

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

Injury No.: 05-143216

Employee: Susan Franklin
Employer: Mid America Hotels Corp.
Insurer: Self-Insured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 25, 2012, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Lawrence C. Kasten, issued July 25, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Susan Franklin Injury No. 05-143216
Dependents: N/A
Employer: Mid America Hotels Corp.
Additional Party: None
Insurer: Self c/o Claims Management, Inc.
Appearances: Melvin Franke, attorney for employee.
Ed Weiss, attorney for the employer/insurer.
Hearing Date: March 21, 2012 commenced Checked by: LCK/rf
April 24, 2012 completed

SUMMARY OF FINDINGS

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 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? Undetermined.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
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 happened or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? No.
13. Parts 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 total disability: None.
16. Value necessary medical aid paid to date by employer-insurer: None.
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$705.67.
19. Weekly compensation rate: \$470.45 for temporary total disability and permanent total disability and \$365.08 for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: N/A
23. Future requirements awarded: None.

FINDINGS OF FACT AND RULINGS OF LAW

On March 21, 2012 and April 24, 2012 the employee, Susan Franklin, appeared in person and with her attorney, Melvin Franke for a hearing for a temporary award. The employer was represented at the hearing by its attorney Ed Weiss. Also present for the employer was Jerry Barker, the Director of Loss Prevention and Human Resources. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. Mid America Hotels Corporation was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was duly qualified as a self insured employer care of Claims Management, Inc.
2. On or about November 10, 2005 Susan Franklin was an employee of Mid America Hotels Corporation and was working under the Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The employee's average weekly wage was \$705.67. The rate of compensation for temporary total disability and permanent total disability is \$470.45 per week. The rate of compensation for permanent partial disability is \$365.08 per week.
5. The employer did not pay any medical aid.
6. The employer did not pay any temporary disability.

ISSUES:

1. Accident.
2. Notice.
3. Medical causation.
4. Claim for medical aid.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee Exhibits:

- A. Deposition of Dr. Russell including his CV and report
- D. Medical records of Jefferson Memorial Hospital
- F. Medical records of Center for Interventional Pain Management
- H. Medical records of Dr. Swope
- I. Medical records of Baker Medical Group
- J. Medical records of Dr. Liss
- K. Medical records of Dr. Meyer
- M. Medical records of Dr. Garcia

- N. Time Statement
- O. Subpoena/return of subpoena for Dr. Mishkin
- P. Affidavit of Service
- Q. Social Security decision
- R. Medical records of Hampton Open MRI
- S. 2005 Tax Return
- U. Letter of Dr. Russell dated January 16, 2012
- V. Employee Separation Statement
- W. Payroll statements
- X. Paystub
- Z. W-2s for 2003 and 2004
- AA. Deposition of Chalmer Herron
- BB. Deposition of Julie Jones

Employer Exhibits:

1. Report of Dr. Mishkin dated January 17, 2012
2. Medical records of Dr. Baker
3. Medical records of Dr. Liss
4. Report of Dr. Padda
5. Triage and assessment nursing record of Jefferson Memorial Hospital
6. Wage records
7. Deposition of Dr. Mishkin including his CV and reports

The following exhibit was offered by not admitted into evidence:

- Employee's Exhibit B, a chronology.

The following employee's exhibits were marked but not offered into evidence:

- C – Itemization of medical cost;
- E – Billing records from Jefferson Regional Medical Center;
- G – Billing records from Center for Interventional Pain Management;
- L – Billing records from Dr. Rickmeyer;
- T – Itemization of expenses; and
- Y – Wage rate calculation.

During the hearing on March 21 an issue arose as to the admissibility of Dr. Mishkin's deposition. Prior to the hearing the employee filed a Motion for an Interlocutory Order prohibiting the testimony of Dr. Mishkin or in the alternative a Motion in Limine to prohibit his testimony or in the alternative a Motion to Strike his deposition testimony. On March 21, the Motions were taken under advisement by the undersigned administrative law judge; the employee filed an offer of proof; and the hearing was continued. On March 23, 2012 the employee's Motions were denied by the undersigned administrative law judge. The continuation of the hearing was held on April 24, and the deposition of Dr. Miskin was admitted into evidence.

Judicial notice of the contents of the Divisions' file for the employee was taken.

WITNESSES: Susan Franklin, Shannon Franklin, Chalmer Herron and Julie Jones.

BRIEFS: The employee's brief was received on May 16, 2012. The employer's brief was received on June 4, 2012.

FINDINGS OF FACT:

Based on the review of the evidence, I make the following findings of fact concerning the issue of accident:

The claimant testified that she started working at Burger King in 1996 or 1997.

The claimant saw Dr. Baker on July 26, 2002 with neck and back pain. Past medical history showed neck and back pain for two days. The claimant had positive neck muscle spasms. Vioxx was prescribed; and a strain was diagnosed. On November 20, 2002 the claimant saw Dr. Baker for eye, neck and back complaints.

The claimant testified that she never saw Dr. Baker for back and neck pain, and only saw him for being sick like she had the flu and she had body aches. She does not know how it got into Dr. Baker's records of having a back and neck strain; and does not know why that would be there. With regard to the visit of November 20, 2002, she does not remember that she had neck and back pain but it might have been for having a big cyst behind her ear. She does not know why back and neck pain is in that record.

The claimant started seeing Dr. Liss for anxiety and depression on September 15, 2005. She started seeing Dr. Swope on September 26, 2005 and it was noted that she needed her pain medication straightened out for abdominal pain. She was currently on FMLA and had been off work since September 9, 2005. On October 19, 2005 the claimant saw Dr. Swope with a diagnosis of chronic abdominal pain; and a pain specialist referral was made.

In November of 2005, she had been the Store Manager of the Burger King in Pevely for at least 9 years. She does not remember seeing signs about workers' compensation; and did receive a handbook but does not remember if it had any workers compensation in it. She regularly attended managers meetings, and had her own assistant managers meetings. There was a manger meeting once a month with all store managers, Chalmers Herron the Regional Manager, and Julie Jones the District Manager. The store managers were trained not to file workers' compensation injuries. It was said more than one time, and at every meeting there was something said about avoiding workers compensation. As a manager she received an award due to not having any workers' compensation claims for one year. She was responsible for her store being clean and safe, and she ran a good store.

The claimant testified that around 8 or 9 p.m. on November 10, 2005, she was pulling down boxes from the walk in freezer. She stepped up to take a case of hamburgers off the shelf.

The safety mat slid when she stepped down, her foot slipped, she jerked and she fell down onto her side and back, and hit her back and buttocks. The other employees in the store at the time were Stephanie and Greg, who were helping her close. Stephanie was doing dishes, and the claimant does not know if Stephanie saw her fall, but she helped her up. Greg and Stephanie helped her the rest of the shift. She did not call Mr. Herron or Ms. Jones that night because she would have gotten in trouble if she had called at night. She stayed until closing. The next day Mr. Herron and Ms. Jones were both in the store for a supervisory visit, and she told them that she hurt her back after falling in the freezer. Ms. Jones just looked at her and Mr. Herron said that we all work with bad backs. After November 10, 2005, Greg worked a couple of months, and Stephanie worked 7 more months. To her knowledge, Mr. Herron and Ms. Jones did not perform an inspection or an investigation, did not offer medical treatment, and did not ask how she was doing. She asked them for treatment, and she was ignored.

The claimant testified on direct that the accident was on November 10, 2005. The claimant testified in her June 18, 2010 deposition that she could not remember when the injury happened.

The claimant's husband, Shannon Franklin, testified that he saw the claimant the night after November 10, 2005. She had problems with pain in her low back due to falling, slipping and jarring her back pulling down a box of hamburgers. The claimant was concerned if she went to Ms. Jones, which she did the following day, they would brush her off and she was concerned about losing her job because that is the way the company is. Mr. Franklin testified that if a workers' compensation claim is filed, they are going to make your job miserable or they are going to fire you. The claimant kept working with medication but it has been downhill every since she left Burger King.

Chalmer Herron testified by deposition on May 4, 2011. At the time of the injury and at the time of the deposition he was a regional manager for Burger King. With regard to becoming aware of a workers' compensation injury, the store manager will contact the district manager who then contacts him. Mr. Herron would make sure that the workers' compensation forms including an incident report are filled out and would make sure that they are aware of what caused the accident. With regard to the claimant being familiar with workers' compensation procedures, they are contained in the employee handbook, in the orientation paperwork, and on a standard poster on the wall in all of the locations. The claimant used to work for him, and was a store manager at Butler Hill and then at Pevely. With regard to the alleged injury on or about November 10, 2005 Mr. Herron stated if there was an injury to the claimant it would have been reported to Ms. Jones, the district manager and then she would have informed him of it. Mr. Herron was made aware of the alleged November of 2005 accident from Mr. Barker. The claimant did not tell him the day after the alleged accident that she was injured at work and would have remembered if she told him. The claimant has never told him about the incident, never asked to see a doctor or hospital for any treatment. Ms. Franklin, overall, was a good employee. If the claimant told him that she had been hurt at work and asked for treatment they would have filled out the paperwork.

Chalmer Herron testified at the hearing that at the time of the claimant's alleged accident he was a Regional Manager for Burger King. At the time of the hearing, he was the District Manager which is a lower position. He has been employed by Burger King for 32 years. Mr. Herron stated what he testified to in his May of 2011 deposition was true. Mr. Herron heard about the alleged accident from Jerry Barker and the earliest that he would have known about the accident was when the claim was filed in December of 2006. There was never a report of injury made to him. If someone is injured on the job, the store manager would give him notice, and he would make sure that the store manager filled out proper paperwork, and that it was received in the main office in Cape. The claimant is aware of the procedure due to the poster at all locations, and a handbook for reporting workers compensation injuries. The claimant worked for him for about 10 years. If there had been an injury on the job, the claimant would have called him directly but he did not receive a call from her either that day or the next day. If the employee told Julie Jones, the district manager about an injury, Ms. Jones would have reported it to him. The claimant did not call him about the injury. He never told the claimant that everyone has a bad back, and never told that to anyone with a bad back. The claimant never told him directly about the injury at any time and never asked him for medical treatment. Overall, she was a good employee and he had no problems with her job performance.

Mr. Herron testified that the employer has a strict company policy to report any injury. The company teaches management if an injury is reported, that the paperwork is sent out. If the injury is not reported, he would be out of a job. Since working at Burger King, he has been involved in close to 100 on-the-job injuries.

Julie Jones testified by deposition on May 4, 2011. At the time of the deposition, the claimant was a district manager for Burger King. With regards to her involvement on a workers' compensation injury, it is first reported to the restaurant manager if it's an employee or assistant manager and then Ms. Jones is called. She would follow-up and make sure they fill out the proper reports which got sent to Jerry Barker. The manager on duty at the time fills out the report on injured employees. The employees at the various locations are made aware of the procedure for a workers' compensation injury in the new hire packet, the employee handbook and from a poster hanging in all the stores. The claimant was a store manager and Ms. Jones was her district manager. Ms. Jones worked with the claimant a lot and she was a good employee. Ms. Jones first became aware that that the claimant was reporting an injury probably a year or two before her deposition when Jerry Barker asked her about it. The claimant would have reported the injury to her. There was never an incident report that she either filled out or was brought to her; and she was not aware of one being filled out. The claimant never mentioned anything about an injury at work to her; and did not recall that the claimant told her about the incident the next day. The claimant reporting an injury would be something that she would recall. Since the alleged incident date, the claimant never requested that she be sent to a doctor or a hospital. There have been other employees that have been injured and a report of injury was filled out that day. After a report of injury is sent to her, she will fill it out, fax a copy to the central office, make a copy and send the original to Jerry Barker. Ms. Jones stated that the claimant was a hard worker and always did what she was supposed to do, and received bonuses at the end of the year.

Julie Jones testified at the hearing. She is no longer employed by Burger King. She was employed by Burger King for 25 years. She testified under oath at her May of 2011 deposition, everything she said was the truth, and she would not change any of her testimony. At the hearing, Ms. Jones testified that in November of 2005, she was the District Manager over several stores including Pevely. She was the claimant's direct supervisor and worked with her for approximately 10 years. If there was a workers' compensation injury, Ms. Jones would be called and she would report it to Mr. Herron and Mr. Barker to make sure the proper paperwork was filled out. The employees are familiar with how to report workers' compensation injuries due to the handbook and posters on the wall.

Ms. Jones testified that she worked with the claimant on frequent occasions and saw her several times a week. Ms. Franklin was a good employee. With regard to the alleged accident of November 10, 2005, she first became aware of the alleged injury when she was asked about it by Mr. Barker probably in 2009 or 2010. The claimant never told her about any injury and never asked for treatment. If an injured employee asked for medical treatment, she would have given them a form and sent her for medical treatment. There have been other employees under her that have been injured, and the report of injury was filled out the same day, and a copy was faxed to the central office.

Ms. Jones testified that it was not accurate if the claimant testified that company policy was not to report any injury. If she was told somebody got hurt, she would fill out paper work and send it in. She would not ignore an injury that was reported to her. She thought that she was involved in more than 50 plus workers' compensation injuries while she was a manager. If there was an injury reported and she did not follow the procedures, she would get fired. Mr. Barker never got mad about a work injury being reported. After November 10, 2005, she was in frequent manager meetings with employee and does not remember any conversation with the claimant about an alleged injury or treatment.

The claimant and Mr. Franklin testified that she started going to the Center for Interventional Management after he heard it on a commercial.

The claimant saw Dr. Padda at The Center for Interventional Pain Management on December 7, 2005. The assessment was chronic low back pain and abdominal pain. The health history showed that the claimant had a chief complaint of low back pain and abdominal pain and it appeared that it said for one half of a year.

On December 12, 2005 the claimant saw Dr. Liss. The claimant had stopped taking Effexor because she felt like she was becoming immune to it. The claimant reported that her condition was up and down. It was noted that she was still at Burger King and had moved to the Pevely location. She felt like she was not a happy person and nothing really was going wrong, she just felt unhappy.

The claimant went to the Center for Interventional Pain Management on December 16, 2005. In the review of symptoms, checked was pain in stomach; and printed was chronic pain in lower back and stomach. Dr. Padda performed a bilateral sacroiliac joint injection due to axial

low back pain with SI tenderness and low back, hip and groin pain that were unrelieved with conservative therapy.

The claimant testified that she normally prepares the Time Statements unless she missed work and then Ms. Jones would put it down. "CIS" meant called in sick, and Julie would put that in the record. She remembers specifically when she called in sick to work on January 3, 4, and 5 that she told Ms. Jones that she was not coming into work due to back pain from the fall at work. Ms. Jones did not say anything. The claimant started treatment in December of 2005, and Ms. Jones knew that she was treating for her low back from several conversations they had, and Ms. Jones knew she was sick due to back pain.

The Time Statement shows that the claimant called in sick on January 3, January 4 and January 5. On January 6 she worked from 10 to 8. On January 7, she worked from 8 to 3.

The claimant testified that on January 6, she started working at 10 a.m. and ended work at 8 p.m. During the morning of January 6, she had an SI joint injection, and then went to work at Burger King. After she got off work at 8 p.m. she went to Jefferson Memorial Hospital and was there until after midnight on January 7. After she got out of the emergency room she worked from 8:00 a.m. to 3:00 p.m.

On January 6, 2006 Dr. Padda performed a facet joint injection bilaterally at L4-5 and L5-S1 due to axial back pain with failure of conservative therapy, with the axial symptomatology being present for greater than six months.

During the evening of January 6, 2006 the claimant went to Jefferson Memorial Hospital emergency room. The triage and assessment nursing record showed a chief complaint of lower back pain shooting across the buttock and down both legs for two months which was gradually getting worse. In the box trauma, checked was none. In the trauma section was a box for a fall or other which was not checked. The emergency room physician record on January 7, 2006 at 1:00 a.m. showed the historian was the patient with a chief complaint of back pain with a duration of two months which was worse the last several days. The section for recent injury was not marked either "No", "Yes", or "Possibly". In the how section, circled was lifting. Not circled was turning/bending, fall/near fall or trauma. It was noted that the claimant was a store manager and there was no acute trauma. The claimant was having bilateral radiation to her legs. A lumbar x-ray was taken due to a history of low back pain shooting down both legs.

The claimant testified that she does not know why no trauma was put into the Jefferson Memorial Hospital records on January 6-7, 2006. No trauma was incorrect because she gave them a history of the accident and she was the only person that would have given a history.

On January 11, 2006 the claimant went to the Center for Interventional Pain Management for chronic low back pain. An MRI was ordered. On February 3, a lumbar epidural steroid injection was performed for chronic low back pain and the MRI showed a bulging disc at L5-S1. On February 15 the claimant saw Dr. Liss who noted she was still not a happy person. Included in her current symptoms were her back but there was no mention of the alleged work accident.

On February 16, 2006 Methadone and another pain medication was prescribed. The claimant was treated at the Center for Interventional Pain Management on at least a monthly basis the rest of 2006.

On March 9, 2006 the claimant saw Dr. Swope for upper respiratory complaints; and was diagnosed with sinusitis, with no mention of low back pain.

On March 29, 2006 Dr. Khattak noted that the claimant was a manger of Burger King and did a lot of work. She had been taking more of the Oxy IR and taking Methadone which makes her feel light-headed. Dr. Khattak cut her Methadone in half; and she was instructed to only take Oxy IR only if she needed it; and she was to follow appropriate prescription guidelines.

The claimant saw Dr. Swope on April 24, 2006 due to possibly having the flu. Abdominal pain, multiple abdominal surgeries and a history of bowel obstructions was noted with no mention of back problems. On April 28, the claimant saw Dr. Swope for intestinal infection follow-up. In an April 28, 2006 letter faxed to Dr. Swope's office, Jerry Barker the director of human resources noted that the claimant had presented a doctor's excuse dated April 28, that indicated she was examined on April 24. Mr. Barker stated that the document did not indicate whether the claimant was released to work. Mr. Barker asked whether the claimant was able to work with or without restrictions.

The claimant testified that May 6, 2006 was her last day at work. She had been able to keep working for 6 months and had been taking Oxycodone and morphine.

The claimant's separation form dated May 12, 2006 showed that the claimant quit due to three days of unreported absences. In the remarks it showed no call, no show on May 10, May 11, and May 12, 2006.

On August 25, 2006 the claimant saw Dr. Liss for pain management. It was noted that she had been a manager at Burger King, and was on Oxycodone. On September 27, a CT/myelogram was performed which was ordered by Dr. Padda which noted that her pain began approximately one year ago. On November 15, 2006 the claimant saw Dr. Swope. It was noted that Dr. Padda had referred her to an orthopedic specialist who would not take her because it was work related. The claimant had stopped working in May of 2006 and had never filed a workers' compensation claim. Dr. Swope diagnosed lumbar spine disc problems. The claimant went to Jefferson Memorial Hospital on November 19, 2006 for chronic back pain since 2005 and requested medication refill. She was seeing a pain management doctor, the pain had increased and she was out of pain medication. Assessed was low back pain with a history of a back injury; a Toradol injection was given.

The claimant signed a Claim for Compensation on November 9, 2006 and it was filed on December 15, 2006. The Claim noted a date of accident of November 10, 2005 with a low back injury. The description was that while moving a case of Whoppers from the top shelf to the bottom shelf she had to step up on the bottom shelf in the freezer to reach and get the box down.

When she stepped down the freezer mat slid, causing her to slip as she tried catching her balance and avoid the box falling on her head. The weight of the box caused her back to jerk and fall.

On February 23, 2007 the claimant saw Dr. Liss for pain management. It was noted that she needed back surgery, had applied for social security and workers' compensation was mentioned.

A Report of Injury filed by the employer was received by the Division on July 2, 2007. It was prepared on June 28, 2007 and noted that the employer was notified of the injury on December 28, 2006.

The claimant continued to treat at the Center for Interventional Pain Management in 2007. It appeared that the first time that workers' compensation was mentioned was on April 16, 2007. On August 7 it noted that her workers' compensation papers needed to be reviewed. On October 4, the claimant was encouraged to get with her case manager and the workers' compensation situation.

On December 3, 2007 the claimant saw Dr. Liss who noted she needed back surgery. Workers' compensation was discussed and it was noted that the claimant had a seizure a week and a half ago.

The claimant testified that with regard to Dr. Liss's December 3, 2007 record that she does not remember or recall having a seizure. Mr. Franklin testified that the employee has not had any seizures.

When the claimant went to The Center for Interventional Pain Management on December 24, 2007 she was getting an attorney because it was a work-related injury.

On May 7, 2008 the claimant saw Dr. Padda and indicated that she has had four to five days of withdrawal symptoms and had run out of medication. She was demanding escalating dosages of medication. Dr. Padda stated that once they explained to her that she did not have any clinical evidence of withdrawal she then recanted her story and indicated that maybe she was not having withdrawal but may be having intermittent seizure disorders. Dr. Padda told her if she was having seizures, then she needed to follow-up with a neurologist prior to being treated with him. The claimant then became evasive and said maybe she was not having seizures, maybe they were just the shakes and that she really needed her medications. Dr. Padda noted that on the basis of her multiple deceptive statements she would have to have a toxicology screen and neurology clearance prior to being treated. Dr. Padda then noted that his office was contacted by the claimant's primary care physician who indicated that the claimant had been requesting Valium and high doses of Alprazolam and had been receiving Valium and high dose Alprazolam as well as from Dr. Padda's office. Dr. Padda noted that the claimant was clearly violating her narcotic contract and should not be treated.

The claimant testified that on May 7, 2008, she asked for pain medication just for her back and does not remember discussing any seizures. She does not recall having any seizures,

and does not know why it is in the records. The reason why Dr. Padda would have said she was evasive was because her husband was arguing with him about pain medication. Dr. Padda can type down what he wants but her husband got mad, and the same thing happened with all of the doctors. Mr. Franklin testified that the employee has not had any seizures.

On May 28, 2008 the claimant saw Dr. Liss who noted that the orthopedist she was seeing would not operate on a workers' compensation patient. On July 1, the claimant started seeing Dr. Garcia. It was noted she injured her low back in November of 2005. On July 24, the claimant saw Dr. Garcia with a chief complaint of low back pain with pain that radiated down both legs. It was noted she had an injury at work on November 10, 2005. She was working at Burger King, slipped and fell in the freezer. When she reported the injury to her boss she was told that everyone has back pain. Dr. Garcia diagnosed chronic back pain and referred her to Advanced Pain Center.

On August 4, 2008 the claimant saw Dr. Naushad for lower back pain since an injury at work on November 10, 2005. She had a fall when she stepped down and boxes fell on her at the Burger King in Pevely. Dr. Naushad noted that the claimant had chronic lower back pain since her November 10, 2005 work injury. Since that time she had complaints of low back pain; and according to the claimant she never had any pain before the accident.

The claimant continued to treat with Dr. Garcia through July of 2009. In an August 4, 2009 letter to the claimant, Dr. Garcia stated that he would no longer be able to participate in her medical care effective September 4. Dr. Garcia noted that he had been notified by the pharmacies and Dr. Larice's office that the claimant had obtained narcotic prescriptions from their office as well as at Dr. Garcia's.

The claimant saw Dr. Rickmeyer on October 30, 2009 to establish a new patient relationship. It was noted that the claimant was on disability due to chronic pain from a workers' compensation injury. The claimant was off medications due to lack of insurance and requested that Dr. Rickmeyer take over her medical treatment. The claimant's problems emanate from a back injury in 2005 and she continued to work for seven months after her injury. The claimant was a store manager for Burger King and was in the freezer and tried to lift a hundred pound box of hamburgers. Dr. Rickmeyer assessed chronic pain due to trauma. Dr. Rickmeyer would not refill her pain medications and noted she would have to establish with a chronic pain physician.

RULINGS OF LAW:

Issue 1. Accident.

The employer has denied that on or about November 10, 2005, the employee sustained an accident arising out of and in the course of her employment.

The burden of proof is on the employee to prove all material elements of her claim. See Marcus v. Steel Constructors, Inc., 434 S.W.2d 475 (Mo. 1968) and Walsh v. Treasurer of the State of Missouri, 953 S.W.2d 632,637 (Mo. App. 1997). The employee has the burden of proof

that her injuries were the result of an accident that arose out of and in the course of employment. See Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 419-420 (Mo. App. 1993) and Smith v. Donco Construction, 182 S.W.3d 693, 699 (Mo. App. 2006).

A claim for compensation may be decided solely upon a finding of lack of credibility of uncontradicted and unimpeached testimony. See Cox v. General Motors Corporation, 691 S.W.2d 294 (Mo. App. 1985), Beyer v. Howard Construction Company, 736 S.W.2d 78 (Mo. App. 1987), Smart v. Chrysler Motors Corp., 851 S.W.2d 62, 64 (Mo. App. 1993) and Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525 (Mo. Banc. 1993).

There are a number of evidentiary problems that support a finding that the employee has failed to meet her burden of proof on the issue of accident. These problems are addressed as follows:

The testimony of the employee and Mr. Franklin is inconsistent with the other evidence.

The employee testified that she did not remember seeing signs about workers' compensation in the stores and did not remember if the employee handbook had anything about workers compensation. Mr. Herron testified that the workers' compensation procedures are contained in the employee handbook, in the new employee orientation, and on a standard poster on the wall in each store; and that the employee was aware of the procedure due to the posters and a handbook for reporting workers compensation injuries. Ms. Jones stated that employees at the various locations are made aware of the procedure for a workers' compensation injury in the new hire packet, the employee handbook, and from a poster hanging in all the stores.

The employee testified that the store managers were trained not to file workers' compensation injuries; and at every meeting there was something said about avoiding workers compensation. Mr. Herron testified that the company has a strict policy to report any workers compensation injury; and instructed the managers if an injury is reported, that the paper work is sent out. Ms. Jones testified that it was not company policy not to report injuries.

The employee testified that on November 11, 2005, she informed Mr. Herron and Ms. Jones that she had injured her back after falling in the freezer; and she subsequently told Ms. Jones several times about having back pain from a fall at work; and asked for medical treatment. Mr. Herron testified that the employee did not tell him the day after the alleged accident that she was injured at work, and he would have remembered if she did. The employee never told him directly about the incident at any time and never asked for medical treatment. Mr. Herron heard about the alleged accident from Mr. Barker and the earliest he would have been informed was when the employee's claim was filed in December of 2006. Ms. Jones stated that she first became aware of the alleged accident around 2009 when Mr. Barker asked her about it; the employee never told her anything about a work injury and did not request medical treatment. The report of injury filed by the employer noted that the employer was notified of the injury on December 28, 2006 which was after the Claim for Compensation was filed by the employee on December 22, 2006.

The employee testified that after she told Mr. Herron that she injured her back, he told her that we all work with bad backs. Mr. Herron testified that he never told the employee that everyone has a bad back and has never told that to anyone with a bad back.

The employee testified that she never saw Dr. Baker for back and neck pain. Dr. Baker's records show that the employee saw him on July 26 and November 20, 2002 for neck and back pain.

The employee testified that when she went to Jefferson Memorial Hospital the night of January 6-7, 2006, she gave a history of the work accident. The records from that visit show no trauma and do not have a history of a work accident.

The employee testified she did not recall ever having a seizure. Mr. Franklin testified that the employee has not had any seizures. The medical records of Dr. Liss on December 3, 2007 noted that the employee had a seizure a week and a half ago. The medical records of Dr. Padda on May 7, 2008 noted that the employee might have a seizure disorder.

These multiple inconsistencies have an adverse effect on the credibility of the employee and Mr. Franklin.

There are entries appearing in different health care providers' records that the employee cannot explain.

The claimant testified that she never saw Dr. Baker for back and neck pain, does not know how back and neck pain got into his records; and does not know why that would be in the records. She did not know how no trauma was contained in the Jefferson Memorial Hospital records because she gave them a history of the accident. She does not know why the seizure disorder was mentioned in Dr. Padda's records. These unexplained entries affect the credibility of the employee.

The employee's own treating doctor questioned her credibility.

Dr. Padda noted that when the employee saw him on May 7, 2008, she was being evasive and gave multiple deceptive statements. This has an adverse effect on the employee's credibility.

The medical history given by the employee to the initial treating health care providers does not corroborate the testimony of the employee regarding the alleged accident.

The first medical record after the alleged November 10, 2005 accident was when the employee saw Dr. Padda on December 7, 2005 for chronic low back pain which appeared to say it had been going on for about 6 months. On December 12, 2005, the employee saw Dr. Liss and told the doctor that she was working at a Burger King and was unhappy but nothing was really going wrong. On January 6, 2006, Dr. Padda noted that her back pain had been present for more than 6 months. At her emergency room visit on January 6-7, 2006, the employee did not report

any trauma or fall. The first time that any medical record mentions the back pain was work related was on November 15, 2006 which was over a year after the alleged accident, and 6 days after the employee signed her Claim for Compensation on November 9, 2006. Prior to November of 2006, the employee had been treated over 15 times by several different health care providers and none of the records mention that the low back symptoms were related to an alleged fall at work or an alleged work injury.

This lack of corroborating medical history to the health care providers for over a year after the alleged accident substantially affects the credibility of the employee on the issue of accident, and does not support a conclusion that the employee sustained a work related accident.

CONCLUSION

Based on a thorough review of the evidence including the cumulative effect of the evidentiary problems discussed above, I find that the testimony of the employee and Mr. Franklin was not credible or persuasive. I find that the testimony of Mr. Herron and Ms. Jones was credible and persuasive. I find that the employee failed to satisfy her burden of proof on the issue of accident. I find that the employee did not sustain a work-related accident on or about November 10, 2005 that arose out of and in the course of her employment. The employee's claim for compensation is denied. Although this case was heard as a temporary hearing, the award is final. Given the denial of the employee's claim on the issue of accident the remaining issues are moot and will not be ruled upon.

Made by:

Lawrence C. Kasten
Chief Administrative Law Judge
Division of Workers' Compensation