

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

Injury No.: 05-131219

Employee: Stanley Fischer
Employer: AmerenUE
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 July 30, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued July 30, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of April 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Stanley Fischer Injury No. 05-131219
Dependents: N/A Before the
Employer: AmerenUE **Division of Workers'**
Compensation
Additional Party: Second Injury Fund (left open) Department of Labor and Industrial
Relations of Missouri
Insurer: Self-insured Jefferson City, Missouri
Hearing Date: March 30, 2010 Checked by: JHP

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: N/A
5. State location where accident occurred or occupational disease was contracted N/A
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Not determined
8. Did accident or occupational disease arise out of and in the course of the employment? N/A
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
N/A
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Stanley Fischer

Injury No. 05-131219

- 17. Value necessary medical aid not furnished by employer/insurer? None claimed
- 18. Employee's average weekly wages: \$1,207.60
- 19. Weekly compensation rate: \$696.97 TTD/ \$365.08 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses	None
Weeks of temporary total disability/(or temporary partial disability)	None
weeks of permanent partial disability from Employer	None

22. Second Injury Fund liability: Open

TOTAL: None

23. Future requirements awarded: None

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Claimant:	Stanley Fischer	Injury No. 05-131219
Dependents:	N/A	Before the
Employer:	AmerenUE	Division of Workers' Compensation
Additional Party:	Second Injury Fund (left open)	Department of Labor and Industrial Relations of Missouri
Insurer:	Self-insured	Jefferson City, Missouri Checked by: JHP

A hearing in this proceeding was held on March 30, 2010. The record was left open for 30 days to allow Claimant to submit additional evidence. The record was closed on April 29, 2010. Both parties submitted proposed awards, the latter of which was received on May 6, 2010.

STIPULATIONS

The parties stipulated that on or about October 28, 2005:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was self-insured;
3. the employee's average weekly wage was \$1,207.60; and
4. the rate of compensation for temporary total disability was \$696.97 and the rate of compensation for permanent partial disability was \$365.08.

The parties further stipulated that:

1. no compensation has been paid; and
2. employer has not paid any medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant sustained an accident on or about October 28, 2005;
2. whether, in the alternative, claimant developed an occupational disease due to repetitive trauma prior to October 28, 2005;
3. if the employee sustained a work-related accident or developed an occupational disease by his work-related activities, whether he sustained an injury as a result of the accident or occupational disease;
4. whether the employee complied with the notice requirements of Section 287.420 Mo. Rev. Stat. (2006 Supp.);
5. if the employee sustained a compensable injury, whether he is entitled pursuant to Section 287.170 Mo. Rev. Stat. (2000) to compensation for temporary total

- disability for any periods of time subsequent to the alleged accident or the development of an occupational disease; and
6. if the employee sustained a compensable injury, whether and to what extent employee sustained any permanent partial disability which would entitle him to an award of compensation.

ACCIDENT

The employee has the burden of proving that he or she was injured as a result of an accident which "arose out of" and "in the course of" his or her employment. Section 287.120.1 Mo. Rev. Stat. (Supp. 2006); Trammel v. S & K Industries, Inc., 784 S.W.2d 209 (Mo. App. 1989); Barnes v. Ford Motor Co., 708 S.W.2d 198 (Mo. App. 1986); Westerhold v. Unitog-Holden Mfg. Co., 707 S.W.2d 456 (Mo. App. 1986); Garrett v. Industrial Commission, 600 S.W.2d 516 (Mo. App. 1980); Hawkins v. Emerson Elec. Co., 676 S.W.2d 872 (Mo. App. 1984). The quantum of proof was changed by statutory amendment in 2005 from "reasonable probability" to "more likely to be true than not true." Section 287.808 Mo. Rev. Stat. (2006 Supp.).

Amendments made to Section 287.020.2 Mo. Rev. Stat. (Supp. 2006) in 2005 completely revised the definition of "accident". Accident is now defined to mean "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor." In Subsection 10 of Section 287.020 the legislature stated that it was its intent "to reject and abrogate earlier caselaw interpretations on the meaning of or definition of 'accident' ..." Thus the 2005 amendments appear to have eliminated accidents caused by "gradual and progressive injuries resulting from repeated exposure to on-the-job hazards" and accidents caused by "normal or usual strains". Section 287.020.2 repealed the prior "clearly work related" test.¹

The 2005 amendments do not define "unusual strain" except to indicate that it must be identifiable by time and place of occurrence and produce "at the time objective symptoms of an injury caused by a specific event during a single work shift." In State ex rel. Hussman-Ligonier Co. v. Hughes, 153 S.W.2d 40 (Mo. 1941), the Supreme Court held that the injury itself did not constitute proof of "accident". Id. at 42. In Crow v. Missouri Implement Tractor Co., 307 S.W. 2d 401 (Mo. 1957) the Supreme Court held that an "unusual or abnormal strain" could be

¹ Under pre-2005 caselaw "accident" also included "gradual and progressive injuries resulting from repeated exposure to on-the-job hazards," Westerhold v. Unitog-Holden Mfg. Co., 707 S.W.2d 456, 458 (Mo. App. 1986), and a "physical breakdown or change in pathology" resulting from the performance of the usual and customary duties of the employee, Rector v. City of Springfield, 820 S.W.2d 639, 642, (Mo. App. 1991). The Supreme Court's decisions in Wolfgeher v. Wagner Cartage Service, Inc., 646 S.W.2d 781 (Mo. 1983) and Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983) dispensed with the previous requirement for proof of an abnormal or unusual strain in order to establish an accident and allowed proof of a normal or usual strain to suffice. Repetitive trauma could also constitute an accident. Kintz v. Schnucks Markets, Inc., 889 S.W.2d 121 (Mo. App. 1994); Sansone v. Joseph Sansone Const. Co., 764 S.W.2d 751 (Mo. App. 1989). As long as the injury was clearly job related, it was compensable. Wolfgeher, supra at 785. It is likely that all of the foregoing caselaw interpreting the meaning of "accident" have been abrogated. Injuries due to repetitive motion are now recognized as occupational diseases by Section 287.067.3 Mo. Rev. Stat. (2006 Supp.).

classified as an accident, even though it was not preceded by a slip or fall. Id. at 405. Numerous subsequent decisions discussed what facts constituted an “abnormal strain”. See cases discussed in Wolfgeher v. Wagner Cartage Service, Inc., 646 S.W.2d 781, 783-84 (Mo. 1983). Eventually, the courts developed a narrow rule that “[o]nly where the strain is accompanied by a slip or fall, or where the strain is unexpected or abnormal, will the injured person be deemed to have sustained an ‘accident’.” Id. at 784. Subsequently, the Supreme Court's decisions in Wolfgeher v. Wagner Cartage Service, Inc., 646 S.W.2d 781 (Mo. 1983) and Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983) dispensed with the previous requirement for proof of an abnormal or unusual strain in order to establish an accident and allowed proof of a normal or usual strain to suffice. The appellate courts will have to decide whether the 2005 amendments have adopted the pre-Wolfgeher definition of “unusual strain” or some other meaning for that phrase.

The "trier of fact must make his or their decision upon the whole record, must consider all the evidence and may not arbitrarily disregard any evidence in the record." Barnes v. Ford Motor Co., supra at 200. The trier of fact determines the weight and credibility of the evidence. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Barnes at 200; Roberts v. Sharp Bros. Const. Co., 599 S.W.2d 91 (Mo. App. 1980). The testimony of a witness may be disbelieved even if there is no contradictory or impeaching testimony. Smart v. Chrysler Motors Corp., 851 S.W.2d 62, 64 (Mo. App. 1993); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 161-2 (Mo. App. 1986); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267 (Mo. App. 1993); Weeks at 516. The trier of facts may even base its findings solely on the testimony of the employee. Pendergrass v. Killian Const. Co., 891 S.W.2d 166 (Mo. App. 1995).

Claimant's Testimony

Stanley Fischer, Employee herein, testified that he has been employed with AmerenUE for approximately 30 years and has been a traveling operator since 2000. He described his job as requiring him to go from substation to substation where he operates electrical switches on the side of roads or under streets, as is the case in downtown St. Louis. He described having to lift a 45 pound “extendo-stick” that can reach up to 35 feet in order to reach distribution switches. He indicated that he lifts the stick and looks up at the stick to confirm that the stick catches with the switch clip. Employee stated that he uses the stick in this manner about 10-12 times per day. He works 5 days per week.

Employee testified that on Friday, October 28, 2005, he started his shift at about 7:00 in the morning and was assigned to a job in the South County/Lemay area where he was required to tie and clear feed. Employee recalled using the stick to operate the switch and feeling a “funny” sensation in his neck and shoulders afterwards. He stated that he felt pain when he closed the switch and it was a specific event. He had not experienced this type of pain prior to October 28, 2005. He testified that he did not call anyone and shook it off and went back to work. He remembered doing the same type of job at least one more time that day.

Employee testified that he worked his entire shift on October 28 and did not participate in any strenuous activity at home. He testified that he began noticing symptoms the following

morning (Saturday) and described a numbing pain in his left arm that got progressively worse during the course of weekend. By Sunday morning he was experiencing an aching pain shooting down his left arm. Fearing that he might be having a heart attack, Employee sought medical treatment at the Barnes-Jewish Hospital Emergency department on Monday morning.² Mr. Fischer stated that he did not have any neck pain at this point, but the pain was located in his left arm and shoulder. He testified that he had not made a connection between his symptoms and his work at this point.

Findings of Fact

Based on the medical records, I make the following findings of fact.

On Tuesday morning, November 1, 2005 Mr. Fischer sought treatment at Barnes-Jewish Hospital Emergency Department for pain in the left shoulder which radiated down the left arm since the previous night (Monday, October 31). His pain increased with movement. He denied any injury to both Dr. Michael E. Mullins and the nurse. He had tried Celebrex without any relief of pain. (Employer's Exhibit 9, Pages 11-12 & 19) He was placed on a cardiac monitor. His electrocardiogram and blood tests were normal. X-rays of the cervical spine revealed diffuse degenerative disc disease of the cervical spine, most prominent at C4-5 and C5-6 with uncovertebral joint spurring at C3-4 causing mild narrowing of the neural foramen. (Employer's Exhibit 9, Pages 10, 12 & 34-38) Dr. Mullins suspected that Employee had cervical radiculopathy. Employee was treated with Celecoxib and Ibuprofen. (Employer's Exhibit 9, Pages 14) Dr. Mullins told Mr. Fischer that he suspected that Employee had cervical radiculopathy rather than an acute cardiac episode. (Employer's Exhibit 9, Page 25) On discharge, he was given a prescription for Ibuprofen and advised to follow up with his primary physician. (Employer's Exhibit 9, Pages 21-22)

Mr. Fischer returned to Barnes-Jewish Hospital Emergency Department the next day for continued pain in his left shoulder and shoulder bade and because the Ibuprofen was upsetting his stomach and not helping his pain. He told Dr. Randall Jotte that his injury was not work related. Dr. Jotte diagnosed Employee with neck pain, C3-C4 radiculopathy, and degenerative, cervical disk disease. He was given Oxycodone and acetaminophen. (Employer's Exhibit 9, Pages 39-42 & 47-48)

Mr. Fischer contacted Dr. Darren E. Wethers, his personal physician, who ordered an MRI of the cervical spine. It was performed on November 3. According to the radiologist, it showed advanced degenerative facet joint changes at C3-4 and C4-5, a small disk protrusion at C5-6 which abutted the anterior aspect of the cervical cord, disc bulging and degenerative changes at C6-7 which abutted the anterior aspect of the cervical cord and resulted in mild to moderate bilateral foraminal narrowing, and diffuse disc bulging and degenerative changes and a small to moderate sized left posterior disc protrusion at C7-T1 which mildly impressed upon the left anterior aspect of the cervical cord. (Employer's Exhibit 3)

² The Barnes Hospital records indicate that he presented to the Emergency Room at 09:54 on November 1 (Tuesday), 2005. (Employer's Exhibit 9, Pages 11-12)

On November 4 Dr. Wethers diagnosed Employee with cervical spinal stenosis and cervical radiculopathy down the right (sic?) arm and excused him from work. Mr. Fischer was not examined at that time.³ (Employer's Exhibit 1)

Dr. Charles E. Wetherington, a neurosurgeon, examined Mr. Fischer on November 22, 2005.⁴ Dr. Wetherington noted that Claimant's left shoulder pain began approximately three weeks earlier and that there was no precipitating event. He indicated that the pain radiated into the left arm, hand, long, ring, and small fingers. Employee reported numbness and tingling in those areas. On review of the MRI of the cervical spine Dr. Wetherington noted a left sided C7-T1 disc herniation which caused some neural foraminal narrowing, cervical degenerative disc disease with osteophyte formation at C3-4 and C5-6. He prescribed Percocet and recommended that Employee undergo a trial of cervical steroid injections. He also discussed possible surgery with Employee. (Employer's Exhibit 3)

Dr. Richard S. Gahn of Advanced Pain Control examined Mr. Fischer on November 29, 2005. On the Patient Questionnaire, Claimant reported pain in the left side of his neck, left shoulder, and left arm which began suddenly on October 31, 2005. He did not check the box for injury at work. Mr. Fischer described his symptoms as aching and at times burning pain in his hand and arm, sharp pain in his joints from shoulder to hand, and numbness in three fingers. He indicated that he was experiencing pain 24 hours per day at a nine on a scale of 0 to 10. Dr. Gahn administered a fluoroscopically-guided cervical epidural steroid injection at the C7-T1 interspace. (Employer's Exhibit 7)

Mr. Fischer returned to Dr. Gahn on December 13, 2005. He reported that his pain was less intense, though it continued in the left neck and left upper extremity. Dr. Gahn administered a second fluoroscopically-guided cervical epidural steroid injection at the C7-T1 interspace. (Employer's Exhibit 7)

Mr. Fischer returned to Dr. Gahn on December 28, 2005. He reported that his pain was less severe and less frequent than it had been, though he continued to experience radicular symptoms in the left scapular region and forearm. Dr. Gahn administered a third fluoroscopically-guided cervical epidural steroid injection at the C7-T1 interspace. (Employer's Exhibit 7)

Employee returned to Dr. Wetherington on January 12, 2006. Claimant reported that he had not experienced any significant relief from the cervical epidural steroid injections. Dr. Wetherington again recommended surgery. (Employer's Exhibit 3)

Mr. Fischer returned to Dr. Wethers on January 20, 2006. He told him that he had undergone three steroid shots for cervical spine stenosis and that his pain had improved, but had

³ The records of Dr. Wethers have been rearranged in chronological order.

⁴ In June of 2005 Dr. Wethers referred Mr. Fischer to Dr. Charles E. Wetherington for evaluation of Employee's lumbar disc disease. (Employer's Exhibit 1)

not resolved. Employee indicated that surgery was an option, though he wished to postpone that option.⁵ He indicated that he had returned to work the previous day. (Employer's Exhibit 1)

Prior neck injury and medical treatment

Employee was injured in a motor vehicle accident on January 24, 1997. X-rays taken at St. Mary's Hospital in East St. Louis did not reveal any fractures. He sought medical treatment from Dr. Wethers three days later. Dr. Wethers noted that he was having left arm neuralgia with weakness down to the hands and involving the first three fingers of the left hand. He diagnosed Employee with cervical and lumbar strains, told him to continue taking the analgesics given in the Emergency Room, and prescribed physical therapy. (Employer's Exhibit 1)

Mr. Fischer returned to Dr. Wethers on March 6, 1997. He reported that his neck pain had improved though his back was still giving him a lot of trouble. According to Dr. Wethers the physical therapist graded his cervical improvement at 90%. Dr. Wethers prescribed additional physical therapy. On April 3, 1997 Dr. Wethers noted that Employee had completed physical therapy and was continuing a home exercise program. He noted that Claimant's cervical and lumbar strains were improved. Though Claimant continued to see Dr. Wethers for back pain in 1997 and early 1998, he did not mention any neck pain. (Employer's Exhibit 1)

Mr. Fischer was injured on October 30, 2002 when the truck that he was driving was struck in the rear by another vehicle. He was taken to St. Mary's Health Center in St. Louis County. Employee complained of posterior head, posterior neck and low back pain. X-rays taken of the cervical spine revealed osteoarthritis with spurs at C4, C5, C6, and C7 vertebral bodies and the absence of the normal curve. X-rays taken of the lumbar spine demonstrated only small spurs. No fractures or dislocations were seen. He was given an injection of Toradol and Robaxin. (Employer's Exhibit 7)

Claimant sought chiropractic care for his cervical and lumbar strains from Selam B. Deutschmann who treated him from November 15, 2002 through January 10, 2003. (Employer's Exhibit 4)

On March 7, 2003 Claimant underwent an MRI of the lumbar spine. It revealed a degenerative desiccation of the L3-4 disc, moderate central disc protrusion at L4-5 and degenerative disc desiccation and a large left paramedian focal disc protrusion at L5-S1 with apparent impingement upon the thecal sac and degenerative disc desiccation. (Employer's Exhibit 1)

On a referral from BarnesCare, Dr. James Coyle, an orthopedic surgeon, examined Claimant on June 4, 2003. Claimant described the motor vehicle accident of October 30, 2002. He complained of frequent headaches and neck, back and leg pain. Claimant described a second injury on May 5 or 7 when he aggravated the symptoms in his low back. He subsequently had buttock pain bilaterally as well as left posterior thigh pain. Dr. Coyle noted that Claimant's neck pain was much better though he was still experiencing frequent headaches. Employee

⁵ Employee continued to have episodic right (lumbar?) sciatica, but he was getting by with opiate medications. (Employer's Exhibit 1)

complained of a burning sensation in the hips and buttocks. Dr. Coyle took additional cervical and lumbar x-rays and reviewed the March 7, 2003 lumbar MRI. He diagnosed Employee with substantial preexisting degenerative lumbar and cervical disc disease, acute cervical sprain due to the motor vehicle accident, and lumbar sprain due to the motor vehicle accident with aggravation in May of 2003. He prescribed aquatic physical therapy and light duty at work and ordered a lumbar MRI to rule out any acute change following the May injury. (Employer's Exhibit 6)

On a referral from Dr. Coyle, Dr. Russell C. Cantrell, a physiatrist, examined Mr. Fischer on June 23, 2003. Employee complained of pain in his low back with intermittent radiation down his left leg to the calf. Dr. Cantrell reported that the repeat lumbar MRI of June 8, 2003 revealed a transitional S1 segment, a large central and left L5-S1 disc herniation, a small central L4-5 disc herniation, and a much smaller central disc herniation at L3-4.⁶ He diagnosed Claimant with a lumbar strain with sacroiliac joint dysfunction. He prescribed additional physical therapy for his low back and light duty at work. On July 22, 2003 Dr. Cantrell indicated that Claimant's leg symptoms had resolved though he still had a dull ache in his low back. Dr. Cantrell prescribed two additional weeks of physical therapy. On August 13, 2003 Claimant returned to Dr. Cantrell and reported no complaints of pain in his right leg, less numbness and tingling, and only intermittent discomfort in his low back. Dr. Cantrell encouraged him to continued with a home exercise program and released him from treatment. (Employer's Exhibit 8)

On April 9, 2004 Claimant returned to Dr. Wethers who noted that he was continuing to receive physical therapy for his back. He noted degenerative radicular symptoms. There was no mention of his neck. Dr. Wethers prescribed Celebrex. Claimant continued to see Dr. Wethers through June of 2005 for his lumbar disc disease. (Employer's Exhibit 1)

Additional Findings

Based on the Barnes Hospital records, I previously found that Employee's left arm pain began on the evening of Monday, October 31 and that he sought treatment at the emergency room early Tuesday, November 1, 2005. Presumably, Employee worked on Monday, October 31. There was no testimony that he was unable to work on Monday because of left arm pain. This record is inconsistent with Employee's testimony that he went to the emergency room on Monday morning and his pain became severe on Sunday, October 30.

It is understandable that Claimant's concern over possible cardiac problems caused him to deny to the emergency room physician and nurse on November 1 that he had sustained any injury. However, on November 1, Employee was told that he had a possible pinched nerve; that diagnosis should have jogged his memory about the October 28 event had it occurred. It apparently did not jog his memory. I previously found that on November 2 Employee returned to the Barnes Hospital emergency room for treatment of ongoing left upper extremity and neck pain and that he told Dr. Randall Jotte that his injury was not work related. This statement is inconsistent with Employee's assertion that he injured his left shoulder/neck on October 28.

I previously found that Dr. Wetherington examined Mr. Fischer on November 22, 2005 and noted that Claimant's left shoulder pain began approximately three weeks earlier and that

⁶ The report of the radiologist was not offered into evidence.

there was no precipitating event. The denial to Dr. Wetherington of any precipitating event is inconsistent with Employee's assertion that he injured his left shoulder/neck on October 28.

I previously found that Dr. Richard S. Gahn of Advanced Pain Control examined Mr. Fischer on November 29, 2005. On the Patient Questionnaire, Claimant reported pain in the left side of his neck, left shoulder, and left arm which began suddenly on October 31, 2005. He did not check the box for injury at work. The statement that his left neck and upper extremity pain began suddenly on October 31, 2005 (Monday) is inconsistent with Employee's assertion that he injured his left/shoulder neck on Friday, October 28, 2005.

Claimant testified that he did not mention the October 28, 2005 injury to any of his treating doctors because he only made the connection of his work to his neck pathology when a co-worker called him during the time he was off work (November 1, 2005 through January 19, 2006) and mentioned that his neck problem might have happened at work.

Taking into account my observations of Mr. Fischer's demeanor during his testimony at the hearing and the histories in the medical records which conflict with Claimant's testimony, I find that Employee's testimony concerning an event on Friday, October 28, 2005 when he felt pain while using the 35 foot stick to close a switch is not credible. I further find Claimant's explanation for his failure to mention the October 28 incident to his treating physicians is not credible. Being questioned by four different doctors about whether Employee had sustained any injury should have caused him to make a connection between his pinched nerve and the alleged October 28 incident (had it occurred) long before the co-worker allegedly planted the idea in his mind.

Based on the foregoing findings, I find that Claimant did not sustain any accident at work on October 28, 2005.

OCCUPATIONAL DISEASE

Mr. Fischer alternatively claims that he developed an occupational disease in his neck due to repetitive trauma prior to October 28, 2005.

As the Claim for Compensation alleges an injury date of October 28, 2005, this claim is presumably governed by the 2005 amendments to Chapter 287 which became effective on August 28, 2005.

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2005 Supp.). It defines occupational disease in subsection 1 as:

an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it

must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2, which was added in 1993 and amended in 2005, provides that an occupational disease is compensable "only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable." (2005 additions underlined)⁷

Subsection 287.067.3, which was added in 2005, recognizes an injury "due to repetitive motion" as an occupational disease and further provides that provides that "[a]n occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable."

In repetitive motion cases, as practically all movements of the human body done during the course of employment are also replicated in nonworking environments and as most occupationally induced diseases also sometimes occur in the public at large, the courts have for many years focused on a particular risk or hazard to which an employee's exposure is greater or different than the public at large. Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548, 552-54 (Mo. App. 1972); Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988); Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299-300 (Mo. App. 1991). The courts have required the claimant to present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. They have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort". Id. at 300; Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988). It is unclear whether the foregoing tests survive the 2005 amendments. Without deciding whether the foregoing tests survive the 2005 amendments, I will apply the prevailing factor test and the employment-related risk test set forth in Section 287.067 Mo. Rev. Stat. (2005 Supp.).

⁷ The 2005 amendments also deleted the 4 criteria set forth in Section 3(2) of Section 287.020 which included the "a substantial factor" causation test, the natural incident of the work rule, the proximate cause test, and the unrelated hazard or risk rule, all of which had been adopted in 1993. The decisions in Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000) and Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998) explaining the "a substantial factor" test have been superseded by the 2005 amendments.

Claimant must establish, generally through expert testimony, the likelihood that the claimed occupational disease was caused by conditions in the work place.⁸ Section 287.808 Mo. Rev. Stat. (2005 Supp.); Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that the “occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.067.2 Mo. Rev. Stat. (2005 Supp.).

Section 287.190.6(2), which was added in 2005, provides in pertinent part that “[m]edical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty.” A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795, 797 (Mo. App. 1987). The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990).

Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). The new Section 287.190.6(2) further provides that “[i]n determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.” The fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. George v. Shop 'N Save Warehouse Foods, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

Medical Opinions

Dr Robert P. Margolis, a neurologist, examined Claimant on June 22, 2007 at the request of his attorney. His medical report was admitted into evidence in lieu of testimony. (Claimant's Exhibit A)

⁸ The burden of proof with respect to factual propositions has been changed from reasonable probability to “more likely to be true than not true.” Section 287.808 Mo. Rev. Stat. (2005 Supp.).

Mr. Fischer told Dr. Margolis that he felt a funny feeling in his neck and upper back on October 28, 2005 while pushing upward on a pole, which was 35 feet long and 40 to 45 pounds in weight, that by Monday he had pain radiating down his left arm with associated numbness. (Claimant's Exhibit A, Page 1)

Dr. Margolis diagnosed Claimant with a symptomatic disc protrusion with neck pain and radicular complaints. Dr. Margolis opined that the incident at work on October 22 (sic), 2005 “was the substantial and prevailing factor in this patient suffering an injury to his neck in the form of symptomatic disc protrusion. This resulted in neck pain as well as radicular complaints.” (Claimant's Exhibit A, Page 4)

Dr. Robert J. Bernardi, a neurosurgeon, testified by deposition on behalf of Employer on August 26, 2009. He examined Mr. Fischer on January 22, 2008. (Employer's Exhibit 10)

Dr. Bernardi testified that Claimant told him that sometime in 2005 he experienced the onset of pain between his shoulder blades while using a long pole and looking overhead to turn switches on and off and shortly thereafter developed neck pain and pain that radiated into his left arm. (Employer's Exhibit 10, Page 8)

Dr. Bernardi reviewed the MRI films of November 3, 2005. He opined that they showed degenerative disc disease in the lower part of the neck, which had probably developed over many months or years, and a disc herniation at C7-T1 to the left of midline with some nerve root compression. (Employer's Exhibit 10, Page 10) He diagnosed Claimant with multi-level cervical degenerative disc disease, a left C7-T1 disc herniation, and left cervical radiculopathy most likely involving the C7 nerve root. (Employer's Exhibit 10, Page 11)

Dr. Bernardi testified that he “could not determine” that the work accident Employee described was the prevailing factor in Employee’s symptoms. The first reason for this “opinion” was Employee’s failure to mention to any of the treating physicians that he thought that his symptoms were work related. Second, Dr. Bernardi indicated that the mechanism of injury Employee described is not one which he would expect to be associated with a disc herniation. He indicated that people typically develop disc herniations after a forward flexion event rather than looking overhead.⁹ Dr. Bernardi also mentioned that Employee’s radicular symptoms had changed overtime. He indicated that Dr. Wetherington thought that Employee had C8 radiculopathy due to compression by the C7-T1 disc herniation. Dr. Bernardi testified that Employee’s physical examination had changed from November of 2005 to January 22, 2008, when Dr. Bernardi examined Mr. Fischer. On January 22, 2008 Employee appeared to have a C7 nerve problem due to a new problem in his neck, rather than a C8 nerve problem. (Employer's Exhibit 10, Pages 12-15)

On cross examination Dr. Bernardi conceded that Claimant’s failure to mention an on-the-job injury during his first visit to the emergency room may have been due to his worry over possibly experiencing a heart attack. (Employer's Exhibit 10, Page 29) On redirect examination

⁹ In his written report Dr. Bernardi stated that epidemiologically, jobs that require very heavy lifting on a frequent basis are the only occupations associated with an increased risk of disc prolapse. (Employer's Exhibit 10, depo ex 3, pp 5-6)

Dr. Bernardi stated that the emergency room records ruled out a heart attack and Claimant was advised that the problem was coming from his neck. He indicated that Employee's fear over possibly having a heart attack would not explain the histories given to Drs. Gahn and Wetherington. (Employer's Exhibit 10, Pages 41-42)

On cross examination Dr. Bernardi opined that theoretically, in some circumstances, how frequently and how much lifting is involved could be relevant to the epidemiology and the cause of a herniated disc. (Employer's Exhibit 10, Pages 31 and 33) Dr. Bernardi did not ask Employee how much the pole weighed or how often he lifted it as part of his job activities. (Employer's Exhibit 10, Page 31) He further opined that the length of time that Employee extended his neck would not be relevant in the development of a cervical disc herniation. (Employer's Exhibit 10, Page 32)

On redirect examination Dr. Bernardi stated that occupations which involve repetitive movement of the neck do not seem to be statistically associated with an increased risk of cervical disc herniation. (Claimant's Exhibit 10, Pages 39-40) Dr. Bernardi agreed that as he had reviewed Dr. Margolis' report stating the weight of the pole as 40 to 45 pounds, he probably knew the weight of the pole. (Employer's Exhibit 10, Page 40)

Additional Findings

Dr. Margolis opined that the incident at work on October 22 (sic), 2005 "was the substantial and prevailing factor in [Employee] suffering an injury to his neck in the form of [a] symptomatic disc protrusion" which "resulted in neck pain as well as radicular complaints." While this opinion concerning a one-time event on October 28, 2005 would have been relevant had I found that Claimant had sustained an accident of October 28, 2005, it is not relevant on the issue of whether Claimant's occupational activities over a period of time exposed him to the risk of developing a symptomatic disc protrusion and whether they were the prevailing factor in causing Claimant's disc protrusion and radicular complaints. Dr. Margolis only addressed a one-time event; he did not discuss whether Employee's repetitive activities involving the pole over a period of time were the prevailing factor in causing his symptomatic disc protrusion.

Dr. Bernardi opined that he "could not determine" that the work accident Employee described was the prevailing factor in Employee's symptoms. That peculiar formulation ("could not determine") is not the same as stating that an employee's work accident was not the prevailing factory in causing his or her symptoms. His strongest explanation for this "opinion" was that the mechanism of injury was not typical for a cervical herniated disc.¹⁰

More importantly, Dr. Bernardi was not asked his opinion on whether Claimant's occupational activities of lifting a pole, which was 35 feet in length and 40 to 45 pounds in weight, about 10 to 12 times per day, over a period of time greater than just on October 28, 2005, was the prevailing factor in causing Employee's symptomatic disc protrusion and radicular

¹⁰ While Dr. Bernardi's opinion might be viewed as equivocal when compared to a strong contrary opinion with supporting analysis from an equally qualified expert, neither his opinion nor Dr. Margolis' opinion matter regarding causation by an alleged incident on October 28, 2005, as I previously found that Claimant did not sustain any accident on October 28, 2005.

complaints. Consequently, the opinions of Dr. Bernardi do not help Claimant prove that he sustained an occupational disease.

In failing to adduce a medical opinion that Claimant's occupational activities of lifting a pole, which was 35 feet in length and 40 to 45 pounds in weight, about 10 to 12 times per day, over a period of time greater than just on October 28, 2005, was the prevailing factor in causing his symptomatic disc protrusion and radicular complaints, Claimant has failed to meet his burden of proving that he developed an occupational disease.

As I have found that Claimant did not sustain an accident on October 28, 2005 and failed to prove that he developed an occupational disease, the claim for compensation is accordingly denied.

Date: _____

Made by: _____

JOHN HOWARD PERCY
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

NAOMI PEARSON
Division of Workers' Compensation