

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

Injury No.: 05-139987

Employee: Mulija Kadric
Employer: Centaur Building Services, Inc.
Insurer: North River Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

The administrative law judge concluded that employee did not suffer a compensable injury by occupational disease premised on her finding that the opinions from employer's medical expert, Dr. Lange, were credible and persuasive.

We wish to make clear that we do not adopt a position that one must demonstrate a particular traumatic event in order to prove causation where the claim for low back injury is premised on an occupational disease theory. Such a view departs from a long history of Missouri decisions recognizing that an employee can suffer a compensable low back injury owing to cumulative or gradual trauma. See, e.g., *Higgins v. Quaker Oats Co.*, 183 S.W.3d 264, 267 (Mo. App. 2005).

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Linda J. Wenman, issued June 21, 2012, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 28th day of June 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Mulija Kadric

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge denying benefits is in error, and should be reversed.

Employee worked for employer for about three and a half years. Employee worked in two different locations. Her duties at the first location, known as the "Westport location," included collecting trash, vacuuming, and general housekeeping. Employee cleaned 26 bathrooms in a 12 level building. Employee picked up trash, vacuumed, mopped the floors, wiped down mirrors, sinks, faucets, and dusted. Her duties required her to constantly bend, lift heavy trash bins, put trash into dumpsters, and mop floors. Employee collected trash from several restrooms into a barrel, then tied the trash into a large bag. Employee then had to lift the bag out of the barrel. The bags weighed between 30 and 35 pounds. Employee also daily lifted 6-7 bags of trash overhead into a dumpster.

Employee worked at the Westport location for about 2 years until employer assigned her to work at the "Delmar location." Employee's duties at the Delmar location included vacuuming, emptying trash, wiping the restrooms down, dusting, and taking out the trash. The work at the Delmar location was even heavier; for instance, the trash weighed more, and the vacuum cleaner was heavier than the one at the Westport location.

The foregoing duties caused employee to suffer symptoms of low back pain. Employee never had back problems before she worked for employer. Employee went to see her doctor, who prescribed medications, injections, pain patches, and a back brace. Employee left her employment with employer owing to the severity of her symptoms; she also had to leave a subsequent job owing to pain and problems with depression.

Section 287.067.2 RSMo provides, as follows:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

In the context of occupational disease, the courts have clarified that:

A claimant must submit medical evidence establishing a *probability* that working conditions caused the disease, although they need not be the sole cause. Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee.

Vickers v. Mo. Dep't of Pub. Safety, 283 S.W.3d 287, 292 (Mo. App. 2009)(citations omitted)(emphasis in original).

Employee: Mulija Kadric

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Employee presented expert medical testimony from Dr. Thomas Musich. Dr. Musich opined that employee suffered an occupational disease affecting her low back and both of her lower extremities. Dr. Musich opined that employee's work for employer is the prevailing factor in the development of acute and severe low back pain and radiculopathy which has resulted from multilevel lumbar disk bulging, bilateral sacroiliac joint dysfunction, and bilateral piriformis syndromes. Dr. Musich rated employee's permanent partial disability at 25% of the body as a whole referable to her lumbosacral symptomatic pathology.

Employer presented expert medical testimony from Dr. David Lange. Dr. Lange opined that employee's work was not the prevailing factor causing her low back complaints. Dr. Lange premised his opinion on the facts that employee did not suffer any particular traumatic event, and because her MRI was not "particularly exciting." *Transcript*, page 536. Dr. Lange explained that all adults have degenerative changes, and employee's MRI appeared to show degenerative changes. Dr. Lange does not believe that employee's experiencing the onset of symptoms for the first time during her back-intensive work for employer is important. In other words, Dr. Lange wrote off employee's symptoms in favor of his view that employee must either experience a specific accident, or provide an MRI showing something other than degenerative changes. I strongly disagree with this view because I believe it finds no support in the Missouri Workers' Compensation Law.

First, as the majority has noted, there is no requirement that employee identify a particular traumatic event because this is an occupational disease case. Second, Dr. Lange's opinion requiring a change on MRI and discounting employee's pain complaints misconstrues employee's burden of proof. The version of § 287.800 RSMo applicable to this case requires that we strictly construe the provisions of the Missouri Workers' Compensation Law. Strictly construing the language of § 287.067.2 set forth above, I find no requirement that employee prove that her occupational exposure is the prevailing factor in causing a change on her MRI. Dr. Lange would discount employee's pain complaints because her MRI reveals the type of degenerative changes that he says every adult has in their spine. But pain is unquestionably a "medical condition," and as the circumstances of this case make abundantly clear, pain can result in "disability."

Dr. Musich, on the other hand, provided a medical opinion that meets employee's burden of establishing a probability that working conditions caused her low back pain. I do not find that his factual errors materially detract from the logic and good sense of his causation opinion. I find Dr. Musich's opinions in this matter to be credible.

In sum, I would reverse the award of the administrative law judge and award employee the temporary total disability benefits, past medical expenses, future medical expenses, and permanent disability benefits to which she is entitled. Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee:	Mulija Kadric	Injury No.:	05-139987
Dependents:	N/A		Before the
Employer:	Centaur Building Services, Inc.		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	North River Insurance Co.		Department of Labor and Industrial
Hearing Date:	May 23, 2012		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	LJW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged as November 16, 2005
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
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 contracted: Employee alleges while performing her job duties she developed low back pain.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged low back.
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Mulija Kadric

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- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$310.00
- 19. Weekly compensation rate: \$206.67 / \$206.67
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: No

TOTAL: - 0 -

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mulija Kadric	Injury No.: 05-139987
Dependents:	N/A	Before the
Employer:	Centaur Building Services, Inc.	Division of Workers' Compensation
Additional Party:	Second Injury Fund	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	North River Insurance Co.	Checked by: LJW

PRELIMINARIES

The above referenced Workers' Compensation claim was heard for final award by the undersigned Administrative Law Judge on May 23, 2012. Post-trial briefs were received on June 13, 2012. Attorney Frank Niesen represented Mulija Kadric (Claimant). Centaur Building Services, Inc., (Employer) is insured by North River Insurance Company, and represented by Attorney John Mohan. Assistant Attorney General Rodney Campbell represented the Second Injury Fund (SIF).

Prior to the start of the hearing, the parties identified the issues for disposition in this case: occupational disease; notice; medical causation; liability of Employer for past medical expenses; liability of Employer for future medical care; liability of Employer for past temporary total disability (TTD) benefits; liability of Employer or SIF for permanent total disability (PTD) benefits; and liability of Employer or SIF for permanent partial disability (PPD) benefits. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Claimant offered Exhibits B-P, Employer offered Exhibits 2-3, and Claimant and Employer offered Joint Exhibit A-1. SIF offered no exhibits. All exhibits were admitted. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled. Claimant's testimony was received via a translator as she speaks limited English.

Findings of Fact

All evidence presented has been reviewed. Only testimony necessary to support this award will be summarized.

1. Claimant is 48 years old, immigrated to the U.S. from Bosnia during 2002, and became an American citizen in 2011. Within six months of her arrival to the U.S., Claimant began working for a commercial cleaning company on a part-time basis. Seeking full-time employment, nine months later during June 2003, Claimant began working for Employer as a member of a commercial cleaning crew. Claimant worked for Employer until December 2005, and during the

period of her employment, Claimant worked in two office buildings. Claimant worked in the first office building for two years. Her job duties in the first building included cleaning 26 bathrooms, mopping floors, dusting, wiping down counters, vacuuming, and collecting and disposing trash. Claimant's heaviest work at that building involved the trash removal. Claimant estimated each bag weighed approximately 30-35 pounds, and she placed 6-7 trash bags in the dumpster 2-3 times per shift. Due to her short stature, Claimant would need to lift the trash bags and throw it up and into the dumpster. During June 2005, Claimant's job duties were moved to the second building where she worked for the final six months of her employment with Employer. Claimant's job duties remained the same with a few exceptions. At the second building, Claimant also cleaned kitchens, she felt the lifting was heavier, and she was required to hand dry marble flooring to avoid streaks, which required her to work on her knees when she performed this work.

2. During March or April of 2004, Claimant began to experience the gradual onset of low back pain. Claimant believed her back pain was due to her work, and notified her Bosnian supervisor that her back was bothering her, but denied any specific work event for when her pain started. When the supervisor informed Claimant the pain should be reported to company management, Claimant declined fearful she would lose her job. Claimant's supervisor then began to help her perform her job. During June 2005, when Claimant began work in the second building, her manager changed, and she no longer received assistance performing her work.

3. Claimant's first complaints of low back pain are documented in her medical records on October 21, 2005. On that date, Claimant's primary care physician noted complaints of low back and right shoulder pain, which had "been troubling her for 2 yrs [years]," and a lumbar MRI was ordered. On November 21, 2005, the lumbar MRI was obtained that demonstrated "broad based bulging of the disk posteriorly in the mid-line at the L1,2 as well as the L4,5 which abuts the thecal sac but does not encroach upon the neural canal . . . no other signs of bulging, protrusion, or extrusion of a disk." On November 30, 2005, Claimant's primary care physician notified Claimant "that one of her disc had herniated/protruded but has not compressed any nerve." The physician advised Claimant to gradually increase her activity, and to restrict the amount of weight she lifted. The physician also encouraged physical therapy and an aerobic exercise program.¹

4. Claimant left her employment with Employer on December 14, 2005, due to her physical complaints. On April 10, 2006, Claimant resumed employment with O'Brien Corporation (O'Brien). Her job duties at O'Brien allowed Claimant to sit and pack light weight small pipes and place approximately ten pipes in a box. When full, the box was set aside and picked up by a supervisor. Claimant left that employment on January 31, 2007. O'Brien reported Claimant was laid-off, but Claimant testified she requested her leave as being recorded as a lay-off so that she could collect unemployment. Claimant testified she left this employment due to increased depression, not wanting to be around people, nervousness, and crying spells occurring at work.²

5. Claimant's next medical visit is recorded on September 25, 2006, which indicates she complained of low back pain, a facial rash, and other psychiatric related complaints. The

¹ Claimant testified she never received physical therapy because she could not afford it.

² Claimant has a long standing history of significant psychiatric conditions primarily attributed to the trauma she encountered in the Bosnian war.

examining physician noted Claimant was taking Voltaren (non-steroidal anti-inflammatory), and the physician did not alter the medication. On January 3, 2007, Claimant's physician prescribed Ultram for her complaints of low back pain. During February 2007, Claimant's physician begins to record Claimant's complaints regarding "low back and leg pain," along with other physical and psychological complaints.

6. On September 10, 2008, Claimant's primary care physician issued the following disability letter:

To whom it may concern:

Mrs. Kadric, Mulija has been coming to our office w [with] multiple problems.

- 1) Depression with PTSD
- 2) Generalized anxiety disorder
- 3) Chr [chronic] back pain
- 4) Neuropathy

Mulija is going regularly to psychiatry. Her current conditions render her unable for [?] employment and self [?] activities. I would recommend that she gets medical assistance.

7. Due to continued complaints of low back pain, a repeat MRI was obtained on March 13, 2012. The second MRI was performed at a different imaging center, and demonstrated disc desiccation at L3-4, L4-5, and L5-S1 with mild disc space narrowing at those levels, mild to moderate disc bulging throughout the lumbar spine, and degenerative facet changes throughout the lumbar spine. Claimant's primary care physician referred Claimant to a pain management physician.

8. As of hearing, Claimant reports constant low back pain that radiates into her left leg where she also describes numbness and swelling. Claimant's pain is made worse by bending or moving. Claimant testified she can lift a "few" pounds, and is limited in walking, sitting, standing, and navigating stairs. Claimant no longer gardens or travels due to pain, and only prepares small meals. During 2007, Claimant began to experience sleep difficulty due to her back pain, and now uses a sleeping pill at night.

9. On April 17, 2007, Claimant was examined at her request by Dr. Musich. Dr. Musich is board certified in family practice medicine. Dr. Musich noted that prior to her employment with Employer, Claimant had no back complaints, and she never suffered any single event injury adversely effecting her low back "prior to, during or following her employment" with Employer. Dr. Musich also noted Claimant's job duties "required constant mopping of floors, cleaning 24 commercial bathrooms daily, scrubbing floors on her hands and knees³, and grabbing, lifting and emptying trash cans on a daily basis." Dr. Musich also noted "by November 2005" Claimant's "low back pain became severe and radiated from the sacroiliac joints bilaterally into her gluteal

³ Dr. Musich's description is contrary to Claimant's actual job duties. Claimant's job duties only required her to be on her hands and knees for limited periods during the last 6 months of her employment with Employer, and this requirement began after she developed and sought medical care for low back pain.

regions and down into the knee levels bilaterally.”⁴ Upon examination, Dr. Musich noted the following abnormal findings: subjective pain to deep palpation over the sacroiliac joints bilaterally; decreased range of motion of the lumbar spine in all planes; positive Faber testing for sacroiliac joint pain; and positive bilateral piriformis testing. Dr. Musich diagnosed severe low back pain with radiculopathy, disc bulging, bilateral sacroiliac joint dysfunction, and bilateral piriformis syndrome. Dr. Musich opined Claimant’s work with Employer was the prevailing factor in her development of occupational low back disease. Dr. Musich rated Claimant’s disability at 25% BAW PPD referable to her lumbosacral pathology.

10. On November 6, 2007, Claimant was examined by Dr. Lange at the request of Employer. Dr. Lange is a board certified orthopedic spine surgeon. Dr. Lange noted Claimant’s job duties with Employer for the 3 ½ years she worked for Employer. Dr. Lange also noted Claimant developed low back pain slowly over time. Upon examination, Dr. Lange noted the following abnormal findings: low back discomfort with flexion and extension; discomfort of the lumbosacral junction with passive rotation of her torso at the hips; simulated axial compression on the vertex of the head and with light palpation; and lumbosacral tenderness to light palpation. Dr. Lange opined Claimant’s MRI report was indicative of degenerative disc disease at two levels, and not disc herniation. Dr. Lange opined that while acknowledging the presence of the disc degeneration and Claimant’s complaints of low back pain, “it would still be impossible to state any specific occupational disease” related to Employer. Dr. Lange rated Claimant’s degenerative disc disease at 2-3% BAW PPD.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to occupational disease and medical causation

Section 287.067.1 RSMo. 2005, provides as follows:

In this chapter the term “occupational disease” is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

⁴ This statement is contrary to Claimant’s medical records. Claimant’s first recorded complaint of leg pain is documented in her medical records on February 5, 2007.

Further §287.067.2 provides an “injury by occupational disease” is compensable “only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert’s testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds).

Claimant alleges a low back disability due to occupational disease. Two physicians provided opinions regarding the relationship of Claimant’s low back condition to her work duties. Dr. Musich opined Claimant’s work with Employer was the prevailing factor in her development of multilevel lumbar disc bulging, bilateral sacroiliac joint dysfunction, and bilateral piriformis syndromes. However, during deposition cross-examination Dr. Musich conceded that any of his listed conditions are things that people are exposed to in ordinary life even absent employment. (Exhibit N, pg.19) Further, Dr. Musich also acknowledged receiving an inaccurate or incorrect history regarding Claimant’s employment might change his causation opinion. (Exhibit N, pg.18) I find some of the findings expressed by Dr. Musich in his report and deposition testimony to be incorrect or incomplete.⁵ As Dr. Musich utilized incorrect or incomplete history when rendering his causation opinion, I do not find Dr. Musich’s opinion to be credible.

Dr. Lang is a board certified orthopedic spine surgeon. Dr. Lang opined Claimant’s work for Employer was not the prevailing factor in causing the medical condition. During deposition cross-examination, Dr. Lang explained his causation opinion as follows:

Q. Well, if she noticed the pain while she’s performing her activities, each day it seems to get a little bit worse, wouldn’t that essentially seem to correspond to a causation event?

A. No.

Q. And why not?

A. For the reasons I have already stated. Simply because the symptoms are triggered with any particular activity doesn’t mean that the activity has actually brought on some particular problem in the back, or even aggravated it. It may mean simply that the patient is not an idea - - or the individual is not a idea match for that activity. So, as an example, Ms. Kadric might well have pain with recreational activities. It

⁵ Namely, Claimant performed *some* work on her hands and knees, but only in the last 6 months of her employment and this work started *after* she was treating for low back pain. Also, Dr. Musich incorrectly reads Claimant’s medical records when stating Claimant had leg radiculopathy when she sought medical treatment during November 2005, when in fact the medical records first record leg pain during February 2007, *more than a year after* she left her employment with Employer.

wouldn't mean necessarily that the recreational activities brought on the anatomic issue in her back.

Q. Are you foreclosing the possibility that her employment aggravated her back condition, Doctor?

A. I don't know what you mean by "foreclosing."

Q. Okay. Are you saying that that is not a possibility in this case?

A. I don't think that's a possibility. I think she had degenerative changes, and she probably was aging during the three and a half years that she worked for Centaur, and she may not have been an idea match for her occupation. Just like she might not be an idea match for any activities away from Centaur. Simply because her symptoms began while she was working at Centaur doesn't mean there is a causal connection.

(Exhibit 2, pgs. 24-25)

Dr. Lang goes on to point out Claimant's low back pain did not develop suddenly, rather it came on gradually and over time worsened, a history that strengthens his opinion that Claimant's back condition was degenerative and not caused by her work duties with Employer.

Claimant bears the burden of proving the essential elements of her claim by producing evidence from which it may be reasonably found that an injury resulted from the cause for which the employer would be liable. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697 (Mo.App. 1973). The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993). Following the 2005 amendments to the Missouri Workers' Compensation Law, an injury by occupational disease is compensable "*only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability*" (emphasis supplied). Based on the foregoing discussion, I find the opinion of Dr. Lang credible and persuasive, and accept his opinion that Claimant's low back condition does produce disability, but was not caused by her work duties. Accordingly, I find Claimant has not met her burden to establish her job duties produced an occupational disease that arose out of and in the course and scope of her employment.

CONCLUSION

Claimant did not sustain her burden to establish her job duties produced an occupational disease that arose out of and in the course and scope of her employment. All remaining issues are moot. SIF has no liability in this claim as there is not a compensable injury.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation