

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

Injury No.: 08-048118

Employee: Deborah Johnson
Employer: Department of Public Safety (Missouri Veteran's Home)
Insurer: Self-Insured/CARO
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 December 27, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued December 27, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25th day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

**FINAL AWARD
Denying Compensation**

Employee: Deborah Johnson Injury No.08-048118
Dependants: NA
Employer: Missouri Veteran's Home; Department of Public Safety
Additional Party: NA
Insurer: Self Insured/CARO
Hearing Date: November 12, 2010 Checked By: MSS/cy

FINDINGS OF FACTS 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: June 11, 2008
5. State location where accident occurred or occupational disease was contracted: Veteran's Home; Warrensburg Johnson County, Missouri.
6. Was above employee in employ of above employer at the 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? 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 occurred or occupational disease was contracted: Claimant was assisting a resident with a gait belt, was pulling the resident up when

she felt immediate pain. She woke the next morning with increased pain and shortness of breath. She alleges the lifting incident caused injury to her back and body as a whole.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Back and body as a whole
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: \$1,180.11 (3 weeks 5/7 days)
16. Value necessary medical aid paid to date by employer/insurer? \$7,149.44
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$714.87
19. Weekly compensation rate: \$476.58/317.72
20. Method wages computation: Comparable employee - RSMo. ' 287.250.1(5).

COMPENSATION PAYABLE

21. Second Injury Fund liability: None
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

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On November 12, 2010 the employee and the employer/insurer appeared for a temporary hearing. The Division had jurisdiction to hear this case pursuant to Section 287.203 RSMo. 2000. The employee, Ms. Deborah Johnson appeared in person and with counsel, Mr. Jeff Dull. The employer/insurer appeared by counsel, Ms. Kimberley Fournier. The evidence consisted of live testimony of the employee. Medical records, medical reports and other exhibits were offered and admitted into evidence.

The following exhibits were offered by employee:

Exhibit A- 60 day notice of Dr. Swaim's report and attached medical records
Exhibit B- Dr. Swaim's report

The following exhibit was offered by employer:

Exhibit 1-60 day report of Dr. Baileys report and attached medical records

ISSUES

The issues to be determined by this hearing are as follows:

- (1) Accident
- (2) Medical Causation
- (3) Future Medical
- (4) Temporary total disability

Based upon the evidence and the live testimony, I find the following:

Deborah Lynn Johnson is a 36 year old woman who lives in Warrensburg, Missouri with her two children. She is a high school graduate, has an associates degree, and is currently attending the University of Central, Missouri. Ms. Johnson is a smoker.

Ms. Johnson's work history includes mostly utilizing her CNA license. She procured that license in 1993 and has been certified in both Kansas and Missouri. She has always worked in nursing homes. Beginning in 2004, Ms. Johnson began working for the State of Missouri at the Veterans' Home in Warrensburg, Missouri. Her job duties included helping patients by cleaning and assisting with personal care which often required her to use a "gait belt" to assist her lifting immobile patients. She worked for the Veterans Home from 2004 through 2008. She was under no doctor's restrictions during that time.

Ms. Johnson does, however, have a history of physical problems. First when Ms. Johnson was a child, she was diagnosed with a bone disease called polyfybrosis displasia. This condition affected her right femur and her pelvis. She underwent three surgeries-one when she was ten years of age, one when she was 12 years of age and the final one in 1998. The condition did cause Ms. Johnson to have ongoing back pain and an altered gait. She also had a knee surgery in 1991.

In November of 2005 Ms. Johnson had an event while lifting a patient that caused back pain. Ms. Johnson underwent physical therapy following this incident.

Lastly, Ms. Johnson testified that her job duties would frequently cause her to strain her back resulting in back pain following her shifts. Muscle strains were an ordinary part of Ms. Johnson's job.

On June 11, 2008, Ms. Johnson indicates that she was toward the end of her shift when she injured herself while lifting a very large patient with a "gait belt". She indicates she felt immediate sharp pain in her upper back between her shoulder blades. She completed her shift while performing all of the requirements of her job the remainder of that day because she felt this incident was typical of past muscle strains. No one saw the incident Ms. Johnson described as her work related injury. She went home that day and did not tell her supervisor of the incident.

The next day Ms. Johnson told her supervisor about the incident, an accident report was filled out, and Ms. Johnson was sent out for treatment.

Initially Ms. Johnson complained of pain in her thoracic spine. Approximately three days after her alleged incident, Ms. Johnson began having low back pain and radiating pain down into her legs. Ms. Johnson initially saw Dr. Anderson, then was sent to see Dr. Alexander Bailey for her complaints. Her treatment was as follows:

On July 2, 2008 Dr. Anderson shows thoracic spine pain, and “now” into lumbar spine. It also shows a history of the three surgeries to the right femur and hip due to the polyfibrosis dysplasia. He sends Ms. Johnson for physical therapy.

Beginning on July 17, 2008 Ms. Johnson underwent three weeks of physical therapy.

The July 23, 2008 thoracic/lumbar spine X-ray showed no spondylolisthesis in the thoracic spine but showed decreased disc space with degenerative spurring in the lumbar spine.

The July 31, 2008 MRI showed disk desiccation at the L5-S1 level and a protrusion of the disc at that level as well.

On her own, Ms. Johnson saw Dr. Templeton for an opinion regarding her back and hip pain. Dr. Templeton saw Ms. Johnson initially on August 21, 2008. At that time the doctor stated that the etiology of her back pain is unclear if it was a fall or a lifting injury. Also during that visit, Dr. Templeton noted Ms. Johnson to have ongoing hip pain. (The note references a visit for ongoing hip pain in March of 2008-prior to the June 2008 injury)

The August 15, 2008 thoracic spine X-ray revealed no evidence of instability, no evidence of significant degeneration, no significant arthrosis. X-ray report of the lumbar spine showed evidence of bilateral spondylosis and listhesis of L5-S1. Adjacent levels appear to be maintained without significant abnormality.

The August 15, 2008 report from Dr. Bailey notes complaints of pain in her neck with numbness in her right arm, pain between her shoulder blades, pain in the mid and lower back and into her leg. She complained that physical therapy worsened her pain. He notes prior back pain when Ms. Johnson had other incidents at work before June of 2008. He diagnoses spondylosis-listhesis at the L5-S1 level and back strain. Dr. Bailey states at that time, “clearly, her spondylosis-listhesis is pre-existing in nature. Her minor lifting injury working for the Department of Veterans Affairs nursing home did not result in spondylosis or listhesis. She has this underlying condition that has been present for some time. Most likely, it has been present since her youth...This may represent an exacerbation of symptoms, but the vast majority of her overall condition appears to be pre-existing in nature. It is impossible to time her MRI findings and it is impossible to determine whether this truly happened on the job or not. This more likely than not was going to develop over her recent lifetime. Ultimately, the lysis and listhesis has been present for some time and there was a natural progressive degeneration and failure of the L5-S1.”

On September 2, 2008 Ms. Johnson underwent her first epidural steroid injection.

On September 12, 2008 Dr. Bailey's notes indicated that “causation remains in question” regarding Ms. Johnson's back complaints. He states that “The patient has a known spondylosis-listhesis that is not new and that is longstanding.”

Ms. Johnson underwent an MRI, and began seeing a neurosurgeon, Dr. Bailey, for treatment. He allowed Ms. Johnson to continue working on a light duty status. The MRI showed a bulging disc and degenerative conditions. Ms. Johnson had physical therapy and then had two epidurals. She continued to work light duty while under this care and treatment. Ms. Johnson refused the third epidural as the first two were very painful to her.

On September 16, 2008 Ms. Johnson underwent her second epidural steroid injection.

Dr. Templeton's note of September 11, 2008 indicates that Ms. Johnson's pain began between her shoulder blades in June of 2008... then eventually "went into" her lower back. Dr. Templeton advised her to continue getting conservative therapy, have a second set of epidurals and to have surgery only if those modalities failed. He also advised her that she would need to discontinue smoking.

At the request of the employer/insurer, on September 26, 2008 Dr. Bailey authored a report discussing the causation for Ms. Johnson's back pain and need for surgery. He stated that Ms. Johnson has "clear evidence of a spondylosis-listhesis" that clearly pre-existed her June 11, 2008 incident. He goes on to note that Ms. Johnson had admitted to previous exacerbation of back pain prior to June 11, 2008. She had failed motion segment, failed for sometime, that was exacerbated in the past. The June 11, 2008 incident "more likely than not represented a minor exacerbation of her underlying personal medical condition." Dr. Bailey went on to say that he did not believe Ms. Johnson's employer was responsible for the spondylosis or listhesis, and that more likely than not, and within a reasonable degree of medical certainty, Ms. Johnson was going to have ongoing, progressive exacerbations of back and leg pain associated with her spondylosis-listhesis. This, Dr. Bailey notes, was going to happen "regardless of her work ability." He states that despite Ms. Johnson's specific complaints of pain related to the June 2008 work injury, the natural history of her spondylosis and listhesis was to progressively worsen over time and to be exacerbated "regardless of activities."

On September 26, 2008 the therapy notes indicate that Ms. Johnson was making no complaints of radiating pain.

On October 8, 2008 Dr. Bailey recommended Ms. Johnson undergo an L5-S1 anterior-posterior lumbar spinal fusion and decompression, but awaited the employer/insurer's direction of compensability. At that point he released her to work with a 5 pound lifting/carrying restriction on an occasional basis for 4 weeks.

On October 15, 2008 Ms. Johnson's care and treatment that had previously been provided by her Employer was brought to a halt given the September 26, 2008 report authored by Dr. Bailey indicating that Ms. Johnson's work was not the prevailing cause for her back problems.

On April 27, 2009 Dr. Truett Swaim evaluated Ms. Johnson at the request of her attorney and authored a report. His report indicates that Ms. Johnson's occupational injury of June 11, 2008 was the prevailing factor to cause her to develop lumbar pain and right leg radiculopathy

and was the prevailing factor to cause the necessity for evaluation and treatment she has had for the lumbar condition.

After additional care was denied to Ms. Johnson, she took leave from her employer under FMLA. She has subsequently been terminated.

CONCLUSIONS AND FINDINGS

To be entitled to workers' compensation benefits, a claimant has the burden of proving that the alleged injury was directly caused by the accident. A claimant must establish a causal connection between the accident and the compensable injury." Kerns v. Midwest Conveyor, 126 SW3d 445, 453. (Mo. App. 2004) Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause." Gordon v. City of Ellisville, 268 SW3d 454, 461. (Mo. App. 2008)

The statutory authority for whether or not an injury sustained while in the course and scope of one's employment is compensable can be found in RSMo Section §287.020.3(1) (2005) which reads:

3. (1) in this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident 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.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is *the prevailing factor in causing the injury*; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. (Emphasis added §287.020.3 RSMo 2005.)

Specifically, not only must a claimant show that there is an injury that was directly caused by the accident, but more importantly, that accident is the *prevailing factor* in causing the injury.

In support of her contention that she suffered an injury while lifting a patient with a "gait belt", Ms. Johnson relies on the report of Dr. Truett Swaim who only saw Ms. Johnson one time and subsequently authored a report containing his opinion that Ms. Johnson's work on June 11, 2008 was the prevailing factor in her back pain and need for treatment. She also relies on her own testimony that following June 11, 2008 she was suffering from what her history indicates as intractable pain.

Dr. Alexander Bailey, Ms. Johnson's treating physician offers a considerably different outlook. Based on objective diagnostic testing, he found that Ms. Johnson suffered from an underlying medical condition: spondylosis-listhesis. He points out her history of back pain following work in the past. (She corroborates this finding in her testimony) Dr. Bailey goes on to determine that no matter what type of activities Ms. Johnson participated in, she was going to have this unfortunate outcome, thus while her work may have been a minor exacerbation, it was not the prevailing factor in her back pain and need for treatment.

When there are opinions of medical experts that are conflicting, the fact finding body determines whose opinion is most credible. The fact finder may reject all or part of an expert's testimony. *Bennett v. Columbia Health Care* 134 S.W.3d 84 (Mo.App WD 2004), citing *Kelley v. Banta & Stude Constr. Co.*, 1 SW 3d 43, 48 (Mo. App. ED 1999).

I find Dr. Bailey's report to be more credible given the objective diagnostic findings of pre-existing spondylosis-listhesis and given Ms. Johnson's admissions that strains and pain were a frequent and normal occurrences. There is no compensable accident. Ms. Johnson had an underlying condition that was frequently and regularly exacerbated. She testified to pain on a consistent basis as a result of her work activities. The fact that she may have exacerbated her pain complaints following her work on June 11, 2008 that greater degree of pain in and of itself does not prove a compensable work injury. Looking at the more credible medical expert, Dr. Bailey, the underlying medical condition of spondylosis-listhesis from which Ms. Johnson suffers was going to cause the pain no matter what she did. This particular incident was no different exposure than she was typically exposed to. She has failed to meet her burden that lifting a patient on June 11, 2008 was the prevailing cause for her lumbar condition or the resultant need for surgery.

Because Ms. Johnson's medical evidence lacks credibility, and the Missouri Department of Public Safety-Veteran's Home's evidence was credible, I specifically find that Ms. Johnson failed to meet her burden of proving that the June 11, 2008 incident at work was the prevailing factor in her back pain and need for subsequent treatment. The substantial and competent evidence of causation is supported by Dr. Bailey's opinions in this case-that Ms. Johnson's back complaints were caused by her underlying spondylosis-listhesis and her need for treatment stemmed from that condition rather than a work injury on June 11, 2008.

Because there is no work injury as defined by RSMo Section §287.020.3(1) (2005) I find the employer/insurer is not responsible for any past, or future medical treatment or care, or any past ongoing or future temporary and total disability benefits.

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of _____,
2010 by:

Naomi Pearson
Division of Workers' Compensation