

**TEMPORARY OR PARTIAL AWARD**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No. 11-110474

Employee: Avry Harris  
Employer: Penske Truck Leasing  
Insurer: Old Republic Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard 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 and adopts the award and decision of the administrative law judge dated November 18, 2014.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of § 287.510 RSMo.

The award and decision of Administrative Law Judge John K. Ottenad, issued November 18, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## TEMPORARY OR PARTIAL AWARD

Employee: Avry Harris

Injury No.: 11-110474

Dependents: N/A

Employer: Penske Truck Leasing

Additional Party: N/A

Insurer: Old Republic Insurance Company  
C/O Gallagher Bassett Services, Inc.

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Hearing Date: August 21, 2014

Checked by: JKO

### 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: June 29, 2011
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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: Claimant was employed as a clamp truck/forklift operator for Employer, when he developed neck and upper body complaints as a result of his excessive, repetitive driving while twisted to the right to look behind him as he was operating the machinery.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Body as a Whole—Neck and Upper Body
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

Employee: Avry Harris

Injury No.: 11-110474

- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$445.57
- 19. Weekly compensation rate: \$297.05 for TTD/\$297.05 for PPD
- 20. Method wages computation: By agreement (stipulation) of the parties

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

See body of the Award and future requirements section below

- 22. Second Injury Fund liability: N/A

**TOTAL:**

23. Future requirements awarded: **Continued and ongoing future medical care for Claimant's neck and upper body, including, but not limited to, medications, physical therapy, perhaps selective nerve root injections and possibly, as a last resort if the other treatment does not relieve his complaints, a neck surgery, to cure and relieve him of the effects of the injury, as explained in the body of the Award.**

Each of said payments to begin immediately and to be payable and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kerry I. O'Sullivan

**FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Avry Harris	Injury No.:	11-110474
Dependents:	N/A		
Employer:	Penske Truck Leasing		
Additional Party:	N/A		
Insurer:	Old Republic Insurance Company C/O Gallagher Bassett Services, Inc.		
Hearing Date:	August 21, 2014	Checked by:	JKO

Before the  
**Division of Workers’  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

On August 21, 2014, the employee, Avry Harris, appeared in person and by his attorney, Ms. Kerry I. O’Sullivan, for a hearing for a Temporary or Partial Award on his claim against the employer, Penske Truck Leasing, and its insurer, Old Republic Insurance Company C/O Gallagher Bassett Services, Inc. The employer, Penske Truck Leasing, and its insurer, Old Republic Insurance Company C/O Gallagher Bassett Services, Inc., were represented at the hearing by their attorney, Mr. William Lemp. The Second Injury Fund is not a party to this case.

The parties agreed that this was being tried as a non-Section 203 temporary hearing. They further agreed that if I should find in favor of Employer on the need for medical treatment, then, instead of issuing a Temporary or Partial Award, I would issue a Final Award to bring full closure to this matter as a result of this hearing. At the time of the hearing, the parties agreed on certain stipulated facts and identified the issues in dispute. These stipulations and the disputed issues, together with the findings of fact and rulings of law, are set forth below as follows:

**STIPULATIONS:**

- 1) On or about June 29, 2011, Avry Harris (Claimant) allegedly sustained an occupational disease.
- 2) Claimant was an employee of Penske Truck Leasing (Employer).
- 3) Venue is proper in the City of St. Louis.
- 4) The Claim was filed within the time prescribed by the law.
- 5) At the relevant time, Claimant earned an average weekly wage of \$445.57, resulting in applicable rates of compensation of \$297.05 for total disability benefits and \$297.05 for permanent partial disability benefits.
- 6) Employer has not paid any benefits to date.

**ISSUES:**

- 1) Did Claimant sustain an occupational disease?
- 2) Did the occupational disease arise out of and in the course of employment?
- 3) Are Claimant's injuries and continuing complaints medically causally connected to his alleged occupational disease at work?
- 4) Did Claimant provide Employer with proper notice of the injury under the statute?
- 5) Is Employer liable for ongoing medical care?
- 6) What is the nature and extent of Claimant's permanent partial disability attributable to this alleged occupational disease injury?

**EXHIBITS:**

The following exhibits were admitted into evidence:

***Employee Exhibits:***

1. Certified medical treatment records of BJC North County Physicians
2. Independent medical report of Dr. Paul Matz dated May 14, 2014
3. Medical treatment records of Berland Imaging & MRI
4. Independent medical report of Dr. Shawn Berkin dated January 21, 2013
5. Certified medical treatment records of Christian Hospital
6. Certified medical treatment records of the St. Louis County Department of Health
7. FMLA medical certification forms

***Employer/Insurer Exhibits:***

- A. Independent medical report of Dr. Russell Cantrell dated March 27, 2013
- B. Deposition of Dr. Daniel Kitchens, with attachments, dated August 13, 2014

***Note:*** Any stray marks or handwritten comments contained on any of the exhibits were present on those exhibits at the time they were admitted into evidence, and no other marks have been made since their admission into evidence on August 21, 2014.

**FINDINGS OF FACT:**

Based on a comprehensive review of the evidence, including Claimant's testimony, the expert medical opinions and deposition, the medical treatment records, the other records, and the testimony of Employer's witness, as well as my personal observations of Claimant and the other witness at hearing, I find:

- 1) **Claimant** is a 36-year-old, clamp truck/forklift operator, who worked for Penske Truck Leasing (Employer) for a little over four years, from May 2008 until August 2012. After he was terminated in August 2012, he applied for and received unemployment benefits for a period of time. Subsequently, he worked for a couple of other employers, until earlier this year, when he became employed by Alpla Plastic Company (through St. Louis Staffing) as a clamp truck/forklift driver. He currently is working for Alpla (through St. Louis Staffing) full time, 35-40 hours per week.
- 2) Claimant testified that he is pursuing a Claim here for neck and back complaints. He testified that his job as a clamp truck/forklift driver for Employer required him to sit, twisted to the right, looking over his right shoulder with his left hand on the steering wheel to drive. He estimated that he spent 85% of each workday for Employer in this position driving the clamp truck/forklift. He testified that he worked 12-hour days, 7 days a week for the first 1 ½ years he was employed by Employer, and, then, he worked 8-12 hours per day for 5-6 days a week for the balance of his time there. He said that he was primarily on the forklift driving, but he would have to occasionally pick up items as well by hand, such as microwaves or cook tops. He estimated that the lifting component was approximately 15% of his time working for Employer.
- 3) Claimant testified that sitting and driving while twisted to the right and looking back over his shoulder was uncomfortable within the first year he was doing it. He said that the problems got worse as time went on and he continued performing this activity. He testified that he told his supervisor, Cory, about his problems in September 2010, and, then, later on he told a team leader, Matt Harris, about the neck and back problems he was having as well. He said that he has never received any injections, physical therapy or other medical treatment from Employer for his complaints.
- 4) Claimant testified that the problems became worse in 2011, so he signed up for FMLA. His **Medical Certification for FMLA** (Exhibit 7) dated June 29, 2011 from Dr. Misir, indicates that as a result of chronic sinus pain and infection and chronic back pain, Claimant will need to miss work approximately four times a month for one to two days per treatment between June 29, 2011 and December 29, 2011.
- 5) Medical treatment records from **Dr. Naresh Misir at BJC North County Physicians** (Exhibit 1) document an initial complaint of back pain by his kidneys, and chest and rib pain on July 22, 2009. However the records also reveal treatment in 2009 for urolithiasis (stones) that could account for the back/flank pain. Beginning on March 9, 2012, Claimant complained of moderate-to-severe right neck pain with radiation to the right arm that began one year prior to the visit. In follow-up visits in August

2012, Claimant continued to complain of severe neck pain aggravated by twisting, with radiation into the bilateral upper arms, and he was diagnosed with worsening cervicalgia. A cervical MRI taken on August 15, 2012 showed a minor broad-based disc bulge at C4-5 without foraminal encroachment or nerve root compression. By August 27, 2012, Claimant was still reporting worsening neck pain and radiation into both arms with weakness, pain and tingling.

- 6) The medical treatment records from **Christian Hospital** (Exhibit 5) begin with an admission to the emergency department on March 7, 2012 for face, head and neck injuries on account of being assaulted in a McDonald's by several individuals. The records document swelling, lacerations and abrasions to various parts of his face. Claimant testified at hearing that this admission was not him and that he was the victim of identity theft. He explained that he has had problems with someone stealing his identity and running up bills in his name. In comparing the March 7, 2012 hospital admission with a doctor's visit to Dr. Misir that Claimant had on March 9, 2012, I find that Dr. Misir noted no abnormalities about Claimant's face on March 9, 2012, despite lacerations and swelling being noted at the hospital two days earlier. I also found differences in the reported drug allergies, the history of past medical conditions and history of past surgery, as well as differences in how his signature and initials looked in the record of this visit (lack of a middle initial included when Claimant always signed with a middle initial in other places). All of this leads me to conclude that the March 7, 2012 visit was not Claimant and he was not the victim of an assault on that date.
- 7) Claimant's actual treatment at **Christian Hospital** (Exhibit 5) began on March 9, 2012, when he had some cervical spine x-rays taken and he was diagnosed with cervicalgia. He had some additional visits in early April 2012 for testicular/genital pain and problems, but nothing else specific that I found for the neck or upper back.
- 8) Claimant was examined by **Dr. Shawn Berkin** (Exhibit 4) for an independent medical examination at the request of Claimant's attorney on January 16, 2013. Following his physical examination of Claimant and his review of the medical treatment records, Dr. Berkin wrote his report dated January 21, 2013. Claimant provided Dr. Berkin a consistent history of continually having to twist and look behind him to drive the forklift for Employer in reverse as a part of his job duties. Claimant reported pain and stiffness in his neck, difficulty turning his head, pain into his left arm and left-sided anterior chest wall pain. Dr. Berkin diagnosed a cervicothoracic strain, a C4-5 disc bulge and a left pectoralis/intercostal muscle strain. He opined that the industrial injury in June 2011 from operating the forklift with the neck turned to the right, was the prevailing factor in causing those diagnoses. Dr. Berkin did not believe that Claimant had reached maximum medical improvement and he felt Claimant would benefit from more treatment, including medications and a referral to a pain management specialist for consideration of cervical epidural steroid injections.
- 9) Claimant was examined by **Dr. Russell Cantrell** (Exhibit A) for an independent medical examination at the request of Employer's attorney on March 27, 2013.

Following his physical examination of Claimant and his review of the medical treatment records, Dr. Cantrell issued his report on that same date. Claimant provided Dr. Cantrell a consistent history of continually having to twist and look behind him to drive the forklift for Employer in reverse as a part of his job duties. Claimant told Dr. Cantrell that despite not working since August 2012, he has continued to have progressively worsening pain in his neck, bilateral parascapular area, left chest wall and low back, with complaints extending into his left arm and left leg. On physical examination, Dr. Cantrell found full (normal) range of motion, with tenderness but no spasm, and normal strength and reflex testing. Dr. Cantrell opined that Claimant's ongoing complaints are not causally related to his occupational activities leading up to June 29, 2011. As support for his opinion, he noted Claimant's report that the symptoms are progressively worsening even though he is not performing this work activity anymore, and suggested that if the work activities caused the complaints, then they should not be getting worse, but should lessen, with the cessation of the occupational activities. He opined that the bulging disc at C4-5 is representative of a degenerative process, which is also not related to his work activities for Employer. Dr. Cantrell noted earlier in the report that Claimant had not had a steroid injection or any formal physical therapy, but he did not believe Claimant was in need of any further treatment for his subjective complaints. He opined that Claimant had reached maximum medical improvement for his alleged injury and did not have any permanent partial disability attributable to his occupational activities.

- 10) Medical treatment records from the **St. Louis County Department of Health** (Exhibit 6) document an initial visit for neck and back pain complaints on May 3, 2012. On December 4, 2013, Claimant again presented with back and neck pain. He provided a history of repeated upper body twisting while operating a forklift on his job and noted that he drove backwards several hours a day for several days a week. He reported taking medications for his complaints but noted ongoing, worsening pain and paresthesias into both upper extremities. When his complaints continued into early January 2014, he was sent for an MRI to further evaluate his condition.
- 11) The MRI of the cervical spine taken at **Berland Imaging & MRI** (Exhibit 3) on January 9, 2014, revealed a C4-5 small-to-moderate sized disc herniation encroaching upon the lateral aspect of the right lateral recess (slightly larger than seen on the August 15, 2012 MRI) and a C5-6 small right-sided lateralizing disc bulge without significant spinal canal encroachment. The MRI of the thoracic spine taken on January 14, 2014, showed small disc bulges at T1-2 and T3-4, but no evidence of disc herniation or spinal canal encroachment.
- 12) Claimant followed up at the **St. Louis County Department of Health** (Exhibit 6) on January 17, 2014 after his MRIs were performed. He was diagnosed with cervicalgia, and the doctor noted that Claimant was unable to be sent to pain management or for a neurosurgery consult because there were no available providers who would see him without insurance. He recommended continued medical management by his primary care physician.

- 13) **Dr. Carmel Boykin Wright** (Exhibit 6) wrote a final report dated April 2, 2014, wherein she confirmed that Claimant had been diagnosed with cervicalgia. She further opined that “this problem was caused by repeated twisting of the neck over the course of several years. If this occurred as a requirement of the patient’s previous employer, I feel that his current problem is related to his previous job duties.”
- 14) Claimant was examined by **Dr. Paul Matz** (Exhibit 2), a neurosurgeon, for another independent medical examination at the request of Claimant’s attorney on May 14, 2014. Following his physical examination of Claimant and his review of the medical treatment records, Dr. Matz issued his report under that same date. Claimant again provided a consistent history of his repetitive forklift driving activities at work for Employer. Claimant reported ongoing pain in the right neck and shoulder, as well as some aching in the left chest, and stiffness in the neck and back. Dr. Matz diagnosed a C4-5 disc displacement with C5 sensory motor radiculopathy. He acknowledged that this type of condition could develop due to a degenerative process, but Claimant was “on the young side for that to happen.” He noted the mechanical mechanism of repetitively rotating his head to the right, that he thought put mechanical pressure in an abnormal way on Claimant’s neck and also narrowed the foramina on the right side of his neck. Dr. Matz opined that the repetitive work duties (repetitive rotation of the head while driving the forklift for Employer) were the prevailing factor for the development of the C4-5 disc displacement and the cervical radiculopathy. He recommended continued treatment in the form of physical therapy and perhaps selective nerve root injections. He noted that if this treatment did not improve his complaints, then, perhaps a neck surgery would be a consideration of last resort. With regard to the left chest wall complaints, he diagnosed a thoracic strain and recommended some physical therapy.
- 15) Employer took the deposition of **Dr. Daniel Kitchens** (Exhibit B) on August 13, 2014 to make his opinions in this case admissible at trial. Dr. Kitchens is board certified in neurological surgery. He examined Claimant one time, November 19, 2013, for an independent medical examination at the request of Employer and provided no treatment in this case. He issued his first report on that same date after his physical examination of Claimant and his review of the medical treatment records. Then, after he had the chance to review and compare the old and new cervical MRIs, he issued a supplemental report dated August 5, 2014. Claimant, again, provided a consistent history of the onset of his complaints while performing backwards forklift driving for Employer. The physical examination revealed normal strength, sensory and reflex testing. At the time of his first report, Dr. Kitchens agreed that the MRI showed a mild disc bulge at C4-5, somewhat to the right. Dr. Kitchens opined that Claimant had subjective reports of pain in the upper back, both arms and left leg (in a non-radicular manner), but no signs or symptoms of cervical radiculopathy or cervical myelopathy. He opined that Claimant “did not sustain an acute injury to his neck as a result of his work activities,” and, so, therefore, “his work activity of driving a forklift is not the prevailing factor in his current subjective report of near total body pain.” He found no incident at work that led to the report of pain and also found no objective structural abnormality to explain the pain either. He did not believe any further treatment was needed. After comparing the August 15, 2012 cervical MRI to the

January 9, 2014 cervical MRI (which Dr. Kitchens did not have at the time of his original examination), Dr. Kitchens further opined that there was an obvious worsening of the disc protrusion, in that Claimant had a disc herniation to the right at C4-5 in the January 2014 MRI. He opined that Claimant developed the cervical disc herniation after he left employment, and since there was no work incident to serve as a prevailing factor for the herniation, it was not work related. Dr. Kitchens also disagreed with Dr. Matz's conclusion about the force applied to Claimant's neck on account of his work activities. Dr. Kitchens noted that Claimant's neck was not forcibly attacked or moved, no force was applied to the top of his head from an object falling on it, nor was his head jerked or forced around. He believed Claimant was simply using "his neck in a normal physiologic manner," and, so, therefore, "this normal movement of his neck cannot serve as the prevailing factor in the development of a cervical disc bulge." Dr. Kitchens also believed that the disc bulge was from an underlying degenerative condition.

- 16) In terms of his current complaints, Claimant testified that his neck stiffens up on him with movement in any direction. He said that his right arm is constantly numb and he has pain in his left arm, left leg and some in the right leg. He said that he sometimes gets headaches because the pain is too unbearable. Basically, he said that the whole top half of his body is in pain. He is asking for medical treatment to address the complaints he has that he associates with his work activities for Employer.
- 17) On cross-examination, Claimant admitted that his first request for medical treatment was made after he was terminated by Employer. He also confirmed that the FMLA filing was to cover days he needed to take off work for his complaints or other illnesses, but he was not off work for five months straight.
- 18) **Michael Landen**, the operations manager for Employer, testified on Employer's behalf at the hearing. He confirmed that Claimant worked for him and Claimant was terminated for cause. He said that he first became aware of Claimant's Claim after Claimant's termination. Mr. Landen testified that he was familiar with the responsibilities of a clamp truck driver, and admitted that the driver does spend 75-80% of the workday looking backwards while driving. He noted that the driver could also turn his body more, instead of just his head and neck to provide better support while driving backwards. However, I did note that when Mr. Landen demonstrated how the drivers are positioned when driving backwards, he demonstrated the same exact body position as Claimant demonstrated during his testimony. He also admitted that the drivers wear lap belts while operating the forklifts or clamp trucks.

**RULINGS OF LAW:**

Based on a comprehensive review of the evidence described above, including Claimant's testimony, the expert medical opinions and deposition, the medical treatment records, the other records, and the testimony of Employer's witness, as well as my personal observations of Claimant and the other witness at hearing, and based on the applicable laws of the State of Missouri, I find the following:

Since the first three issues are seemingly interconnected in this case, I will address them together in the same section of the award.

***Issue 1: Did Claimant sustain an occupational disease?***

***Issue 2: Did the occupational disease arise out of and in the course of employment?***

***Issue 3: Are Claimant's injuries and continuing complaints medically causally connected to his alleged occupational disease at work?***

Considering the date of the alleged injury, it is important to note the statutory provisions that are in effect, including **Mo. Rev. Stat. § 287.800 (2005)**, which mandates that the Court "shall construe the provisions of this chapter strictly" and that "the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts." Additionally, **Mo. Rev. Stat. § 287.808 (2005)** establishes the burden of proof that must be met to maintain a claim under this chapter. That section states, "In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true."

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence. *Id.* at 199.

Under **Mo. Rev. Stat. § 287.067.1 (2005)**, occupational disease is defined as "an identifiable disease arising with or without human fault out of and in the course of the employment." Additionally, under **Mo. Rev. Stat. § 287.067.3 (2005)**, "An 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." That section then defines "prevailing factor" as "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." It continues, "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."

The Court in *Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43 (Mo. App. E.D. 1999), provided guidance on the proof the employee must provide in order to make an occupational disease claim compensable under the statute. The Court held that first, the employee must provide substantial and competent evidence that he contracted an occupationally-induced disease rather than an ordinary disease of life. There are two considerations to that inquiry: (1) Whether there was an exposure to the disease 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. The Court then held that the employee must also establish, usually with expert testimony, the probability that the claimed occupational disease was caused by the conditions in the workplace. More specifically, employee must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." *Id.* at 48. Finally, the Court noted, "where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible." *Id.*

Based on Claimant's and Mr. Landen's testimony, as well as the competent, credible and persuasive opinions of Dr. Paul Matz, I find that Claimant has met his burden of proving the presence of an occupational disease that arose out of and in the course of his employment. I further find that he has met his burden of proof to show that his neck and back complaints and problems are medically causally related to his employment as a forklift/clamp truck driver for Employer.

I find that both Claimant and Mr. Landen described and demonstrated the same exact body position that forklift/clamp truck drivers would be in during the course of their work for Employer. The undisputed evidence in the record shows that as a forklift/clamp truck driver for Employer, Claimant was required to sit, twisted to the right, looking over his right shoulder with his left hand on the steering wheel for 75-85% of each workday, for over four years that he worked there. Based on the amount of time each day he was required to work in this twisted, contorted position, and based on the extent of the duration of his employment for Employer (over four years), I find that his work as a forklift/clamp truck driver for Employer required repetitive, extensive twisting of his neck and upper body to operate the forklifts/clamp trucks as dictated by Employer.

In order to meet his burden of proof in this matter, in addition to credible testimony on his own behalf regarding the nature of his work and the onset of his complaints, Claimant also needed to submit competent, credible and reliable medical evidence to show that he suffered from an occupational disease and also to show that that occupational disease was medically causally related to his work as a forklift/clamp truck driver. To meet this burden of proof, Claimant offered the opinions of Drs. Shawn Berkin, Carmel Boykin Wright and Paul Matz, who each opined that Claimant's work as a forklift/clamp truck driver, and, specifically, his work activity of repeated twisting of the neck over the course of several years, is the prevailing factor in the cause of Claimant's neck and back complaints and his need for treatment for his neck and back. To counter these opinions, Employer offered the opinions and testimony of Drs. Russell Cantrell and Daniel Kitchens, who opined that Claimant's C4-5 disc bulge, was simply a part of an underlying degenerative condition, which was not related at all to Claimant's work for Employer. Dr. Kitchens testified that Claimant "did not sustain an acute injury to his neck as a result of his work activities," and, so, therefore, "his work activity of driving a forklift is not the

prevailing factor in his current subjective report of near total body pain.” He found no incident at work that led to the report of pain and also found no objective structural abnormality to explain the pain either.

With all due respect to the other physicians who have offered their opinions in this case, I find that the decision on the medical causation issue in this matter actually comes down to deciding which of the two neurosurgeons, Drs. Matz or Kitchens, have offered the most credible and persuasive opinions in connection with this case. After all, as the two neurosurgeons who offered opinions in this matter, I find that they are the most qualified of the doctors in the record to comment on neck and back diagnoses and what might be the cause of such diagnoses. Having reviewed both opinions in light of the rest of the medical treatment records and evidence in this case, I find that the opinions of Dr. Matz are more competent, credible and persuasive than the contrary opinions of Dr. Kitchens in this case.

While I find that both experts are equally qualified to render opinions in this area of medicine, as both are neurosurgeons, I find that Dr. Kitchens’ opinions seem to errantly focus much more heavily on the absence of a specific trauma or an accident to account for the neck and back complaints, when, in fact, Claimant has never alleged an accident, but, instead, an occupational disease, as the mechanism of injury in this case. Dr. Kitchens opined that Claimant “did not sustain an acute injury to his neck as a result of his work activities,” and, so, therefore, “his work activity of driving a forklift is not the prevailing factor in his current subjective report of near total body pain.” This opinion, on the absence of an acute injury, misses the mark as an acute injury was never alleged. Dr. Kitchens continues in a later report to note that Claimant’s neck was not forcibly attacked or moved, no force was applied to the top of his head from an object falling on it, nor was his head jerked or forced around. He believed Claimant was simply using “his neck in a normal physiologic manner,” and, so, therefore, “this normal movement of his neck cannot serve as the prevailing factor in the development of a cervical disc bulge.” I find that this opinion, again, misses the point of the Claim. I am, further, perplexed by Dr. Kitchens’ assertion that working for 75-85% of each workday with your neck and upper body twisted to constantly look behind you, is “a normal physiologic manner” for use of the neck and upper body. While I certainly understand that our spine was constructed in such a way as to allow us to twist to look behind us on occasion, I cannot help but think that it was not constructed to allow us to constantly be twisted and looking behind us for hours per day for over four years, without there being some additional strain on the spine and upper body.

Dr. Matz’s opinion on the relationship between Claimant’s work as a forklift/clamp truck driver (specifically his mechanical mechanism of repetitively rotating his head to the right), and the development of the neck and back complaints is more clearly explained and understandable than the contrary opinion from Dr. Kitchens in this case. Dr. Matz noted the mechanical mechanism of repetitively rotating Claimant’s head to the right, put mechanical pressure in an abnormal way on Claimant’s neck and also narrowed the foramina on the right side of his neck. He opined that the repetitive work duties (repetitive rotation of the head while driving the forklift for Employer) were the prevailing factor for the development of the C4-5 disc displacement and the cervical radiculopathy. Based on this persuasive medical opinion, I find that there was an exposure to the C4-5 disc displacement and cervical radiculopathy, greater than or different from that which affects the public generally, because of the work Claimant was doing with the extensive, repetitive twisting of his neck and upper body while operating a forklift/clamp truck

for Employer. I also find that there is a recognizable link between the disease (C4-5 disc displacement and cervical radiculopathy) and some distinctive feature of the employee's job (repetitive, extensive twisting of the neck and upper body) which is common to all jobs of that sort for Employer. Dr. Matz also credibly described a recognizable link between a distinctive feature of Claimant's job (repetitive, extensive twisting of the neck and upper body) and the C4-5 disc displacement and cervical radiculopathy. Considering all these things, I find Dr. Matz credibly established that Claimant's work was the prevailing factor in causing the neck and back conditions/complaints.

Employer suggests that Claimant is not credible, in that his complaints are rather extensive and in a number of different parts of his body that would be difficult to directly connect to a cervical disc herniation. While I can understand Employer's point in this regard, and I do find it difficult to understand the connection, for instance, between bilateral leg complaints and a neck and upper body injury, I would note that I am only finding a medical causal connection in this Award between Claimant's job duties and his neck and upper body complaints. To the extent that Dr. Matz did not causally connect any low back or lower extremity problems to Claimant's work for Employer, then neither do I. In that respect, then, I find that Claimant's complaints in the neck and upper body are consistent with essentially untreated neck and upper back conditions and his complaints in other parts of his body are not addressed as Dr. Matz did not specifically relate them to Claimant's work activities for Employer.

Employer also argues, based on the testimony of Dr. Kitchens, that the C4-5 disc herniation is not related to Claimant's work for Employer because it was first detected on the cervical MRI in January 2014, well after Claimant last worked for Employer. Dr. Kitchens points out that the MRI in August 2012, only showed a C4-5 disc bulge, and, so, the herniation must have occurred between August 2012 and January 2014, when Claimant was no longer working for Employer. In the context of this argument, based on the timing of the discovery of the frank herniation, I must also note that Dr. Matz only causally relates C4-5 disc displacement, not specifically a disc herniation, to the work activities. I must also note that even when the disc bulge was discovered on the first MRI, Claimant essentially had no significant medical treatment to address the effects of the C4-5 bulge or any of his complaints at that time. Therefore, this Award contemplates the medical causal connection of the C4-5 disc displacement, not specifically the herniation, and the effects/complaints caused by that displacement, that are related to the extensive upper body and neck twisting while driving a forklift/clamp truck for Employer.

Accordingly, on the basis of Claimant's and Mr. Landen's testimony and the credible and persuasive medical opinions of Dr. Paul Matz, I find that Claimant met his burden of proving the presence of an occupational disease of C4-5 disc displacement and cervical radiculopathy that arose out of and in the course of employment as a forklift/clamp truck driver, and which was medically causally connected to it. I find that Claimant's repetitive, extensive twisting of the neck and upper body, during the course of his employment as a forklift/clamp truck driver, was the prevailing factor in causing this medical condition and any disability Claimant currently has in his neck and upper body as a result of it. I find that his work as a forklift/clamp truck driver was the primary factor, in relation to any other factor, in causing both the medical condition and disability in his neck and upper body.

**Issue 4: Did Claimant provide Employer with proper notice of the injury under the statute?**

Under **Mo. Rev. Stat. § 287.420 (2005)**, “No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.”

When considering this notice provision for occupational diseases, and specifically interpreting the phrase “after the diagnosis of the condition,” Courts have held that “a person cannot be diagnosed with an ‘occupational disease or repetitive trauma’ until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure.” *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823 (Mo. App. S.D. 2009). In other words, a mere diagnosis of a condition is not enough. It is only after a diagnosis is made and a medical causal connection between that diagnosis and the work exposure is given, that the 30-day notice time frame begins to run.

Case law has held that the purpose of this section is to give an employer the timely opportunity to investigate the facts surrounding an injury, and if the injury occurred, the chance to provide the employee with medical treatment in order to minimize the disability. *Willis v. Jewish Hospital*, 854 S.W.2d 82 (Mo. App. E.D. 1993) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003). However, if the employee failed to give timely written notice of the injury, that failure may be circumvented if the failure to give timely written notice did not prejudice the employer.

In the case at bar, Claimant testified that he told his supervisor, Cory, about his problems in September 2010, and, then, later on he told a team leader, Matt Harris, about the neck and back problems he was having as well. He was never sent anywhere for medical treatment to address his complaints, but, admittedly, Claimant did not ask for medical treatment at that time either. Claimant filed his Claim for Compensation on September 12, 2012. In the absence of any other evidence in the record of any earlier written notice from Claimant to Employer about his neck and upper body condition, I find that the filing of the Claim on September 12, 2012 is the first notice Employer was provided of this neck and upper body injury.

Much like in *Allcorn*, the resolution of this issue in the case at bar turns on when “the diagnosis of the condition” occurred. Having reviewed the medical treatment records and expert reports in detail, I find that the first “diagnosis of the condition” occurred on January 21, 2013, when Dr. Shawn Berkin issued his report, in which he both, offered a diagnosis and medically causally connected it to Claimant’s employment for Employer. To the extent that Claimant filed his Claim for Compensation in this matter on September 12, 2012, well before the diagnosis of the condition had occurred in January 2013, I find that Claimant appropriately provided timely notice of his occupational disease to Employer pursuant to the statute.

While it is true that Claimant may have had an idea earlier in this case that his repetitive upper body and neck twisting at work was the cause of his neck and upper body issues, I find that Claimant's layperson belief of what may be causing his neck and upper body complaints is not a sound basis, in and of itself, for making a medical causal connection between a diagnosis and a work activity or exposure. Claimant is not a diagnostician and does not have the medical training or expertise to offer an opinion on medical causation. I find that Claimant's belief as to medical causation does not start the 30-day notice clock running. It takes a medical professional to offer such an opinion to start that notice clock.

Second, while it is also true that some of the early medical treatment records in this case, such as those from BJC North County Physicians and Dr. Misir, generally discuss Claimant's twisting activities and his neck and upper body complaints, I found no frank medical causation opinions relating Claimant's complaints or diagnoses to his work activities for Employer in those records. I find that those references in the early medical treatment records do not equate to a diagnostician clearly and specifically medically causally relating the diagnoses to Claimant's work for Employer.

Having found no such medical causation opinion from a medical diagnostician in the record of evidence prior to Dr. Berkin offering his opinion on January 21, 2013, and having found that Claimant previously provided written notice to Employer in his Claim for Compensation that he filed in this matter on September 12, 2012, I find that Claimant appropriately provided timely notice of his occupational disease to Employer pursuant to the statute.

***Issue 5: Is Employer liable for ongoing medical care?***

According to **Mo. Rev. Stat. § 287.140.1 (2005)**, "the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment...as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." Claimant bears the burden of proving this element of the claim.

Just as Claimant must prove all of the other material elements of his claim, the burden is also on him to prove entitlement to future medical treatment. ***Dean v. St. Luke's Hospital***, 936 S.W.2d 601, 603 (Mo. App. 1997) *overruled on other grounds*, ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d at 223 (Mo. banc 2003). Claimant is entitled to an award of future medical treatment if he shows by a reasonable probability that future medical treatment is needed to cure and relieve the effects of the injury. ***Concepcion v. Lear Corporation***, 173 S.W.3d 368, 372 (Mo. App. 2005).

Based on the competent and substantial evidence described above, I find that Claimant is entitled to the future medical care suggested and recommended by Dr. Paul Matz and Dr. Shawn Berkin for the neck and upper body complaints related to this injury at work for Employer leading up to June 29, 2011.

Having previously found Dr. Matz and (to the extent his opinions are consistent with Dr. Matz) Dr. Berkin, credible and persuasive in this case, I find, based on their medical opinions that Claimant is in need of ongoing treatment for his neck and upper body, including, but not limited to, medications, physical therapy, perhaps selective nerve root injections and possibly, as a last resort if the other treatment does not relieve his complaints, a neck surgery.

Therefore, based on Dr. Matz's opinion, and based on Claimant's desire to receive the recommended medical care, I find Claimant has met his burden of proof to show an entitlement to future medical treatment for his neck and upper body. Employer is directed to return Claimant to a treating physician and/or surgeon for further evaluation and a determination on whether the previously recommended treatment is still needed to cure and relieve Claimant of the effects of this injury at work. Employer is then directed to provide any and all treatment (conservative or surgical) recommended by that physician (or any other referral physicians) to cure and relieve Claimant's neck and upper body complaints/diagnoses, which are medically causally related to his work for Employer.

***Issue 6: What is the nature and extent of Claimant's permanent partial disability attributable to this alleged occupational disease injury?***

To the extent that this is a Temporary or Partial Award providing for more medical treatment for Claimant on account of this injury, and to the extent that Claimant has, therefore, not yet reached maximum medical improvement on account of his neck and upper body injury, I find that this remaining issue on an amount of permanent partial disability in this case, is not yet ripe for determination and will not be addressed in this Award.

**CONCLUSION:**

Claimant met his burden of proving the presence of an occupational disease of C4-5 disc displacement and cervical radiculopathy that arose out of and in the course of employment as a forklift/clamp truck driver, and which was medically causally connected to it. He met that burden through his own testimony, and the credible and persuasive medical opinions of Dr. Paul Matz, that Claimant’s repetitive, extensive twisting of the neck and upper body, during the course of his employment as a forklift/clamp truck driver, was the prevailing factor in causing this medical condition and any disability Claimant currently has in his neck and upper body as a result of it. His work as a forklift/clamp truck driver was the primary factor, in relation to any other factor, in causing both the medical condition and disability in his neck and upper body.

Having found no medical causation opinion from a medical diagnostician in the record of evidence prior to Dr. Berkin offering his opinion on January 21, 2013, and having found that Claimant previously provided written notice to Employer in his Claim for Compensation that he filed in this matter on September 12, 2012, Claimant appropriately provided timely notice of his occupational disease to Employer pursuant to the statute.

Employer is responsible for providing continued and ongoing future medical care for Claimant’s neck and upper body, including, but not limited to, medications, physical therapy, perhaps selective nerve root injections and possibly, as a last resort if the other treatment does not relieve his complaints, a neck surgery, to cure and relieve him of the effects of the injury.

To the extent that this is a Temporary or Partial Award providing for more medical treatment for Claimant on account of this injury, and to the extent that Claimant has, therefore, not yet reached maximum medical improvement on account of his neck and upper body injury, the remaining issue on an amount of permanent partial disability in this case, is not yet ripe for determination and will not be addressed in this Award. Compensation awarded is subject to a lien in the amount of 25% of all payments in favor of Ms. Kerry I. O’Sullivan for necessary legal services.

Made by: \_\_\_\_\_  
 JOHN K. OTTENAD  
*Administrative Law Judge*  
*Division of Workers' Compensation*