Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 05-140864

Employee: Elizabeth Downing

Employer: McDonald's Sirloin Stockade, Inc.

Insurer: Missouri Restaurant Association Insurance Trust

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, read the briefs, heard the parties' arguments, 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 and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert H. House, issued August 17, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of April 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Elizabeth Downing

Injury Nos. 05-140864 & 06-079039

Dependents: N/A

Employer: McDonald's Sirloin Stockade

Additional Party: N/A

Insurer: Missouri Restaurant Association

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

Hearing Date: July 13, 2012

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: 8/6/05 AND 6/12/06
5. State location where accident occurred or occupational disease was contracted: JASPER COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
    BUSING TABLES AND DUTIES OF A WAITRESS
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: BACK
14. Nature and extent of any permanent disability:
15. Compensation paid to-date for temporary disability: $0.00 – BOTH CASES
16. Value necessary medical aid paid to date by employer/insurer?$6,545.44 -- 05-140864
    -0- -- 06-079039

17. Value necessary medical aid not furnished by employer/insurer?

18. Employee's average weekly wages: $184.80 -- BOTH CASES

19. Weekly compensation rate: $132.09 -- BOTH CASES

20. Method wages computation: AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: June 13, 2006, emergency room visit -- $1,105.79
June 15, 2006, emergency room visit -- $1,116.53

20 1/7 weeks of temporary total disability (or temporary partial disability) 20.142 x $132.09 = $2,660.56

100 weeks of permanent partial disability from Employer 100 x $132.09 = $13,209.00

N/A weeks of disfigurement from Employer

22. Second Injury Fund liability: None

TOTAL: $18,091.88

23. Future requirements awarded:

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

THOMAS CARLTON

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Elizabeth Downing

Injury Nos. 05-140864 & 06-079039

Dependents: N/A

Employer: McDonald's Sirloin Stockade

Additional Party: N/A

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AWARD

The parties presented evidence at a hearing on July 13, 2012, regarding injury numbers 05-140864 and 06-079039. Claimant appeared in person and with her attorney, Tom Carlton. Employer/insurer appeared through their attorney, Greg Carter. Also appearing was Matt Adrian, who represented Freeman Healthcare System regarding medical fee dispute number 06-00764 relating to injury number 06-079039.

The parties agreed that claimant's average weekly wage was $184.80 for both cases representing a workers' compensation rate of $132.09 per week. Employer/insurer paid no temporary total disability benefits and paid medical benefits in the amount of $6,545.44 which the employer/insurer represent were paid in the '05 case. An off-the-record discussion was held concerning the issues to be presented for determination at the hearing. The following issues were stated by the parties:

Injury number 05-140864:

1. Whether claimant sustained an injury by accident arising out of and in the course and scope of her employment.

2. Whether claimant provided sufficient notice as required under Missouri law to the employer of her alleged accidental injury at work.

3. Whether claimant's current physical condition was caused by her alleged accidental injury at work.

4. The liability of employer/insurer for past medical care.

5. The nature and extent of claimant's disability for the liability of employer/insurer for past temporary total disability benefits.

Injury Number 06-079039:

1. Whether claimant sustained an injury by occupational disease arising out of and in the course and scope of her employment or whether she was exposed to the hazards of an occupational disease through repetitive trauma.

2. Whether claimant's current physical condition was caused by her alleged occupational disease.

3. Whether claimant provided sufficient notice of her alleged occupational disease.

4 The nature and extent of any disability.

5. The liability of employer/insurer for past medical care.

6. The liability of the employer/insurer for any alleged temporary total disability benefits.

There was also the independent issue of a medical fee dispute with Freeman Healthcare System seeking payment for two emergency room visits by claimant. One emergency room visit was for services provided on June 13, 2006, in the amount of $1,105.79. The person listed as having authorized the services was Jim Vaughn, manager. The second services were provided

through the emergency room on June 15, 2006, in the amount of $1,116.53 with Amy Clements, assistant manager, being listed as the person authorizing such care. The medical fee provider has dismissed all other medical fee applications for direct payment asserted against employer/insurer for the underlying cases based upon lack of authorization.

Claimant was the only witness testifying at the hearing. Terry McDonald, the owner of Sirloin Stockade, claimant's employer, testified by deposition. Jimmy Edward Vaughn, the manager for employer, also testified by deposition as did Amy Clements, who was the assistant manager/waitress for employer. Additionally, LuAnn Henderson, who is an adjuster for the insurer at the time of the events in this case also testified by deposition. I find the testimony of those witnesses to be credible.

The circumstances concerning claimant's injury in this case and the circumstances that followed are in dispute. Claimant alleges that she injured her back on August 6, 2005, while leaning over a table to clean it off. When she was returning to an upright position, she felt immediate pain in her back. That pain was enough for her to catch her breath. Nevertheless, claimant continued to work. Claimant testified in her deposition and at hearing that she might have mentioned in passing to Jim Vaughn, the manager, what happened. However, claimant did not state in her testimony that she told Mr. Vaughn anything specific about her injury that allegedly occurred while leaning over and then returning to an upright position while cleaning off a table. In her deposition testimony she testified that she said to him that she had just pulled something. Mr. Vaughn then rubbed her back for a couple of seconds similar to a pat on the back. Mr. Vaughn testified that he does not recall specifically that incident, but that claimant could have told him in August of ‘05 that she had lifted a tray and felt pain in her back after which he rubbed her back. Mr. Vaughn testified that that could have happened “because I’ve rubbed their backs and shoulders many times … oh, yes, when they have their monthly thing they complain about it it’s just you hear stuff all the time about their aches and pains.” In response to the question, “Do they complain to you about their backs from lifting of trays?" Mr. Vaughn replied, “ I mean they just complain that their back is sore. I don't know."

Employer/insurer did not file a report of injury at that time, nor did claimant request any treatment at that time. Claimant continued to work without receiving any treatment until March 7, 2006, when she went on her own to a chiropractor, Dr. Webb. Dr. Webb noted in his records that claimant's diagnosis was "Subacute exertional right sciatic radiculitis associated to lumbosacral segmental dysfunction." A specific complaint noted in claimant's history was right hip pain radiating down the right leg to the calf. Additionally, there were two separate records from the same date indicating that claimant's symptoms were gradual for three months but got better at times and that claimant "thinks may be related to activities at work but not positive." A similar record on that date (not in the records certified by Dr. Webb's office) simply indicated that claimant "thinks maybe related to activities but not positive," without any indication of work. Dr. Webb's records also note on March 7, 2006, claimant's low back pain and right leg pain. Claimant continued to treat with Dr. Webb, who on April 28, 2006, ultimately concluded that claimant needed an MRI. He advised claimant to check with her insurance for an MRI. He continued to treat her through May 4, 2006.

Claimant eventually was seen at Occumed in Joplin, Missouri on May 12, 2006. The owner of Sirloin Stockade, Terry McDonald, and the manager, Jim Vaughn, along with the assistant manager, Amy Clements, deny authorizing any treatment. So too initially did, LuAnn Henderson, the adjuster for the insurance company, who, in her deposition, initially stated that Jim Vaughn had authorized treatment. However, LuAnn Henderson, later in her deposition, admitted that she had authorized treatment and specifically authorize the MRI. Employer/insurer paid for the services of Occumed. Occumed also provided an EMG which indicated the possibility of a herniated disk. The EMG was paid for by employer/insurer. Claimant was treated at Occumed, and an MRI was obtained which demonstrated a large L5-S1 disc herniation. The MRI was paid for by the employer/insurer. The initial Occumed patient registration/admission from May 12, 2006, notes claimant's pain in her back and right leg and indicates authorization from Jim Vaughn, manager of Sirloin Stockade. It also noted the guarantor as Sirloin Stockade. On June 14, 2006, the Freeman Occumed Worker's Compensation referral form noted a referral to Dr. Ipsen as approved by "LuAnn" on June 14, 2006. Claimant was assessed by Dr. Ipsen. He recommended surgery. However, on June 20, 2006, as set out in the notes included as an exhibit in LuAnn Henderson's deposition, the insurance company denied

authorization for surgery. Nevertheless, on June 23, 2006, claimant proceeded with surgery without authorization. The surgery consisted of a right L5-S1 micro diskectomy. Claimant continued to have complications and a second surgery was performed by Dr. Ipsen on June 25, 2006, with a complete L5-S1 laminectomy and diskectomy. At the time of the surgeries there was a concern as to whether or not claimant had a malignancy at that area. That was found not to be the case. Employer/insurer paid for Dr. Ipsen's treatment prior to claimant's surgery.

Claimant continues to have problems with her back. She has severe pain going down her left leg with numbness from the waist down to her foot. She continues to have some problems with numbness on the right through the right leg, but that is only intermittent. She continues to have right leg pain. Claimant has stated that her left foot feels like she is always stepping on a rock at her heel and that she continues to have some pain in her lower back.

Claimant obtained the services of Dr. P. Brent Koprivica, an occupational medicine specialist, who opined that claimant has sustained a permanent partial disability in the amount of 25 percent to the body as a whole as a result of her back and leg problems. He noted claimant's pain and numbness in her legs, problems with her balance and her walking with a limp. He further opined that the initial annular injuries likely occurred on August 6, 2005, when she was bending over a table but that her ongoing work activities aggravated the problem and progressed the injury to the point where her condition became disabling. In effect, he found that claimant's disability was a result of a repetitive injury and occupational disease through her work which concluded on June 12, 2006. He found that the repetitive injury is what necessitated the need for her surgeries. He further found that the care and treatment that she received including her surgeries were reasonable and necessary as a result of her occupational disease. Dr. Koprivica further found that claimant was temporarily and totally disabled from June 13, 2006, until October 2006 following her diagnosis of the need for and the completion of surgery.

It is clear from the evidence in this case that claimant suffered an event on August 6, 2005, when she was leaning over a table to clean it off. She felt pain as she returned to a standing position. There is no evidence to the contrary. Apparently claimant, in passing mentioned her injury to Jim Vaughn, the manager, of the Sirloin Stockade, without any details or

a specific assertion of relation to work. Mr. Vaughn did not specifically remember that happening, and claimant throughout her testimony by deposition and at trial stated that the "notice" of her injury was not specific. Nevertheless, Mr. Vaughn admitted in his deposition that that notice may well have occurred since he often pats or rubs on the waitresses who complain about their various pains, including back pain. However, based upon the entire tenor of claimant's testimony along with that of the various witnesses for the employer, I cannot find that claimant gave a sufficient specific notice of her accident to place employer on notice of a specific and identifiable injury on August 6, 2005. Apparently, neither claimant nor the employer placed any significance to the injury at the time it occurred sufficient for claimant to seek treatment or employer to report the incident to the insurer or to the state. Indeed, although claimant suffered immediate pain and continued to have pain on and off thereafter, she apparently was unaware of the seriousness of her injury until later when the pain became significant radiating pain into her legs with numbness into her legs. Claimant later sought treatment on her own from a chiropractor noting right hip and radicular pain along with low back pain as noted in Dr. Webb's records. At some point in time, months after the accident, she had conversations with Jim Vaughn, the manager, and Terry McDonald, the employer, regarding her problems sufficient for Mr. Vaughn to visit with LuAnn Henderson, an adjuster for the employer/insurer's workers' compensation insurance company. Exactly what kind of notice was provided at that time is difficult to determine based upon the testimony of all of the witnesses in this case including claimant. Nevertheless, at some point in time, and certainly by May 18, 2006, the insurance company was aware of claimant's injury, and claimant was sent to Occumed with authorization for treatment provided directly by LuAnn Henderson. Employer denies authorizing any treatment prior to that of LuAnn Henderson. From the record, however, it is certain that claimant received authorized treatment from Occumed during which an EMG and MRI was provided. Occumed referred claimant to Dr. Ipsen who recommended surgery. When Dr. Ipsen recommended surgery, the employer/insurer decided not to authorize the surgery pending further investigation and informed both claimant and Dr. Ipsen of that fact. Nevertheless, claimant on her own decided to go forward with the first surgery which Dr. Ipsen performed. She underwent a second surgery by Dr. Ipsen two days later. Employer/insurer have denied the claim indicating that they were willing to provide treatment as needed. At trial employer/insurer denied both the '05 and the '06 claims.

Based upon all of the evidence presented in this case I find and conclude as follows: Claimant provided notice to the employer of the '05 injury without any specific details on August 6, 2005. The notice that claimant gave on the date of the injury was insufficient for employer to be put on notice of claimant's accidental injury since it appears that neither employee nor employer/insurer believed at that time that that event was of any significance. No additional information was provided to employer/insurer until after claimant received treatment from her chiropractor and months later sought additional medical care from employer/insurer that included an EMG and an MRI. It was at that time the parties were aware of the significance of her condition and the work relatedness.

There was concern by Dr. Estep at Occumed and the employer/insurer of the work relatedness of claimant's condition. In the occupational health clinic notes from Occumed on June 5, 2006, Dr. Estep stated the following:

> Recommend orthopedic spine neurosurgical opinion. However upon calling the insurance company, the insurance company is questioning whether or not this is related to the injury on 8/6/05. To help differentiate and expedite the issue, it is recommended at this time that an EMG of the right lower extremity to help differentiate whether or not this is new or old be proceeded with. If the EMG shows an acute radiculopathy with less than three to six months worth of time frame, this may in fact be a new injury versus if it does show chronic issues with greater than six months of age, then it would be consistent with the injury on 8/6/05. This was discussed openly with the insurance company and they did express understanding and agreement. Recommend at this time that an EMG be immediately proceeded with. Arrangements are made at this time. She may return to work with no lifting over 15 pounds, minimize bending or twisting. We will see her after the EMG and then be able to discuss whether or not to proceed with neurosurgical evaluation under a work related issue or whether or not it is non-work related.

After the EMG was performed and the results evaluated, Dr. Estep on June 8, 2006, wrote the following:

> SUBJECTIVE: She is seen for re-evaluation for an L4-L5 disc with radiculopathy and right lower extremity atrophy. She states she is still having pain. She now presents for an evaluation.
>
> She has undergone electromyelographical evaluation by Dr. Robbie yesterday. Dr. Robbie does note an L5-S1 radiculopathy on the right lower extremity shown to be chronic in nature. It is mild in nature, but it is definitely chronic. It has been there at least greater than six months.
>
> OBJECTIVE: She continues to show atrophy associated with her right lower extremity associated with the calf. She walks with a mild atelectatic gait.
>
> IMPRESSION: 1) RIGHT L4-L5 DISC WITH RADICULOPATEY.
> 2) RIGHT LOWER EXTREMITY ATROPHY.
>
> PLAN: Recommend a surgical opinion at this time. Recommend no lifting over 15 pounds, minimize bending and twisting, alternate sit/stand/walk every 15-20 minutes.

From the June 5, 2006, and June 8, 2006, records of Dr. Estep, it is clear that it was his opinion claimant's condition was work related since it was not a new injury but a chronic injury of greater than six months. Upon that basis, he recommended a surgical opinion. At that time claimant was referred to Dr. Ipsen, an orthopedic surgeon, which was authorized by Luann Henderson for employer's workers' compensation insurance carrier for an evaluation. Clearly neither employer nor claimant were aware of the work relatedness of her injury until the opinion of Dr. Estep and later by Dr. Koprivica. Claimant's injury was insignificant except as to immediate pain at the time it occurred on August 6, 2005. Her condition worsened over time to the point that she need additional treatment in March of 2006 from her chiropractor, Dr. Webb,

and later by the doctors at Occumed, and Dr. Ipsen. This is similar in circumstance to the facts in *Messersmith v. University of Missouri-Columbia/Mt. Rehabilitation Center,* 43 SW3d 829 (Mo banc 2001). The Missouri Supreme Court in *Messersmith* found that Messersmith's failure to provide notice as required under §287.420, RSMo. which at the time of the August 6, 2005, injury would have been not later than 30 days after the accident was excused by good cause because of the nature of her injury. As stated by the Court in *Messersmith,* "Messersmith's injury is the type of latent injury that this Court has held to be good cause for an innocent delay in filing an injury report with an employer." Citing *State exhibit rel. Buttiger v. Haid,* 330 Mo. 1030, 51 SW2d 1008. *Messersmith,* 43 SW3d 832. As stated in *Messersmith* by applying *Buttiger,* "The failure to give the required notice has been excusable for good cause where at the time the accident occurred the injury appeared trivial to the employee and its seriousness did not become apparent until more than 30 days had elapsed." That is clearly the situation in this case. Indeed, neither the claimant nor her employer believed that her injury was significant at the time it occurred when she gave no details of an injury to her employer on August 6, 2005, but merely indicated back pain with or without a mention of a specific event of lifting dishes and clearing tables as part of her duties as a waitress. Claimant's testimony varies as to precisely what she may have stated and the manager of her employer's business indicated that she may have given details but he doesn't recall. Based upon the Supreme Court's decision in *Messersmith*, I find that claimant in all likelihood did not give specific enough notice on August 6, 2005, or within 30 days thereafter to put the employer on notice of her injury, but that there is good cause for that failure based upon the circumstances of this case and the latent nature of her injury. Moreover, there is no indication within the record that failure to report the accident earlier resulted in any prejudice to the employer or had it initiated its investigation earlier. It is clear from the testimony of Mr. Vaughn, the manager for the employer's business, that he was well aware of waitresses, including claimant, having back problems and complaints from their heavy lifting without reporting any of those situations. Additionally, there is no medical evidence that submitting claimant's treatment to a doctor earlier would have changed her condition or the need for any treatment. As a result, I find that there is good cause excusing claimant from specific notice of an injury at work from August 6, 2005, and I find and conclude that there is no prejudice to the employer as a result thereof.

Employer/insurer also deny the 2005 case based upon a lack of medical causation for claimant's current condition. It is clear from the opinions of Dr. Koprivica and the findings of Dr. Estep at Occumed, that claimant's condition was caused by her work. Dr. Estep, albeit without any direct use of the word caused by or causation in his report indicated the work-related nature of the injury based upon it being at least six months old. Dr. Koprivica was more specific in finding the work relatedness of the original event on August 6, 2005, but finding a specific occupational injury (as claimed in the 2006 claim) as being the ultimate determinant of claimant's disability. Consequently, I find that claimant's initial injury was caused her event on August 6, 2005, as noted by Dr. Koprivica without any contradiction by other physicians in the record, and indeed confirmed by Dr. Estep.

Employer/insurer have also denied the '06 claim in which claimant alleges an occupational disease or repetitive trauma injury. It is clear from claimant's testimony as well as that of Jim Vaughn that the waitresses at Sirloin Stockade have complained often about their backs. It is also clear from the testimony of claimant and Jim Vaughn that as a waitress claimant had to clean tables, lift dishes, glasses and other items of a heavy nature on a repetitive basis. Indeed, there is no evidence to the contrary. Based upon that set of circumstances, Dr. Koprivica has opined that claimant suffered an occupational disease, repetitive trauma injury. He found that the prevailing factor resulting in the large disc herniation at L5-S1 was her bending and lifting task as a waitress over time. He concluded that the initial annular tear is likely to have occurred on August 6, 2005, but that claimant's ongoing work activities further aggravated and progressed her initial injury to the point that it became disabling and necessitated medical care. In effect, Dr. Koprivica found that that repetitive injury or occupational disease was a result of her work and exposure to the hazard of an occupational disease. There is no medical or other expert evidence to the contrary and I find his opinion to be credible. It is clear from the medical records and the EMG as analyzed by Occumed that claimant had sustained an injury to her back which the physicians at Occumed sufficiently believed was work related so that they referred her to Dr. Ipsen for treatment. The Occumed doctors did not indicate work-relatedness through an occupational disease. That was solely the conclusion of Dr. Koprivica. Based upon claimant's testimony, along with all of the evidence in this case, including the uncontradicted opinions of Dr. Koprivica, I find that claimant sustained an injury by occupational disease arising out of and

in the course and scope of employment that is the prevailing factor in causing her condition and disability and that she was exposed to the hazards of an occupational disease through her bending and lifting activities at work over time. As a result, I find and conclude that claimant's herniated disc and the need for treatment as a result thereof were caused by her occupational disease and that she was exposed to the hazards of an occupational disease. That is ultimately the conclusion of Dr. Koprivica, which I find to be credible.

Employer/insurer have denied the compensability of this case because claimant did not provide notice of the occupational disease. I find and conclude that the evidence is sufficient and credible that claimant was injured August 6, 2005. However, there is insufficient evidence to find that her continuing problems were from that injury alone. I find Dr. Koprivica credible, persuasive, and uncontradicted in his conclusions that following the August 6, 2005, event, claimant continued to work and was exposed to the hazards of an occupational disease. It was not until Dr. Koprivica's report beginning on June 11, 2007, that claimant was aware through an expert opinion that her pain, including radiating pain from her back to her legs (with numbness) was a result of an occupational disease from her work. Section 287.420, RSMo., states that "[n]o proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice … has been given to the employer no later than 30 days after the diagnosis of the condition[.]" However, *Allcorn v. TAP Enterprises, Inc.*, 277, SW3d 823 (Mo.App. SD 2009), holds that notice is not necessary until a physician relates a diagnosis of a condition as an occupational disease or repetitive trauma from work. That did not occur in this case until the opinion of Dr. Koprivica, long after claimant had filed her claim in this case. As a result, I find that claimant has provided sufficient notice under Missouri law in injury number 06-079039 pursuant to the interpretation of §287.420, RSMo., as provided in *Allcorn*.

Claimant has sought the payment of medical bills from Webb Chiropractic, Dr. Brian Ipsen, and Freeman Hospital. All of the bills from Webb Chiropractic deal with treatment prior to notice to employer/insurer and prior to any authorization provided by employer/insurer. The bills from Dr. Ipsen relate to surgical treatment following employer's denial of surgery. Claimant clearly was informed of the lack of authorization for her surgery by an adjuster for the insurer and

yet proceeded with the surgery anyway. Employer/insurer had provided authorized treatment by Occumed and later by Dr. Ipsen. Employee clearly was aware that the employer/insurer desired to investigate further the claim prior to authorization of surgical treatment, yet decided to have that treatment preformed anyway. Employer/self-insurer denied past medical care on the basis of lack of authorization. Employer/self-insurer also generally denied this claim. When there is a general denial of benefits, a claimant may seek medical care on his own. Wiedower v. ACF Industries, Inc. 657 S.W.2d 71 (Mo.App. E.D. 1983); Beatty v. Chandeysson Electric Company, 238 Mo.App. 868, 190 S.W.2d 648 (Mo.App. 1945). The general denial found in the Answer is not a full reflection of the circumstances of this case especially since employer/insurer in its Answer stated their willingness to provide treatment. It is unlike the situation in Wiedower in which a general denial of treatment entitled the claimant to obtain his own medical care and be reimbursed for those costs. This is more like the set of circumstances found in Anderson v. Parrish, 472 S.W.2d 452 (Mo.App.1971), in which at the time of the accident the claimant was sent to a physician by employer, and the claimant "therefore, knew that the employer was ready and willing to furnish him medical treatment. . . . The Act gives the employee the right to employee's own physician at his own expense, and it only when the employer has notice that the employee needs treatment or demand is made on the employer to furnish medical treatment, and the employer refuses or fails and neglects to provide needed treatment, that the employer is held liable for the medical treatment procured by the employee." Anderson, 472 S.W.2d 457.

There is no indication within the records of Dr. Ipsen or within the report of Dr. Koprivica that the need for either of claimant's surgeries was required on an "emergency" basis. Although Dr. Ipsen noted on June 25, 2006 that "Claimant proceeded to both surgeries without giving the employer/insurer the opportunity to investigate the claim further or be given the opportunity to either accept or decline surgical treatment later. They did not authorize either surgery. Hayes v. Compton 135 S.W.3d 465, 471 (Mo.App. S.D. 2004). In effect, that was a decision by claimant to seek treatment on her own when employer/insurer did not authorize such care pending investigation. As a result, I deny claimant's request for the treatment provided by Dr. Ipsen for his two surgeries and additionally the services provided by Freeman Hospital thereafter for the dates of service of June 23, 2006, June 25, 2006, and August 16, 2006. Additionally, I deny the request for treatment from Southwest Anesthesiology which also was as

a result of the surgeries which were not authorized. I additionally deny the treatment at Webb Chiropractic since employer was not given the opportunity to provide treatment to claimant at that time.

Claimant had additional services from the emergency room at Freeman Hospital on June 13, 2006, and June 15, 2006, during the period of time that claimant was under authorized care by the employer/insurer. Although it is unclear from the records that those services were specifically authorized by the employer, it is clear from claimant's testimony and the medical records that that treatment was required on an emergency basis. Since I have found that claimant's occupational disease injury was compensable, I order employer/insurer to pay to Freeman Healthcare System the bills for the dates of service to Freeman Hospital for the emergency room care of $1,105.79 for the date of service on June 13, 2006, and $1,116.53 for the emergency room care for the date of service of June 15, 2006.

There is an underlying medical fee dispute number 06-00764 filed by Freeman Healthcare system for those two emergency room visits. The healthcare provider indicates that there were authorizations from two individuals, specifically Jim Vaughn and Amy Clements for the two bills. However, the testimony of those two witnesses indicated they did not authorize such treatment nor request that any bills be sent to them. I find their testimony to be credible. However, at that time medical care was being authorized by LuAnn Henderson, an adjuster for the insurance company. There is no indication that she authorized those bills. As a result, I deny the medical fee dispute based upon the lack of authorization. *Curry v. Ozark Electric Corporation,* 39 SW3d 494 (Mo bank 2001). However, since I have ordered the bills to be paid in the underlying claim, it is clear that the result is the same -- that Freeman Health System should be paid for its services.

Claimant has sought temporary total disability benefits for the time frame that she was recovering from her surgery. Although I have denied the specific payment of the past medical bills relating to her surgeries, it is clear that from the testimony of Dr. Koprivica and the medical records in this cases that claimant was temporarily and totally disabled from June 13, 2006, until October 2006. However, it is unclear that Dr. Ipsen released her in October of 2006, since he

continued to treat her thereafter until she was released fully on June 28, 2007. Apparently, on August 28, 2006, Dr. Ipsen wanted to see claimant again in eight weeks for a repeat evaluation to see whether she was ready to go back to work. Claimant canceled her appointment with Dr. Ipsen in October of 2006, and she continued to have problems. However, it is apparent that Dr. Koprivica believes that claimant as of October 2006, after reviewing the medical records and the history given to him by claimant, had reached maximum medical improvement for her condition. As a result, I order employer/insurer to pay claimant temporary total disability at the agreed upon rate of $132.09 from June 13, 2006, to October 31, 2006. I find and conclude that her temporary total disability is the result of the ’06 occupational disease injury and not the ’05 accidental injury claim.

Claimant also seeks permanent disability. It is clear that claimant continues to have significant problems. The only rating in this case is Dr. Koprivica's rating of 25 percent to the body as a whole based upon claimant's back pain, her radiating pain, the numbness throughout her legs and her altered gate. I find that Dr. Koprivica’s rating is appropriate after reviewing all of the medical records in this case, claimant’s testimony, and Dr. Koprivica's report. As a result, I order employer/insurer to pay to claimant 25 percent of the body as a whole at the agreed upon rate of $132.09 for a total of $13,209.00 in injury number 06-079039. I find no liability from the 05-140864 injury alone but only as it is a part of the injury by occupational disease.

Claimant's attorney, Tom Carlton, is allowed an attorneys fees of 25 percent of the amounts awarded herein which shall constitute a lien upon this award.

Signed: 8-17-12

Made by: /s/ Robert H. House
Robert H. House
Administrative Law Judge
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 06-079039

Employee: Elizabeth Downing

Employer: McDonald's Sirloin Stockade, Inc.

Insurer: Missouri Restaurant Association Insurance Trust

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 parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) whether employee sustained an injury by occupational disease arising out of and in the course and scope of employment; (2) whether employee's current physical condition was caused by the alleged occupational disease or whether employee was exposed to the hazards of an occupational disease under Missouri law; (3) whether employee provided sufficient notice to the employer as required under Missouri law; (4) the nature and extent of any disability; (5) past medical liability; and (6) temporary total disability.

The administrative law judge rendered the following findings and conclusions: (1) employee provided sufficient notice under Missouri law; (2) employee sustained an injury by occupational disease arising out of and in the course and scope of employment that is the prevailing factor in causing her condition and disability, and was exposed to the hazards of an occupational disease through her bending and lifting activities at work over time; (3) employee is not entitled to her past medical expenses for two surgeries performed by Dr. Ipsen, and for services provided by Freeman Hospital on June 23, 2006, June 25, 2006, and August 16, 2006; (4) employee is not entitled to her past medical expenses for treatment from Southwest Anesthesiology; (5) employee is not entitled to her past medical expenses for treatment from Webb Chiropractic; (6) Freeman Healthcare system's medical fee dispute is denied based on a lack of authorization; (7) employer is liable for temporary total disability benefits from June 13, 2006, to October 31, 2006; and (8) employer is liable for permanent partial disability benefits consistent with a finding of a 25% permanent partial disability of the body as a whole.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in failing to award employee's past medical bills for surgeries incurred after the employer denied medical treatment recommended by the authorized treating doctor.

For the reasons explained below, we modify the award of the administrative law judge as to the issue of past medical expenses.

Findings of Fact
The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

Past medical expenses
Employer initially authorized and paid for conservative medical treatment for employee's low back injury. Meanwhile, the insurer was questioning employee's work comp claim. On June 5, 2006, the adjustor, LuAnn Henderson, spoke with employee and told her that the insurer had concerns about the compensability of her claim in light of the 2005 amendments to the Missouri Workers' Compensation Law, and what Ms. Henderson felt was an unusual timeline for employee's low back symptoms. Ms. Henderson told employee that she was going to speak to the employer, review some records, and make a more informed decision about authorizing treatment.

Ms. Henderson authorized the treating physician, Dr. Estep, to obtain an EMG study to see if employee's nerve problems were new or chronic, with the understanding that if the EMG revealed the problems were new, the claim would be denied, because this would not be consistent with employee's claimed date of injury. The EMG showed a chronic problem, consistent with employee's date of injury, and Dr. Estep recommended a neurosurgical consultation. Ms. Henderson authorized the consultation. Dr. Ipsen, the surgeon, recommended an MRI, which Ms. Henderson also authorized. The MRI revealed a large herniation of the L5-S1 disc, and Dr. Ipsen recommended a microdiscectomy, given the size of the herniation and the severity of employee's symptoms. Employee had tried physical therapy without improvement, and was taking Percocet which also wasn't helping. Dr. Ipsen believed that it was unlikely that the disc pathology at L5-S1 would readily improve with epidural steroids. The provider called the insurer, and Ms. Henderson's supervisor told the provider that the insurer would not authorize surgery.

On June 20, 2006, Ms. Henderson spoke to employee about the surgery and told her that the insurer couldn't authorize such a major expense as surgery given the questions the insurer had about the compensability of the claim. Employee was tearful and upset; she was in a lot of pain. Ms. Henderson reiterated the insurer's concerns with the timeline of employee's symptoms, the possible effect of the 2005 amendments, and the fact Ms. Henderson wasn't able to read some handwritten chiropractor notes and was waiting for the chiropractor to respond to a request for typewritten notes. Employee spoke to Ms. Henderson again on June 22, 2006, and Ms. Henderson again told her that the issue was employee "waited nine months to decide it happened at work," but that Ms. Henderson would get all the information together and confer with her supervisor about the effects of the 2005 amendments "on compensability." Ms. Henderson told employee that, hopefully, she could make a decision that day. Ms. Henderson did not speak again with employee.

Employee obtained a personal loan and underwent the surgery recommended by Dr. Ipsen on June 23, 2006. Following that surgery, employee experienced complications requiring a

second surgical intervention on June 25, 2006. Employee also underwent follow-up care at Freeman Hospital.

Employee credibly testified (and we so find) that she remains liable for the medical bills contained in Employee's Exhibit M. Those bills reflect the following charges: $663.00 from Webb Chiropractic Clinic, $14,369.60 from Dr. Ipsen's office, $2,208.00 from Southwest Anesthesiology, and $31,392.77 from Freeman Health System, for a total of $48,633.37. We note, however, that employee testified that the bills in Exhibit M total $43,399.27.

Conclusions of Law

Past medical expenses

Employee suffered a compensable low back injury. The only question before this Commission is whether employee is entitled to her past medical expenses incurred after employer failed to authorize the surgery recommended by the treating physician. To answer that question, we turn to § 287.140.1 RSMo, which 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. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

Under the foregoing provision, an employer has the statutory right to direct an employee's medical treatment for a work injury, including the right to choose the providers. On the other hand, where the employer has notice of an employee's need for treatment but refuses or fails to provide it, the employee has the right to obtain medical treatment on her own, while later seeking an award of past medical expenses. *Reed v. Associated Elec. Coop., Inc.*, 302 S.W.3d 693, 700 (Mo. App. 2009). Here, employer had notice of employee's need for surgery when its authorized treating physician, Dr. Ipsen, recommended a microdiscectomy. The only question is whether Ms. Henderson's conversations with employee constituted a refusal or a failure to provide care, such that employee was entitled to pursue her own treatment and obtain an award of past medical expenses.

The courts have held that an employer's equivocation on whether to provide treatment constitutes a refusal. *Banks v. Springfield Park Care Ctr.*, 981 S.W.2d 161 (Mo. App. 1998). In *Banks*, the employee wanted to proceed with a recommended surgery. *Id.* at 162-63. The employer told employee it was going to review her case and try to come up with a reasonable medical plan and that if she went ahead and obtained an unauthorized surgery, it would expect her to pay for it. *Id.* at 163. Employee underwent the surgery about a month later. *Id.* The *Banks* court held the employer was liable for the bills from the surgery, because the employer had notice of the need for treatment and failed to provide it. *Id.* at 164.

Employer attempts to distinguish *Banks* on the basis that, there, the employee waited about thirty days to obtain the needed treatment, while here, employee underwent

surgery only one day after her last conversation with Ms. Henderson. Employer argues that employee was required to give Ms. Henderson more time (presumably at least thirty days), and that employee's failure to do so reflects a desire on employee's part to select her own treatment at her own expense. We are not persuaded. This employee did not proceed with surgery based on some independent desire to see her own doctor rather than employer's doctor, or to obtain some course of treatment that employer's doctors would not provide. Rather, employee simply proceeded on a recommendation from Dr. Ipsen, the doctor employer sent her to see. These facts do not reflect a "desire" on the part of employee to "select [her] own physician, surgeon, or other such requirement at [her] own expense." § 287.140.1 RSMo.

Meanwhile, Ms. Henderson's reluctance to authorize surgery was not premised on some belief that surgery might not be an appropriate treatment for employee, or that another doctor besides Dr. Ipsen should provide it—rather, Ms. Henderson told employee she could not authorize the surgery because she suspected that employee's injuries were not compensable. Ms. Henderson ultimately agreed, in her testimony, that employer "denied" medical treatment owing to concerns about "compensability." We do not believe that employer's statutory right to direct treatment invested this employer with the right to tell employee to ignore the recommendation from Dr. Ipsen and wait, in severe and unrelenting pain, for no other reason than to allow Ms. Henderson time to build her case for denying the claim altogether.

Employer's argument that employee should have waited also invites the question what would have been the difference in this case if she *had*? In either circumstance, employer remained entitled to pursue its theory that employee's claim was not compensable, while employee was entitled to pursue her claim for past medical expenses, with both parties assuming the risk that their respective positions would be rejected by an administrative law judge. Employee suggests that to accept employer's argument would provide adjustors an incentive to equivocate or delay authorization for particular medical treatments until the employee obtains her own, providing the employer grounds for a "lack of authorization" defense at trial and a possible denial of past medical expenses, even where (as here) the fact-finder finds a compensable injury. This strikes us as a reasonable concern.

Ultimately, in light of these considerations, and because the Missouri case law makes clear that, "[a]n employer's duty to provide statutorily-required medical aid to an employee is absolute and unqualified," *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007), we conclude that employer's failure to authorize the surgery recommended by Dr. Ipsen amounted to a refusal or failure to provide treatment. As a result, employer is obligated to pay employee's past medical expenses arising from her compensable injury.

The total amount of charges reflected in the bills, according to our calculation, is $48,633.37. But employee identified $43,399.23 as the total amount of past medical expenses in both her testimony and in her brief filed with the Commission. From the document entitled "ITEMIZED BILLS" contained in Exhibit M, it appears that, for unknown reasons, employee left out of her calculations certain charges from Freeman Health

System for various service dates between May 12, 2006, and August 16, 2006. Employer did not put on any evidence to show that employee's liability for any of the charges reflected in the bills from Freeman Hospital has been extinguished in any amount by write-offs, discounts, or any source falling outside the scope of § 287.270 RSMo. See *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 823 (Mo. 2003). But because employee appears to admit or concede that her liability does not equal the total amount of the charges reflected in the bills, we will not second-guess her accounting.

We conclude employee is entitled to, and employer is obligated to pay, $43,399.23 in past medical expenses.

Award

We modify the award of the administrative law judge as to the issue of past medical expenses. Employee is entitled to, and employer is obligated to pay, $43,399.23 for employee's past medical expenses flowing from her compensable injury.

In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Robert H. House, issued August 17, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 4th day of April 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Elizabeth Downing

Injury Nos. 05-140864 & 06-079039

Dependents: N/A

Employer: McDonald's Sirloin Stockade

Additional Party: N/A

Insurer: Missouri Restaurant Association

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

Hearing Date: July 13, 2012

Checked by:

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: 8/6/05 AND 6/12/06
5. State location where accident occurred or occupational disease was contracted: JASPER COUNTY, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? YES
7. Did employer receive proper notice? YES
8. Did accident or occupational disease arise out of and in the course of the employment? YES
9. Was claim for compensation filed within time required by Law? YES
10. Was employer insured by above insurer? YES
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
    BUSING TABLES AND DUTIES OF A WAITRESS
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: BACK
14. Nature and extent of any permanent disability:
15. Compensation paid to-date for temporary disability: $0.00 – BOTH CASES
16. Value necessary medical aid paid to date by employer/insurer?$6,545.44 -- 05-140864
    -0- -- 06-079039

17. Value necessary medical aid not furnished by employer/insurer?

18. Employee's average weekly wages: $184.80 -- BOTH CASES

19. Weekly compensation rate: $132.09 -- BOTH CASES

20. Method wages computation: AGREEMENT

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: June 13, 2006, emergency room visit -- $1,105.79
June 15, 2006, emergency room visit -- $1,116.53

20 1/7 weeks of temporary total disability (or temporary partial disability) 20.142 x $132.09 = $2,660.56

100 weeks of permanent partial disability from Employer 100 x $132.09 = $13,209.00

N/A weeks of disfigurement from Employer

22. Second Injury Fund liability: None

TOTAL: $18,091.88

23. Future requirements awarded:

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

THOMAS CARLTON

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Elizabeth Downing

Injury Nos. 05-140864 & 06-079039

Dependents: N/A

Employer: McDonald's Sirloin Stockade

Additional Party: N/A

Insurer: Missouri Restaurant Association

Hearing Date: July 13, 2012

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

Checked by:

AWARD

The parties presented evidence at a hearing on July 13, 2012, regarding injury numbers 05-140864 and 06-079039. Claimant appeared in person and with her attorney, Tom Carlton. Employer/insurer appeared through their attorney, Greg Carter. Also appearing was Matt Adrian, who represented Freeman Healthcare System regarding medical fee dispute number 06-00764 relating to injury number 06-079039.

The parties agreed that claimant's average weekly wage was $184.80 for both cases representing a workers' compensation rate of $132.09 per week. Employer/insurer paid no temporary total disability benefits and paid medical benefits in the amount of $6,545.44 which the employer/insurer represent were paid in the '05 case. An off-the-record discussion was held concerning the issues to be presented for determination at the hearing. The following issues were stated by the parties:

Injury number 05-140864:

1. Whether claimant sustained an injury by accident arising out of and in the course and scope of her employment.

2. Whether claimant provided sufficient notice as required under Missouri law to the employer of her alleged accidental injury at work.

3. Whether claimant's current physical condition was caused by her alleged accidental injury at work.

4. The liability of employer/insurer for past medical care.

5. The nature and extent of claimant's disability for the liability of employer/insurer for past temporary total disability benefits.

Injury Number 06-079039:

1. Whether claimant sustained an injury by occupational disease arising out of and in the course and scope of her employment or whether she was exposed to the hazards of an occupational disease through repetitive trauma.

2. Whether claimant's current physical condition was caused by her alleged occupational disease.

3. Whether claimant provided sufficient notice of her alleged occupational disease.

4 The nature and extent of any disability.

5. The liability of employer/insurer for past medical care.

6. The liability of the employer/insurer for any alleged temporary total disability benefits.

There was also the independent issue of a medical fee dispute with Freeman Healthcare System seeking payment for two emergency room visits by claimant. One emergency room visit was for services provided on June 13, 2006, in the amount of $1,105.79. The person listed as having authorized the services was Jim Vaughn, manager. The second services were provided

through the emergency room on June 15, 2006, in the amount of $1,116.53 with Amy Clements, assistant manager, being listed as the person authorizing such care. The medical fee provider has dismissed all other medical fee applications for direct payment asserted against employer/insurer for the underlying cases based upon lack of authorization.

Claimant was the only witness testifying at the hearing. Terry McDonald, the owner of Sirloin Stockade, claimant's employer, testified by deposition. Jimmy Edward Vaughn, the manager for employer, also testified by deposition as did Amy Clements, who was the assistant manager/waitress for employer. Additionally, LuAnn Henderson, who is an adjuster for the insurer at the time of the events in this case also testified by deposition. I find the testimony of those witnesses to be credible.

The circumstances concerning claimant's injury in this case and the circumstances that followed are in dispute. Claimant alleges that she injured her back on August 6, 2005, while leaning over a table to clean it off. When she was returning to an upright position, she felt immediate pain in her back. That pain was enough for her to catch her breath. Nevertheless, claimant continued to work. Claimant testified in her deposition and at hearing that she might have mentioned in passing to Jim Vaughn, the manager, what happened. However, claimant did not state in her testimony that she told Mr. Vaughn anything specific about her injury that allegedly occurred while leaning over and then returning to an upright position while cleaning off a table. In her deposition testimony she testified that she said to him that she had just pulled something. Mr. Vaughn then rubbed her back for a couple of seconds similar to a pat on the back. Mr. Vaughn testified that he does not recall specifically that incident, but that claimant could have told him in August of ‘05 that she had lifted a tray and felt pain in her back after which he rubbed her back. Mr. Vaughn testified that that could have happened “because I’ve rubbed their backs and shoulders many times … oh, yes, when they have their monthly thing they complain about it it’s just you hear stuff all the time about their aches and pains.” In response to the question, “Do they complain to you about their backs from lifting of trays?" Mr. Vaughn replied, “ I mean they just complain that their back is sore. I don't know."

Employer/insurer did not file a report of injury at that time, nor did claimant request any treatment at that time. Claimant continued to work without receiving any treatment until March 7, 2006, when she went on her own to a chiropractor, Dr. Webb. Dr. Webb noted in his records that claimant's diagnosis was "Subacute exertional right sciatic radiculitis associated to lumbosacral segmental dysfunction." A specific complaint noted in claimant's history was right hip pain radiating down the right leg to the calf. Additionally, there were two separate records from the same date indicating that claimant's symptoms were gradual for three months but got better at times and that claimant "thinks may be related to activities at work but not positive." A similar record on that date (not in the records certified by Dr. Webb's office) simply indicated that claimant "thinks maybe related to activities but not positive," without any indication of work. Dr. Webb's records also note on March 7, 2006, claimant's low back pain and right leg pain. Claimant continued to treat with Dr. Webb, who on April 28, 2006, ultimately concluded that claimant needed an MRI. He advised claimant to check with her insurance for an MRI. He continued to treat her through May 4, 2006.

Claimant eventually was seen at Occumed in Joplin, Missouri on May 12, 2006. The owner of Sirloin Stockade, Terry McDonald, and the manager, Jim Vaughn, along with the assistant manager, Amy Clements, deny authorizing any treatment. So too initially did, LuAnn Henderson, the adjuster for the insurance company, who, in her deposition, initially stated that Jim Vaughn had authorized treatment. However, LuAnn Henderson, later in her deposition, admitted that she had authorized treatment and specifically authorize the MRI. Employer/insurer paid for the services of Occumed. Occumed also provided an EMG which indicated the possibility of a herniated disk. The EMG was paid for by employer/insurer. Claimant was treated at Occumed, and an MRI was obtained which demonstrated a large L5-S1 disc herniation. The MRI was paid for by the employer/insurer. The initial Occumed patient registration/admission from May 12, 2006, notes claimant's pain in her back and right leg and indicates authorization from Jim Vaughn, manager of Sirloin Stockade. It also noted the guarantor as Sirloin Stockade. On June 14, 2006, the Freeman Occumed Worker's Compensation referral form noted a referral to Dr. Ipsen as approved by "LuAnn" on June 14, 2006. Claimant was assessed by Dr. Ipsen. He recommended surgery. However, on June 20, 2006, as set out in the notes included as an exhibit in LuAnn Henderson's deposition, the insurance company denied

authorization for surgery. Nevertheless, on June 23, 2006, claimant proceeded with surgery without authorization. The surgery consisted of a right L5-S1 micro diskectomy. Claimant continued to have complications and a second surgery was performed by Dr. Ipsen on June 25, 2006, with a complete L5-S1 laminectomy and diskectomy. At the time of the surgeries there was a concern as to whether or not claimant had a malignancy at that area. That was found not to be the case. Employer/insurer paid for Dr. Ipsen's treatment prior to claimant's surgery.

Claimant continues to have problems with her back. She has severe pain going down her left leg with numbness from the waist down to her foot. She continues to have some problems with numbness on the right through the right leg, but that is only intermittent. She continues to have right leg pain. Claimant has stated that her left foot feels like she is always stepping on a rock at her heel and that she continues to have some pain in her lower back.

Claimant obtained the services of Dr. P. Brent Koprivica, an occupational medicine specialist, who opined that claimant has sustained a permanent partial disability in the amount of 25 percent to the body as a whole as a result of her back and leg problems. He noted claimant's pain and numbness in her legs, problems with her balance and her walking with a limp. He further opined that the initial annular injuries likely occurred on August 6, 2005, when she was bending over a table but that her ongoing work activities aggravated the problem and progressed the injury to the point where her condition became disabling. In effect, he found that claimant's disability was a result of a repetitive injury and occupational disease through her work which concluded on June 12, 2006. He found that the repetitive injury is what necessitated the need for her surgeries. He further found that the care and treatment that she received including her surgeries were reasonable and necessary as a result of her occupational disease. Dr. Koprivica further found that claimant was temporarily and totally disabled from June 13, 2006, until October 2006 following her diagnosis of the need for and the completion of surgery.

It is clear from the evidence in this case that claimant suffered an event on August 6, 2005, when she was leaning over a table to clean it off. She felt pain as she returned to a standing position. There is no evidence to the contrary. Apparently claimant, in passing mentioned her injury to Jim Vaughn, the manager, of the Sirloin Stockade, without any details or

a specific assertion of relation to work. Mr. Vaughn did not specifically remember that happening, and claimant throughout her testimony by deposition and at trial stated that the "notice" of her injury was not specific. Nevertheless, Mr. Vaughn admitted in his deposition that that notice may well have occurred since he often pats or rubs on the waitresses who complain about their various pains, including back pain. However, based upon the entire tenor of claimant's testimony along with that of the various witnesses for the employer, I cannot find that claimant gave a sufficient specific notice of her accident to place employer on notice of a specific and identifiable injury on August 6, 2005. Apparently, neither claimant nor the employer placed any significance to the injury at the time it occurred sufficient for claimant to seek treatment or employer to report the incident to the insurer or to the state. Indeed, although claimant suffered immediate pain and continued to have pain on and off thereafter, she apparently was unaware of the seriousness of her injury until later when the pain became significant radiating pain into her legs with numbness into her legs. Claimant later sought treatment on her own from a chiropractor noting right hip and radicular pain along with low back pain as noted in Dr. Webb's records. At some point in time, months after the accident, she had conversations with Jim Vaughn, the manager, and Terry McDonald, the employer, regarding her problems sufficient for Mr. Vaughn to visit with LuAnn Henderson, an adjuster for the employer/insurer's workers' compensation insurance company. Exactly what kind of notice was provided at that time is difficult to determine based upon the testimony of all of the witnesses in this case including claimant. Nevertheless, at some point in time, and certainly by May 18, 2006, the insurance company was aware of claimant's injury, and claimant was sent to Occumed with authorization for treatment provided directly by LuAnn Henderson. Employer denies authorizing any treatment prior to that of LuAnn Henderson. From the record, however, it is certain that claimant received authorized treatment from Occumed during which an EMG and MRI was provided. Occumed referred claimant to Dr. Ipsen who recommended surgery. When Dr. Ipsen recommended surgery, the employer/insurer decided not to authorize the surgery pending further investigation and informed both claimant and Dr. Ipsen of that fact. Nevertheless, claimant on her own decided to go forward with the first surgery which Dr. Ipsen performed. She underwent a second surgery by Dr. Ipsen two days later. Employer/insurer have denied the claim indicating that they were willing to provide treatment as needed. At trial employer/insurer denied both the '05 and the '06 claims.

Based upon all of the evidence presented in this case I find and conclude as follows: Claimant provided notice to the employer of the '05 injury without any specific details on August 6, 2005. The notice that claimant gave on the date of the injury was insufficient for employer to be put on notice of claimant's accidental injury since it appears that neither employee nor employer/insurer believed at that time that that event was of any significance. No additional information was provided to employer/insurer until after claimant received treatment from her chiropractor and months later sought additional medical care from employer/insurer that included an EMG and an MRI. It was at that time the parties were aware of the significance of her condition and the work relatedness.

There was concern by Dr. Estep at Occumed and the employer/insurer of the work relatedness of claimant's condition. In the occupational health clinic notes from Occumed on June 5, 2006, Dr. Estep stated the following:

> Recommend orthopedic spine neurosurgical opinion. However upon calling the insurance company, the insurance company is questioning whether or not this is related to the injury on 8/6/05. To help differentiate and expedite the issue, it is recommended at this time that an EMG of the right lower extremity to help differentiate whether or not this is new or old be proceeded with. If the EMG shows an acute radiculopathy with less than three to six months worth of time frame, this may in fact be a new injury versus if it does show chronic issues with greater than six months of age, then it would be consistent with the injury on 8/6/05. This was discussed openly with the insurance company and they did express understanding and agreement. Recommend at this time that an EMG be immediately proceeded with. Arrangements are made at this time. She may return to work with no lifting over 15 pounds, minimize bending or twisting. We will see her after the EMG and then be able to discuss whether or not to proceed with neurosurgical evaluation under a work related issue or whether or not it is non-work related.

After the EMG was performed and the results evaluated, Dr. Estep on June 8, 2006, wrote the following:

> SUBJECTIVE: She is seen for re-evaluation for an L4-L5 disc with radiculopathy and right lower extremity atrophy. She states she is still having pain. She now presents for an evaluation.
>
> She has undergone electromyelographical evaluation by Dr. Robbie yesterday. Dr. Robbie does note an L5-S1 radiculopathy on the right lower extremity shown to be chronic in nature. It is mild in nature, but it is definitely chronic. It has been there at least greater than six months.
>
> OBJECTIVE: She continues to show atrophy associated with her right lower extremity associated with the calf. She walks with a mild atelectatic gait.
>
> IMPRESSION: 1) RIGHT L4-L5 DISC WITH RADICULOPATEY.
> 2) RIGHT LOWER EXTREMITY ATROPHY.
>
> PLAN: Recommend a surgical opinion at this time. Recommend no lifting over 15 pounds, minimize bending and twisting, alternate sit/stand/walk every 15-20 minutes.

From the June 5, 2006, and June 8, 2006, records of Dr. Estep, it is clear that it was his opinion claimant's condition was work related since it was not a new injury but a chronic injury of greater than six months. Upon that basis, he recommended a surgical opinion. At that time claimant was referred to Dr. Ipsen, an orthopedic surgeon, which was authorized by Luann Henderson for employer's workers' compensation insurance carrier for an evaluation. Clearly neither employer nor claimant were aware of the work relatedness of her injury until the opinion of Dr. Estep and later by Dr. Koprivica. Claimant's injury was insignificant except as to immediate pain at the time it occurred on August 6, 2005. Her condition worsened over time to the point that she need additional treatment in March of 2006 from her chiropractor, Dr. Webb,

and later by the doctors at Occumed, and Dr. Ipsen. This is similar in circumstance to the facts in *Messersmith v. University of Missouri-Columbia/Mt. Rehabilitation Center,* 43 SW3d 829 (Mo banc 2001). The Missouri Supreme Court in *Messersmith* found that Messersmith's failure to provide notice as required under §287.420, RSMo. which at the time of the August 6, 2005, injury would have been not later than 30 days after the accident was excused by good cause because of the nature of her injury. As stated by the Court in *Messersmith,* "Messersmith's injury is the type of latent injury that this Court has held to be good cause for an innocent delay in filing an injury report with an employer." Citing *State exhibit rel. Buttiger v. Haid,* 330 Mo. 1030, 51 SW2d 1008. *Messersmith,* 43 SW3d 832. As stated in *Messersmith* by applying *Buttiger,* "The failure to give the required notice has been excusable for good cause where at the time the accident occurred the injury appeared trivial to the employee and its seriousness did not become apparent until more than 30 days had elapsed." That is clearly the situation in this case. Indeed, neither the claimant nor her employer believed that her injury was significant at the time it occurred when she gave no details of an injury to her employer on August 6, 2005, but merely indicated back pain with or without a mention of a specific event of lifting dishes and clearing tables as part of her duties as a waitress. Claimant's testimony varies as to precisely what she may have stated and the manager of her employer's business indicated that she may have given details but he doesn't recall. Based upon the Supreme Court's decision in *Messersmith*, I find that claimant in all likelihood did not give specific enough notice on August 6, 2005, or within 30 days thereafter to put the employer on notice of her injury, but that there is good cause for that failure based upon the circumstances of this case and the latent nature of her injury. Moreover, there is no indication within the record that failure to report the accident earlier resulted in any prejudice to the employer or had it initiated its investigation earlier. It is clear from the testimony of Mr. Vaughn, the manager for the employer's business, that he was well aware of waitresses, including claimant, having back problems and complaints from their heavy lifting without reporting any of those situations. Additionally, there is no medical evidence that submitting claimant's treatment to a doctor earlier would have changed her condition or the need for any treatment. As a result, I find that there is good cause excusing claimant from specific notice of an injury at work from August 6, 2005, and I find and conclude that there is no prejudice to the employer as a result thereof.

Employer/insurer also deny the 2005 case based upon a lack of medical causation for claimant's current condition. It is clear from the opinions of Dr. Koprivica and the findings of Dr. Estep at Occumed, that claimant's condition was caused by her work. Dr. Estep, albeit without any direct use of the word caused by or causation in his report indicated the work-related nature of the injury based upon it being at least six months old. Dr. Koprivica was more specific in finding the work relatedness of the original event on August 6, 2005, but finding a specific occupational injury (as claimed in the 2006 claim) as being the ultimate determinant of claimant's disability. Consequently, I find that claimant's initial injury was caused her event on August 6, 2005, as noted by Dr. Koprivica without any contradiction by other physicians in the record, and indeed confirmed by Dr. Estep.

Employer/insurer have also denied the '06 claim in which claimant alleges an occupational disease or repetitive trauma injury. It is clear from claimant's testimony as well as that of Jim Vaughn that the waitresses at Sirloin Stockade have complained often about their backs. It is also clear from the testimony of claimant and Jim Vaughn that as a waitress claimant had to clean tables, lift dishes, glasses and other items of a heavy nature on a repetitive basis. Indeed, there is no evidence to the contrary. Based upon that set of circumstances, Dr. Koprivica has opined that claimant suffered an occupational disease, repetitive trauma injury. He found that the prevailing factor resulting in the large disc herniation at L5-S1 was her bending and lifting task as a waitress over time. He concluded that the initial annular tear is likely to have occurred on August 6, 2005, but that claimant's ongoing work activities further aggravated and progressed her initial injury to the point that it became disabling and necessitated medical care. In effect, Dr. Koprivica found that that repetitive injury or occupational disease was a result of her work and exposure to the hazard of an occupational disease. There is no medical or other expert evidence to the contrary and I find his opinion to be credible. It is clear from the medical records and the EMG as analyzed by Occumed that claimant had sustained an injury to her back which the physicians at Occumed sufficiently believed was work related so that they referred her to Dr. Ipsen for treatment. The Occumed doctors did not indicate work-relatedness through an occupational disease. That was solely the conclusion of Dr. Koprivica. Based upon claimant's testimony, along with all of the evidence in this case, including the uncontradicted opinions of Dr. Koprivica, I find that claimant sustained an injury by occupational disease arising out of and

in the course and scope of employment that is the prevailing factor in causing her condition and disability and that she was exposed to the hazards of an occupational disease through her bending and lifting activities at work over time. As a result, I find and conclude that claimant's herniated disc and the need for treatment as a result thereof were caused by her occupational disease and that she was exposed to the hazards of an occupational disease. That is ultimately the conclusion of Dr. Koprivica, which I find to be credible.

Employer/insurer have denied the compensability of this case because claimant did not provide notice of the occupational disease. I find and conclude that the evidence is sufficient and credible that claimant was injured August 6, 2005. However, there is insufficient evidence to find that her continuing problems were from that injury alone. I find Dr. Koprivica credible, persuasive, and uncontradicted in his conclusions that following the August 6, 2005, event, claimant continued to work and was exposed to the hazards of an occupational disease. It was not until Dr. Koprivica's report beginning on June 11, 2007, that claimant was aware through an expert opinion that her pain, including radiating pain from her back to her legs (with numbness) was a result of an occupational disease from her work. Section 287.420, RSMo., states that "[n]o proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice … has been given to the employer no later than 30 days after the diagnosis of the condition[.]" However, *Allcorn v. TAP Enterprises, Inc.*, 277, SW3d 823 (Mo.App. SD 2009), holds that notice is not necessary until a physician relates a diagnosis of a condition as an occupational disease or repetitive trauma from work. That did not occur in this case until the opinion of Dr. Koprivica, long after claimant had filed her claim in this case. As a result, I find that claimant has provided sufficient notice under Missouri law in injury number 06-079039 pursuant to the interpretation of §287.420, RSMo., as provided in *Allcorn*.

Claimant has sought the payment of medical bills from Webb Chiropractic, Dr. Brian Ipsen, and Freeman Hospital. All of the bills from Webb Chiropractic deal with treatment prior to notice to employer/insurer and prior to any authorization provided by employer/insurer. The bills from Dr. Ipsen relate to surgical treatment following employer's denial of surgery. Claimant clearly was informed of the lack of authorization for her surgery by an adjuster for the insurer and

yet proceeded with the surgery anyway. Employer/insurer had provided authorized treatment by Occumed and later by Dr. Ipsen. Employee clearly was aware that the employer/insurer desired to investigate further the claim prior to authorization of surgical treatment, yet decided to have that treatment preformed anyway. Employer/self-insurer denied past medical care on the basis of lack of authorization. Employer/self-insurer also generally denied this claim. When there is a general denial of benefits, a claimant may seek medical care on his own. Wiedower v. ACF Industries, Inc. 657 S.W.2d 71 (Mo.App. E.D. 1983); Beatty v. Chandeysson Electric Company, 238 Mo.App. 868, 190 S.W.2d 648 (Mo.App. 1945). The general denial found in the Answer is not a full reflection of the circumstances of this case especially since employer/insurer in its Answer stated their willingness to provide treatment. It is unlike the situation in Wiedower in which a general denial of treatment entitled the claimant to obtain his own medical care and be reimbursed for those costs. This is more like the set of circumstances found in Anderson v. Parrish, 472 S.W.2d 452 (Mo.App.1971), in which at the time of the accident the claimant was sent to a physician by employer, and the claimant "therefore, knew that the employer was ready and willing to furnish him medical treatment. . . . The Act gives the employee the right to employee's own physician at his own expense, and it only when the employer has notice that the employee needs treatment or demand is made on the employer to furnish medical treatment, and the employer refuses or fails and neglects to provide needed treatment, that the employer is held liable for the medical treatment procured by the employee." Anderson, 472 S.W.2d 457.

There is no indication within the records of Dr. Ipsen or within the report of Dr. Koprivica that the need for either of claimant's surgeries was required on an "emergency" basis. Although Dr. Ipsen noted on June 25, 2006 that "Claimant proceeded to both surgeries without giving the employer/insurer the opportunity to investigate the claim further or be given the opportunity to either accept or decline surgical treatment later. They did not authorize either surgery. Hayes v. Compton 135 S.W.3d 465, 471 (Mo.App. S.D. 2004). In effect, that was a decision by claimant to seek treatment on her own when employer/insurer did not authorize such care pending investigation. As a result, I deny claimant's request for the treatment provided by Dr. Ipsen for his two surgeries and additionally the services provided by Freeman Hospital thereafter for the dates of service of June 23, 2006, June 25, 2006, and August 16, 2006. Additionally, I deny the request for treatment from Southwest Anesthesiology which also was as

a result of the surgeries which were not authorized. I additionally deny the treatment at Webb Chiropractic since employer was not given the opportunity to provide treatment to claimant at that time.

Claimant had additional services from the emergency room at Freeman Hospital on June 13, 2006, and June 15, 2006, during the period of time that claimant was under authorized care by the employer/insurer. Although it is unclear from the records that those services were specifically authorized by the employer, it is clear from claimant's testimony and the medical records that that treatment was required on an emergency basis. Since I have found that claimant's occupational disease injury was compensable, I order employer/insurer to pay to Freeman Healthcare System the bills for the dates of service to Freeman Hospital for the emergency room care of $1,105.79 for the date of service on June 13, 2006, and $1,116.53 for the emergency room care for the date of service of June 15, 2006.

There is an underlying medical fee dispute number 06-00764 filed by Freeman Healthcare system for those two emergency room visits. The healthcare provider indicates that there were authorizations from two individuals, specifically Jim Vaughn and Amy Clements for the two bills. However, the testimony of those two witnesses indicated they did not authorize such treatment nor request that any bills be sent to them. I find their testimony to be credible. However, at that time medical care was being authorized by LuAnn Henderson, an adjuster for the insurance company. There is no indication that she authorized those bills. As a result, I deny the medical fee dispute based upon the lack of authorization. *Curry v. Ozark Electric Corporation,* 39 SW3d 494 (Mo bank 2001). However, since I have ordered the bills to be paid in the underlying claim, it is clear that the result is the same -- that Freeman Health System should be paid for its services.

Claimant has sought temporary total disability benefits for the time frame that she was recovering from her surgery. Although I have denied the specific payment of the past medical bills relating to her surgeries, it is clear that from the testimony of Dr. Koprivica and the medical records in this cases that claimant was temporarily and totally disabled from June 13, 2006, until October 2006. However, it is unclear that Dr. Ipsen released her in October of 2006, since he

continued to treat her thereafter until she was released fully on June 28, 2007. Apparently, on August 28, 2006, Dr. Ipsen wanted to see claimant again in eight weeks for a repeat evaluation to see whether she was ready to go back to work. Claimant canceled her appointment with Dr. Ipsen in October of 2006, and she continued to have problems. However, it is apparent that Dr. Koprivica believes that claimant as of October 2006, after reviewing the medical records and the history given to him by claimant, had reached maximum medical improvement for her condition. As a result, I order employer/insurer to pay claimant temporary total disability at the agreed upon rate of $132.09 from June 13, 2006, to October 31, 2006. I find and conclude that her temporary total disability is the result of the ’06 occupational disease injury and not the ’05 accidental injury claim.

Claimant also seeks permanent disability. It is clear that claimant continues to have significant problems. The only rating in this case is Dr. Koprivica's rating of 25 percent to the body as a whole based upon claimant's back pain, her radiating pain, the numbness throughout her legs and her altered gate. I find that Dr. Koprivica’s rating is appropriate after reviewing all of the medical records in this case, claimant’s testimony, and Dr. Koprivica's report. As a result, I order employer/insurer to pay to claimant 25 percent of the body as a whole at the agreed upon rate of $132.09 for a total of $13,209.00 in injury number 06-079039. I find no liability from the 05-140864 injury alone but only as it is a part of the injury by occupational disease.

Claimant's attorney, Tom Carlton, is allowed an attorneys fees of 25 percent of the amounts awarded herein which shall constitute a lien upon this award.

Signed: 8-17-12

Made by: /s/ Robert H. House
Robert H. House
Administrative Law Judge
Division of Workers' Compensation