parties agreed to venue in Greene County, Missouri.
5. The claim was filed within the time prescribed by law and jurisdiction is not disputed.

6. Claimant's average weekly wage of \$290.92, yielding a compensation rate of \$194.00.
7. No temporary total disability or medical benefits have been paid.
8. Exhibit Z, Claimant's personnel file, is the entire file relating to Claimant which is retained by Employer in the ordinary course of the Employer's business. Further, it was Employer's custom to keep records regarding an employee's absences.

### **ISSUES**

1. Did Claimant provide timely notice?
2. Is Claimant's work accident of October 18, 2004, medically and causally related to the Claimant's current disability?
3. What is the nature and extent of Claimant's permanent disability?
4. Are future medical benefits necessary and directly related to Claimant's work-related injuries of October 18, 2004?
5. Is Employer liable for outstanding medical bills in the amount of \$50,784.47?
6. Is Claimant entitled to temporary total disability from March 3, 2005 to May 16, 2005?

### **EXHIBITS**

The following exhibits were offered and admitted:

#### **Medical Records**

- A. Ozarks Medical Center, 43 pages, certified 5/19/2008
- B. St. John's Clinic, Mt. Grove, 14 pages, certified 4/10/2006
- C. St. John's Clinic, Mt. Grove, 21 pages, certified 5/19/2008
- D. St. John's Clinic, Mt. Grove, 1 pages, certified 11/19/2008
- E. St. John's Regional Health Center, 137 pages, certified 5/24/2006
- F. St. John's Regional Health Center, 16 pages, certified 6/20/2008
- G. St. John's Regional Health Center, 55 pages, certified 10/14/2008

#### **Medical Bills**

- H. Bradford Pharmacy, 6 pages, certified 11/14/2008
- I. Ozark Medical Center, 10 pages, certified 5/16/2008.

- J. St. John's Regional Health Center, 17 pages, certified 4/25/2006
- K. St. John's Regional Health Center, 2 pages, certified 6/11/2008
- L. St. John's Clinic, 5 pages, certified 4/10/2006
- M. St. John's Clinic, 11 pages, certified 6/18/2008
- N. Wal Mart Pharmacy, 7 pages, certified 12/30/2008

**Documents**

- O. Claim, Original
- P. Answer, Employer/Insurer
- Q. Entry of Appearance, Randy C. Alberhasky
- R. Medical records disclosure, 6/27/2008
- S. R.S.Mo. §287.210, 9/19/2008
- T. R.S.Mo. §287.210, 9/25/2008
- U. R.S.Mo. §287.210, 10/10/2008
- V. R.S.Mo. §287.210, 12/23/2008
- W. Settlement offer, 7/21/2009
- X. Settlement offer, 8/28/2009
- Y. Wage statement
- Z. Personnel file, Bakersfield School District<sup>i</sup>
- AA. Accidental Injury Claim Form
- BB. School Employee Report of Absence, 5/16/2005
- CC. Staff Absence Reports

**Depositions**

- DD. Dr. P. Brent Koprivica w/ attached exhibits
- EE. Pamela Cotter, Claimant
- 1. Dr. Lennard deposition
- 2. James England deposition

All objections contained in the depositions are ruled in a manner consistent with this Award.

## **FINDINGS OF FACT**

Claimant is a high school graduate. She is 52 years old and lives with her husband of 30 years, who is disabled from a work-related back injury. At the time of her deposition, Claimant's 22 year old daughter, a college student, also lived with her.

Claimant was an employee of Bakersfield School District from 1984 through November of 2005, working the entire time in the food service department. She served breakfast and lunch to students. In 1999, she was promoted to Food Service Manager. She reported to Superintendent Jerry Taylor, whose office was physically located in another building. Her job involved paperwork as well as physical work, including frequent lifting of pots, pans, and utensils.

Claimant supervised three food staff workers. As Food Service Manager, part of her responsibility was to call Lola Bridges, the Superintendent's secretary, when an employee informed her of a work injury. Claimant would orally advise Ms. Bridges of the injury. Claimant had not been responsible for completing written reports regarding other employees' injuries.

### **The Accident**

On the morning of October 18, 2004, Claimant was stacking boxes of 16 ounce vegetable cans. As she lifted a box weighing about 40 pounds to her shoulder level, she experienced a sharp pain that felt like a pulled muscle. She did not have any immediate numbness in her arm.

No one witnessed the event. After Claimant completed the stacking in the supply room, she told Elma Gargione and Marcille Davidson, two of her kitchen workers, of the event and that her neck was bothering her. While neither of these women testified at the hearing, Employer does not contest that an accident occurred at work.

### **Notice**

There was no written notice of the accident. Claimant testified that to the best of her recollection, she called the Superintendent and spoke with his secretary, Lola Bridges, about the incident. On cross-examination, Claimant admitted she really did not recall when she advised the Superintendent's Office of the accident. Her deposition testimony was even less certain:

- Q. Did you report that to the superintendent, Mr. Taylor?
- A. Yes. I told him, but I don't know if it was that day. Usually when one of us would get hurt—if anybody cut their finger or fall—Marcille fell a couple time—I'd call the office and let them know that we'd had an injury.
- Q. So you may not have told Mr. Taylor that day, but it would have been a day later or a week later?
- A. Could have been.
- Q. Okay. You think you would have talked to him with a week?
- A. I don't know. I'm not—I think I did, but—

(Ex. EE p. 26-27).

Claimant then explained that she remembered an in-person conversation with the Superintendent regarding her injury, but that would have occurred months later after surgery

already had been scheduled. She also could not identify the date of the in-person conversation. She believed, however, that the Superintendent recommended that she submit her medical bills to her private insurance, and possibly later turn it into Workers' Compensation (Ex. EE, page 28).

Superintendent Taylor left the school district within the year. No party called him as a witness. Claimant's personnel file does not reflect any notice of a work-related injury.

Claimant alleged that the personnel file is incomplete. She presented a number of staff absentee reports or "pink slips," documenting her need to be off work due to illness (Ex. BB & CC). Copies of these reports or "pink slips" in 2004 and 2005 are not contained in the personnel file. The personnel file also does not contain an Accidental Injury Claim Form that Claimant asked Dr. Lee to sign so that she could collect benefits from AFLAC, a disability insurance policy offered through her employment. Claimant produced a copy of this document separately (Ex. AA).

I find that the personnel file is not materially incomplete. Although Employer, at some point, apparently ceased retaining the hard copies of the "pink slips," each absence was accurately recorded on a computer printout with the reason – either illness or personal. This computer printout is in the personnel file. Second, nothing in the AFLAC disability application indicates that anyone at the school was required to approve or sign the application. The policyholder was Pamela Cotter. Simply because the Bakersfield R-IV School offered its employees a group disability policy (just like a group health insurance policy), does not mean the application for the payment of benefits was a business record that would be retained by Employer

in the ordinary course of its business.

Claimant never requested medical treatment from Employer. Claimant turned to her health insurance for payment of all of her treatment, including surgery-related expenses. When her health care insurer specifically inquired whether the treatment was for a work related condition, Claimant could not state that she responded to the insurer's inquiries.

Claimant admitted she did not complete her leave or absentee requests for her surgery until after the fact, even though she knew ahead of time when the surgery would occur. Claimant did not sign and submit her absences for the time period of March 28, 2005 through May 14, 2005, until May 16, 2005, even though the surgery was scheduled on March 30, 2005.

I specifically find that Claimant did not advise the health insurer that she believed her condition was work-related. I further specifically find that Claimant did not provide Employer with *any* notice, written or oral, of an injury at or near the time of the accident. Although there is evidence that Claimant may have discussed the matter with the Superintendent at some point, such discussion was well after Claimant had undergone months of care by her own selected physicians and after surgery already had been scheduled.

### **Medical Treatment**

Although the accident occurred on October 18, 2004, Claimant sought no medical attention for a month. In the first record of any medical treatment after the accident (Exhibit B), Dr. Nancy J. Hayes, Claimant's personal physician, wrote on November 19, 2004, as follows:

Mrs. Cotter indicates she is having headaches on an almost daily basis at this point.

She reports to using Tylenol or ibuprofen daily. She does frequently take ½ or ¼ of a Zomig tablet. She indicates that her job has become more stressful including more paperwork. She is more short tempered and worried about her husband's health including several other stressors in the workplace and home.

**ASSESSMENT:**

1. Headaches, combination of tension and migraine.
2. Probable recurrence of low grade depression.

Dr. Hayes said to "restart" fluoxetine (a medication Claimant apparently had taken previously for her long history of headaches), and recommended that Claimant return in one month. Although the medical record of November 19, 2004, indicates that Claimant has some stress at work, Dr. Hayes makes absolutely no mention of any *physical* stress or accident at work. When asked to explain why Dr. Hayes, a physician who had been her family doctor for at least eight years, would fail to make mention of the work accident, Claimant replied that it probably just wasn't brought up in the conversation.

When Claimant returned to Dr. Hayes the following month in December 2004, the physician reported that Claimant was having fewer headaches. Dr. Hayes did note on this visit that Claimant had some continued neck pain with tingling and numbness in her left hand. Dr. Hayes wrote: "The patient had been told that she had a herniated disc sometime in the past but elected to not have anything done." (Ex. B). Dr. Hayes believed the left shoulder pain and left hand paresthesias was "most likely representing cervical disc disease." (Ex. B). She recommended an MRI of the neck and a continuation of Claimant's Prozac. Still, there was no mention of a work accident in the medical records of December 2004. Claimant indicated no

problem in communicating with her physician.

The next month, on January 14, 2005, Claimant again saw Dr. Hayes. The MRI was taken that date, but the results had not been given to the physician. While the doctor assessed Claimant as having depression, headaches, and left shoulder pain and left hand paresthesias, there again was absolutely no mention of any work accident.

The MRI performed January 14, 2005, revealed a moderate to large sized central and left paracentral disk herniation at C6-7 extending into the left foramen and right thecal sac, as well as spondylosis with mild narrowing of the right C5-6 foramen.

Claimant was referred to Dr. Sunghoon Lee following her MRI in January 2005. As with Dr. Hayes' records, there is a glaring absence of any mention of a work accident in any of Dr. Lee's treatment records. In the patient history form Claimant completed for Dr. Lee, she indicated a sudden onset of pain beginning in *November* 2004 rather than the alleged work accident date in October 2004. On that same form, she also denied having had any prior neck pain. Claimant has admitted, however, that she previously suffered a whiplash injury in a vehicular accident years earlier. As a result, Claimant received physical therapy and chiropractic treatment for neck pain. (Ex. G).

Dr. Lee scheduled Claimant for surgery, which was performed on March 30, 2005. Claimant underwent a C6-C7 discectomy and fusion, with hardware from C5 to C7. According to the operative report, a "large soft herniation" was noted to the left at C7. Claimant remained off work after the surgery and followed up with Dr. Lee on June 21, 2005, complaining of

headaches and neck pain. Dr. Lee diagnosed her with chronic headache syndrome. He saw her again on August 2, 2005 and reported that she was doing much better. She was released back to full duty. Dr. Lee never suggested that Claimant was unable to work.

On August 15, 2005, Dr. Lee signed the accidental injury claim form at Claimant's request (as referenced above) so that she could obtain benefits from AFLAC insurance. Claimant stated on the form that she suffered an accident on October 18, 2004, while lifting cases of food in the school cafeteria. Dr. Lee related similar information on the claim form, but he gave the date of injury as October 18, 2005 rather than 2004 (Ex. AA). This is the first written documentation of any sort indicating Claimant's contention that she suffered a work injury. I do not find Dr. Lee's statement to be significant given the complete lack of any reference in his earlier records indicating a work-related injury.

Claimant returned to work in August, but on September 6, 2009, Claimant reported to Dr. Hayes that she was having difficulty working because of her head and neck pain. On September 20, 2005 she returned to Dr. Lee complaining of increased pain in the neck, headaches and radiating numbness into the left arm. She had no new injuries. She reported that she had been unable to keep working, and asked that she be kept off work. When Claimant's sick leave expired in November of 2005, she tendered her resignation to the new Superintendent, Jackie Estes. In her resignation, Claimant indicated that she was unable to perform her work. Claimant admitted at the hearing that neither Dr. Hayes nor Dr. Lee have expressed the opinion that Claimant is unable to work.

## **Current Complaints**

Claimant contends she is unable to lift with either arm since her surgery. She contends she can no longer perform her job due to her neck pain, left arm numbness, and frequent debilitating headaches. Although Dr. Koprivica noted that much of Claimant's disability is related to an increase in her headaches, Claimant admitted that she has had migraine headaches since fourth grade. The medication she takes now for her headaches is the same medication she took for migraines before the work accident. But, she contends that the headaches she now suffers differ from those she suffered in the past because they now originate in the neck rather than in the temples (Ex. EE, p. 33). Claimant continues to see Dr. Hayes periodically for ongoing monitoring of her medications for pain and headaches.

Douglas Wood, Claimant's husband, confirmed that Claimant has difficulty performing most household chores. He agreed that the headaches Claimant now experiences appear to be different from those she has had in the past. Mr. Wood also stated, however, that Claimant had missed work due to headaches before the work accident. He also admitted that the medications she takes appear to help.

## **Medical Opinions**

**Dr. Koprivica** saw Claimant on August 11, 2008 for an independent medical examination, and was deposed on November 7, 2008. Even though he agreed that Dr. Hayes did not document any work-related injury or any lifting injury, he opined that the October 18, 2004

accident was a substantial factor in causing the C6-7 disk herniation and need for surgery. He admitted that the work incident was not the only factor in causing the disc herniation. Dr. Koprivica was aware of Claimant's prior auto accident and treatment in 1996. He agreed that Claimant's MRI was consistent with prior multi level disk disease.

Dr. Koprivica testified that Claimant reached maximum medical improvement in July 2005. Dr. Koprivica said Claimant's neck appeared normal except for the range of motion limited from the two-level fusion. He associated Claimant's increased headaches as a result of the work accident. He assigned Claimant a 50 percent permanent partial disability to the body as a whole. While he deferred to a vocational expert as to whether Claimant was permanently and totally disabled, Dr. Koprivica opined it was questionable whether Claimant could return to employment in the open labor market. If Claimant was unable to work, it would be due to a combination of disabilities both present and pre-existing. He imposed a number of restrictions, including a 10 pound lifting limit on an occasional basis, and generally a sedentary work limit. But he imposed no restrictions on Claimant's ability to sit or stand. He indicated that Claimant needed future medical care in the form of medication for the relief of headaches.

While Dr. Koprivica believed the treatment Claimant received was appropriate, he had seen anti-inflammatories used to alleviate the need for surgery. He said if such conservative measures, along with physical therapy, are used to avoid spine surgery, they must be undertaken close to the injury date to be helpful.

**Dr. Ted Lennard** saw Claimant November 24, 2008 and was deposed on February 24,

2009. He reviewed records, performed an exam, and concluded that Claimant had suffered a ruptured disc at C6-7 and severe degenerative disc disease at C5-6. Claimant's disc herniation at C6-7, necessitating surgery, was something relatively new. The herniation at C5-6, however, correlated to severe degeneration. Dr. Lennard admitted that a disc herniation at C6-7 can cause left posterior shoulder pain, although a disc at that low level typically does not cause headaches. It also could potentially cause tingling in the specific fingers.

As for the surgery, Dr. Lennard believed the fusion surgery was appropriate. If, however, symptoms are properly reported within a week or two of their onset, an MRI, along with traction and physical therapy, would have been the appropriate course of care. These measures could have been used to alleviate the need for surgery.

Dr. Lennard said the ruptured disc would have been so painful that he would have anticipated the Claimant seeking immediate medical attention. Even if the disc was progressively enlarging, the pain still would have been severe and immediate. The fact that Claimant delayed treatment for a month, and then made no mention of a work accident to her two treating physicians, convinced Dr. Lennard that Claimant's symptoms were not causally related to the work injury of October 18, 2004.

Even if it had been work-related, Dr. Lennard opined that Claimant's permanent disability, including the ongoing neck pain in the occiput, was only 15 percent to the body as a whole. Dr. Lennard agreed that Claimant's headaches appear to have worsened and that Claimant believed they were disabling, but he did not believe that Claimant differentiated the

location of the headaches. Upon examination, Dr. Lennard found Claimant to have no numbness or hypersensitivity or hyperparasthesia in her neck and arms. He further found that Claimant exhibited only mild diffuse posterior neck tenderness, and no deficits with her reflexes in her arms or neck.

As to future medical, Dr. Lennard did not recommend the use of narcotic medication. He recommended the periodic use of an anti-inflammatory, such as Ibuprofen, because it has equally long-term effectiveness, has no addictive potential, nor problems with constipation or mental status. I find the opinion of Dr. Lennard credible and more persuasive than that of Dr. Koprivica in this case.

### **Vocational Evaluation**

**James England** saw Claimant for a vocational rehabilitation evaluation at the request of Employer on November 11, 2009. He made note of Claimant's significant prior health concerns, including migraine type headaches which caused her to miss work two to three days each month. He also noted a history of pre-existing and ongoing depression, and a prior motor vehicle accident for which Claimant sustained a whiplash injury and received chiropractic care. Based on vocational testing, he believed Claimant had transferable skills to a light level in food service management.

Mr. England's ultimate conclusion, after also considering the rating physicians' opinions, was that Claimant was employable in her past work using Dr. Lennard's restrictions. Conversely, using Dr. Koprivica's restrictions, Claimant would be unemployable due to a

combination of pre-existing and present disabilities. Mr. England noted that Claimant currently was functioning at a sedentary to light level of exertion in her home with her domestic activities.

I find Mr. England's opinion credible in this case.

## CONCLUSIONS OF LAW

### **Claimant Failed to Provide Notice**

Section 287.420 RSMo 2000, requires an employee to provide written notice of the time, place, and nature of the injury as soon as practicable, but not later than 30 days after the work accident. Notice enables an employer to protect itself by prompt investigation and treatment of the injury. *Pursifull v. Braun Plastering & Drywall*, 233 S.W.3d 219 (Mo. App. W.D. 2007).

The timely written notice requirement is excused only upon the showing of good cause or a lack of prejudice to the employer. § 287.420 RSMo 2000. It is uncontroverted in this case that Claimant provided no written notice of her injury within 30 days.

#### **1. No Good Cause**

Claimant is not really sure when she provided Employer with notice of the accident. She initially testified that she telephoned the Superintendent's office to advise him of the work accident and spoke with the secretary. But when pressed for the date or even a time frame for the telephone call, Claimant was not even sure she had made the call. I have found that Claimant did not provide notice, written or oral, at or near the time of the accident.

Claimant presented no evidence to corroborate her contention of a report of injury to the Superintendent at a later date. Her personnel file certainly does not substantiate her contention.

And contrary to Claimant's contentions, the file is not materially incomplete. The fact that the "pink slips" are not in the file are inconsequential since all absences and their reasons are contained on a computer printout. Claimant's serious accusations in her brief that Employer deliberately lost or destroyed records relating to Claimant is simply, on close inspection, not borne out by the evidence.

Moreover, Superintendent Taylor, who was no longer working for the school district, was equally available to both parties. The fact that *Employer* did not call him to testify raises no adverse inference.

Other factors in the case suggest that Claimant had no intention of turning this into workers' compensation prior to her surgery. Evidence of this fact is that she did not respond to her health insurer's inquiry as to whether the injury was work-related. *If* Claimant's injury was work-related, her lack of candor with the health insurer does not bode well for Claimant's credibility on the issue that she provided any notice to Employer. As noted above, I find no credible evidence that Claimant gave notice to Employer until after surgery already was scheduled.

Good cause may also occur when there is evidence that the injury appeared trivial and its seriousness did not become apparent until more than 30 days had elapsed. *Messersmith v. Univ. of Missouri-Columbia*, 43 S.W.3d 829, 832 (Mo. banc 2001). But here, Claimant has never alleged that she did not appreciate the seriousness of her condition, as in *Messersmith*. *See Brown v. Douglas Candy Co.*, 277 S.W.2d 657 (Mo. App. K.C.D. 1955), holding that

employee's lack of notice was fatal to her claim where she fell at work, experienced a severe pain in her back for several months, but failed to report accident to her employer until after diagnosed with a disc injury. I find no good cause for the failure to notify Employer.

## 2. Prejudice

Claimant can demonstrate a lack of prejudice when "evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact-finder." *Willis v. Jewish Hospital*, 854 S.W.2d 82, 85 (Mo. App. E. D. 1993). The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 503 (Mo.App. St.L.D. 1968). If the employer does not admit actual knowledge, the issue becomes one of fact. *Id.* 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. 425 S.W.3d at 503-04. 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 unable to timely investigate. *Pursifull v. Braun Plastering & Drywall*, 233 S.W.3d 219, 223-224 (Mo. App. W.D. 2007).

As noted above, there is no corroborating evidence to demonstrate actual notice at or near the time of the accident. Employer was prejudiced by Claimant's decision to seek medical attention on her own without allowing Employer an opportunity to investigate or to direct medical care. Claimant never requested medical treatment. Even if Claimant had reported the

injury in February or March 2005 in a personal conversation with the Superintendent as she contends, both Dr. Koprivica and Dr. Lennard testified that a course of conservative care could have been undertaken closer to the time of injury to try to alleviate the need for surgery. But here, Claimant simply proceeded on her own, with doctors of her own choosing, without any regard as to how it might affect Employer's potential liability. Claimant failed in her burden to prove that Employer was not prejudiced. Moreover, I conclude Employer presented affirmative evidence of prejudice. Compensation is denied.

### **Medical Causation**

This case arises prior to the 2005 amendments to the workers' compensation law. As to medical causation, the issue is whether the accident was "a substantial factor" in causing the neck injury, need for treatment and subsequent permanent disability. § 287.020.3(2)(a) 2000. It is well established that " 'a preexisting but non-disabling condition does not bar recovery of compensation if a job related injury causes the condition to escalate to the level of disability' [citations omitted]. " *Portwood v. Treasurer of State of Missouri*, 219 S.W.3d 289, 293 (Mo. App. W.D. 2007). Thus, while Claimant may have suffered a prior automobile accident in which she suffered an injury to her neck, there is no MRI to document the extent of the prior injury and no evidence of physical limitations as a result of that prior injury. Still, Claimant has the burden to demonstrate every element of her claim, including medical causation, by "clear evidence." *Frazier v. St. Mary's Honor Center*, 852 S.W.2d 385 (Mo. App. E.D. 1993).

I conclude that Claimant has failed in her burden of proof. There is a complete lack of

medical documentation regarding Claimant's injury in any of the treatment records. Claimant did not seek medical care for at least one month. And then, the record indicates nothing regarding a lifting incident or a work accident. The Claimant had no explanation for the lack of documentation other than the topic simply did not come up at the visit with physicians that she selected.

At her next meeting with her own treating physician, the medical records indicate that Claimant may have had a herniated disc from an automobile accident many years earlier, but again there is nothing to substantiate a work accident or lifting incident that could account for Claimant's physical complaints.

Likewise, there is no work-related etiology or lifting incident noted in Dr. Lee's records. While Claimant submitted her application for disability, signed by Dr. Lee, as evidence of medical causation, such form was signed by Dr. Lee on August 15, 2005. This was nearly two months after the physician released Claimant from his care. It certainly does not represent a contemporaneous medical record that supports a finding of causation. As Dr. Lennard credibly explained, he would have expected an immediate onset of pain and urgent need for medical attention if Claimant had herniated the disc due to the October work accident. The greater weight of the evidence supports the conclusion that Claimant's herniated disc and subsequent need for treatment was not medically and causally related to the work incident.

**Other Issues**

Since I have denied benefits both on the lack of notice and lack of medical causation, I need not address the remaining issues of medical care, temporary total disability, or permanency.

Dated: June 17, 2010

/s/ Victorine R. Mahon  
*Victorine R. Mahon*  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson  
Naomi Pearson  
Division of Workers' Compensation

