

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

Injury No.: 06-084782

Employee: Grace Liggins

Employer: Ameristar Casino

Insurer: Self-Insured administered by Hartford Insurance Company

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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 30, 2008, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued June 30, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 20th day of April 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based

on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Section 287.063.2 RSMo, 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. 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.

It is important to point out that this matter was tried on a petition for hardship hearing wherein employee was seeking medical treatment. "For an award of temporary disability and medical aid, proof of cause of injury is sufficiently made on reasonable probability, while proof of permanency of injury requires reasonable certainty." *Downing v. Willamette Indus.*, 895 S.W.2d 650, 655 (Mo.App.1995), citing *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697, 703 (Mo.App. 1973). "Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt.'" *Thorsen v. Sachs Elec. Co.*, 52 S.W.3d 611, 620 (Mo.App. 2001) (citations omitted).

Combining the governing statute with the legal standard of proof, the question presented to the Commission is *did employee prove within a reasonable probability that the duties she performed for employer were a prevailing factor in causing her medical condition (neck, shoulder and upper extremity symptoms) and disability (difficulty performing her job duties)?*

The answer to this question is clearly yes. Employee provided clear and easy to comprehend testimony regarding the manner in which she performs her duties of lifting and carrying trays loaded with drinks, glasses, ashtrays, etc. She testified to the heavy weight of the trays she carries. The medical records in evidence reveal that the employee's level of neck and shoulder discomfort increases after a work shift. Even a lay person like me can understand that carrying a heavy tray on one's palm at chest-level or higher puts stress on the structures involved with the upper extremity.

Dr. Neisen testified by deposition. Dr. Neisen believes within a reasonable degree of medical and surgical certainty that employee's work of repetitively lifting trays at her employment is the prevailing cause of the problems in her left shoulder and neck. This is consistent with the impression of the employer's treating physician at Barnes Care during the one physician visit employer provided to employee for treatment purposes.

Dr. Nogalski is content to speculate that employee suffers from no shoulder condition of ill-being without the benefit of an MRI. Dr. Neisen is not prepared to speculate about the condition of employee's shoulder and would like to see the results of an MRI of the shoulder before he diagnoses what is wrong, if anything, with the shoulder. Dr. Neisen's approach is the more medically sound.

The administrative law judge found the opinion of Dr. Nogalski – which was offered solely through his report – to be more credible than the opinion of Dr. Neisen. I disagree. After reading Dr. Nogalski's report I am convinced Dr. Nogalski believed employee first experienced neck symptoms before she began performing beverage service duties. Dr. Nogalski relied upon employee's neck and shoulder complaints and treatment beginning in 1998 to conclude that "[t]here are clearly preexisting conditions within the neck which are, within a reasonable degree of medical certainty, causing her current problems." Employee began serving beverages for employer's predecessor in 1995, so employee's 1998 conditions did not preexist her work exposure to the hazards of beverage service. Because he was not aware that employee's earliest symptoms surfaced three years after employee began performing beverage service duties, Dr. Nogalski's opinion

regarding whether those duties caused the conditions giving rise to the symptoms is simply not credible. The award founded upon Dr. Nogalski's opinion is not supported by competent and substantial evidence.

The evidence tends to show that employee's conditions of ill-being began manifesting by 1998. The existence of the conditions at that time does not defeat employee's claim of occupational disease which by its nature develops over time due to repetitive exposure to an injurious stimuli. Employee has met her burden of proving by a reasonable probability that her occupational exposure (carrying heavy drink trays) was the prevailing factor in causing both the resulting medical condition (neck and upper extremity pain and symptoms) and disability (difficulty performing her duties). The opinion of Dr. Nogalski is not credible and did not rebut employee's proof. Employee is entitled to a temporary award of medical care, including diagnostic procedures necessary to determine from what conditions she suffers.

I would reverse the award of the administrative law judge. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Grace Liggins

Injury No.: 06-084782

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: n/a

Employer: Ameristar Casino

Additional Party: n/a

Insurer: Self-insured, administered by Hartford Ins.Co.

Hearing Date: Wednesday, March 26, 2008

Checked by: KD/cmh

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?
Issue as to injury by occupational disease found in favor of the employer and insurer
4. Date of accident or onset of occupational disease: alleged on or about 8/22/06
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri

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, See Award.
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; See Award
10. Was employer insured by above insurer? Employer was self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Alleged occupational disease while working as a cocktail waitress in a casino
12. Did accident or occupational disease cause death? n/a Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: See Award
- Nature and extent of any permanent disability: n/a
15. Compensation paid to-date for temporary disability: none
16. Value necessary medical aid paid to date by employer/insurer? See Award
17. Value necessary medical aid not furnished by employer/insurer? See Award
18. Employee's average weekly wages: \$500.00
19. Weekly compensation rate: \$333.33/\$333.33
- Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable: Issue as to injury by occupational disease found in favor of the employer; see Award.
22. Future requirements awarded: none; See Award

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Grace Liggins

Injury No: 06-084782

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents: n/a

Employer: Ameristar Casino

Additional Party n/a

Insurer: Self-insured, administered by Hartford Ins. Co.

Checked by: KD/cmh

The claimant, Ms. Grace Liggins, and the employer, Ameristar Casino, self-insured in care of Hartford Insurance Co., appeared at hearing and entered into certain stipulations and agreements as to the issues and evidence to be presented in this matter. Claimant seeks a temporary or partial award for further medical care with respect to her neck and left shoulder complaints. No claim has been plead as to the Second Injury Fund.

Ms. Liggins appeared at hearing and testified on her own behalf. The claimant further submitted the deposition testimony of Dr. Frank J. Niesen. The employer and insurer chose not to elicit any witness testimony, and submitted in lieu thereof the medical evaluation report of Dr. Michael P. Nogalski.

The parties have acknowledged that the issues to be resolved at hearing are as follows:

Injury by occupational disease/medical causation;
Notice;
Statute of Limitations; and
Future medical care

EXHIBITS

The following exhibits were received in evidence without objection:

Claimant's Exhibits

- Deposition of Frank J. Niesen, M.D., taken on 2/15/08
- Evaluation report of Frank J. Niesen, M.D., dated 11/1/06
- Evaluation report of Frank J. Niesen, M.D., dated 9/12/07
- Certified records of BarnesCare
- Certified chiropractic records of Patricia M. Rothermich, D.C.
- Certified chiropractic records of David E. Bemis, D.C.

Employer and Insurer's Exhibits

1. Medical evaluation report of Michael P. Nogalski, M.D.
2. BarnesCare physical therapy records

FINDINGS OF FACT AND RULINGS OF LAW

Ms. Liggins, 52 years old as of the date of hearing in this matter, is currently working as a cocktail waitress for Ameristar Casino. Ms. Liggins began working at the casino fourteen years ago, at a time when the facility was known as 'Station Casino', and for the first year or so she worked at the front desk, where a ticket was needed to enter. Ms. Liggins was laid off for two months, and then returned to 'food and beverage', where she began her employment as a cocktail waitress in 1995 and has continued in that same employment up to the present.

Ms. Liggins has had working hours that have changed over the years, from 60 to 70 hours a week when she was first employed as a cocktail waitress, to 40 to 45 hours a week more recently, and to 32 hours a week, eight hour shifts four days a week, since last year. The claimant relates that her first duties at the beginning of a work shift include putting cup holders on tables; putting out ashtrays; making coffee; and putting fruit garnishes in trays. While on the floor serving drinks, the claimant would be carrying as many as 15 to 20 drinks on a tray, and would be constantly setting down drinks from the tray and picking up empty glasses. Ms. Liggins would carry the tray with her left hand and serve with the right. Claimant would generally carry the tray at about the mid-chest level, and if heavy would hold the tray over shoulder level and closer to the body. Ms. Liggins notes that business picks up from 11:00 p.m. to 3 or 4 a.m., and she would be obliged to carry heavy trays.

Claimant relates that she began having neck problems around 1997 or '98 and testified on direct examination that she had only neck problems for the first two years while treating with a chiropractor, Dr. Bemis. Claimant would go to see Dr. Bemis for treatment during her lunch breaks. The records of Dr. Bemis, Claimant's Exhibit F, document 39 visits from 6/29/1998 through 10/27/2000. On 6/29/98 Ms. Liggins provided a health history; was the subject of a neurological examination and spinal X-ray; and was provided chiropractic care.

On 6/29/98 Ms. Liggins provided health information and listed as her major complaint the left shoulder and back. The note dated 6/29/98 begins with the statement "Left neck and shoulder pain non-radiating". The subsequent records as to the various visits to Dr. Bemis are replete with references to left shoulder treatment, and from time to time contain references to complaint of left shoulder discomfort and pain. On 8/10/98 muscular spasm was noted in the left rhomboid and left trapezius, and on 11/04/98 the claimant made complaint of bilateral trapezius pain.

On cross-examination Ms. Liggins was presented with various of the entries in the records of Dr. Bemis, and eventually acknowledged that she could recall that she had made left shoulder complaints in 1998. Ms. Liggins testified that her left shoulder complaints resolved, and that she began to have complaints that led to her treatment with Dr. Rothermich in June of 2004. Ms. Liggins affirms that she complained to Dr. Rothermich as to left shoulder and neck complaints dating back to 2002. Ms. Liggins further affirmed that she complained of the same problems going back to 1997, and that her pain was in the same location from 1997 to the present date. Ms. Liggins further affirmed that her complaints have been continuous since 2002. Claimant acknowledged that she also sought treatment on her own from her personal physician, Dr. Moseley (sp).

Ms. Liggins sought treatment on her own from both chiropractors Bemis and Rothermich, and did not make a request of her employer for treatment until August of 2006. Claimant recalls hearing a noise in her shoulder in August of 2006 while lifting a tray, and relates that for the first time she experienced that severe of a pain running down her arm, which led her to make a request of her employer for treatment. Ms. Liggins did not deny that she had pain into the arm prior to 8/22/06; she agreed with the suggestion that the issue was one as to degree of pain, and that her pain was worse in August of 2006 than it had been before. Ms. Liggins acknowledged that she was referred by the employer to BarnesCare, whose records (Claimant's Exhibit D)

indicate that on 8/22/06 Ms. Liggins presented with complaints of pain to the left neck and shoulder at times radiating down her arm. The record goes on to state that the claimant denied an injury event, but related her pain to her duties as a server. A cervical spine and left shoulder x-ray were performed that date, with the shoulder x-ray interpreted as a negative exam with no osseous (bony) abnormality, and the cervical spine interpreted as showing loss of normal cervical lordosis; degenerative changes at C4-5 and C5-6 spinal levels with moderate loss of disk space height and moderate osteophyte formation; and with no definite evidence of acute fracture or focal bone destruction. Physical examination of the left shoulder that date was reported to reveal, among other findings, a generalized tenderness to the anterior and posterior shoulder, with a full range of motion, and the absence of soft tissue swelling, spasm, or crepitus. Moderate muscle spasm was noted in the left upper trapezius and levator muscles. The health provider provided a diagnosis of left cervical and left shoulder strain with a left trapezius strain; provided Ms. Liggins with medication; returned her to work with restriction that limited her lifting and reaching overhead; and scheduled claimant for physical therapy, anticipating therapy 3 times a week for two weeks.

On 8/24/06 Ms Liggins was referred for physical therapy (See Employer and Insurer's Exhibit No. 2), and that record speaks for itself. The therapy note dated 8/24/06 provides that claimant was to follow up with the BarnesCare physician on 9/05/06. Claimant received further physical therapy on 8/29/06 (See Claimant's Exhibit D), and was to follow up on subsequent dates up to the planned evaluation of Dr. Tobiasz on 9/05/06. There is a one page note entitled REHAB ATTENDANCE RECORD that suggests the claimant met with a physical therapist on 8/31/06, but there is no record of treatment, and the involved note states that no future appointments were scheduled at that time. There is also no further record of any other physical therapy provided, and no record as to any follow up with any health care physician on 9/5/06 or on any other date.

Records from Dr. Rothermich (Claimant's Exhibit E) reveal that on 6/25/04 the claimant began receiving chiropractic care for her left sided neck and shoulder complaints. Claimant treated approximately seven times to early September of 2004; began treating again in February of 2005, with four visits to 5/20/05; and returned in early March of 2006 with complaints of increasing achiness and soreness. Ms. Liggins treated on 3/3, 3/10, and on 3/17/06. The next visit, post the involved alleged injury date of 8/22/06, was on 9/1/06, and the claimant provided a history of seeing a Workers' Compensation MD for complaints of left cervical spine and left upper extremity pain into the arm. Claimant was noted to have had physical therapy on a couple of occasions before further treatment was refused. Ms. Liggins treated with Dr. Rothermich on just the two occasions, 9/1/06 and on 10/27/06, after further treatment was refused by the employer.

The claimant has continued working as a cocktail waitress at Ameristar Casino, and has not received any further chiropractic treatment, or medical treatment provided by the employer, since 2006. Ms. Liggins acknowledged that she also treated with her primary care physician, but none of those records are in evidence, and there is nothing further in evidence by way of testimony, medical record, or otherwise to suggest when Ms. Liggins treated with her primary care physician for her left upper extremity complaints. Ms. Liggins testified that when she was treating with Dr. Bemis she had no reason to believe that her complaints were work related. Claimant further relates that neither Dr. Bemis nor Dr. Rothermich ever made any statements as to whether or not her complaints were work related. Ms. Liggins further testified on direct examination that in 2004 she had no reason to believe that her shoulder and neck problems were work related, and that it was on the day in August of 2006, and while carrying trays, that she experienced a pop in her shoulder, and the pain gave her cause to want medical care. Claimant testified that the first doctor to suggest that her complaints were related to carrying trays was the physician who treated her at BarneCare. On cross examination, Ms. Liggins agreed that it was at some point while treating with Dr. Rothermich that she began to suspect that her left shoulder and left-sided neck complaints could be related to carrying trays. On 10/24/07 Dr. Michael P. Nogalski performed a medical evaluation of Ms. Liggins at the request of the employer and insurer (See Employer and Insurer's Exhibit No.1). On 10/31/07 Dr. Frank J. Niesen performed a medical evaluation of Ms. Liggins at the request of counsel for the claimant (Claimant's Exhibit B). Dr. Niesen also prepared a second report pursuant to a follow up examination performed of Ms. Liggins on 9/11/07, and with the benefit of an MRI report relating to the cervical spine noted as having been taken on 11/13/2006. Both Doctors Niesen and Nogalski had the benefit of the MRI report, reported by Dr. Nogalski to

have been ordered by a Dr. Goldstein, but none of the records of a Dr. Goldstein are in evidence, nor is a copy of the involved MRI of the cervical spine in evidence.

Dr. Nogalski performed an examination of the left shoulder, and appears to have confined his physical examination for the most part to that particular body part, while also noting "distinct tenderness over the left paraspinous muscle region in the cervical area", with some cervical tenderness at the midline and some loss of flexion and extension of the cervical spine with pain when turning to the right and left. With regard to the left shoulder, he found relatively normal muscle size and contour; full shoulder range of motion; no appreciable findings that show impingement; an acromioclavicular joint that is nontender; motor strength tests at Grade 5/5 with no focal motor deficit; upper extremity appearing to be intact and symmetrical with respect to the right side; normal scapular motion; and with some mild tenderness diffusely over the trapezial region, with pain complaints upon resisted muscle testing around the shoulder in the trapezial region and neck area. X-ray of the right shoulder was interpreted as showing some mild degenerative changes of the AC joint and a Type II acromion. It is unclear whether Dr. Nogalski took his own x-ray of the shoulder, or was relying on the x-ray performed on 8/22/06 at Missouri Baptist Medical Center (See Claimant's Exhibit D). Dr. Nogalski interpreted the x-rays of the cervical spine as showing severe degenerative disease at C4-5 with significant narrowing and generalized spondylosis that he considered severe in this segment, with degenerative changes at C5-6. Again, it is not readily apparent whether Dr. Nogalski took his own cervical spine x-ray or whether he relied on or even had the opportunity to review the cervical x-ray or x-ray report from Missouri Baptist Medical Center taken on 8/22/06 (Claimant's Exhibit D). From the nature of his report, however, it appears that he did in fact take and report as to his own x-rays, given the nature of his findings and the failure in his written report to include a reference to those 8/22/06 x-rays as a part of the history or part of the records review. Dr. Nogalski noted that the cervical MRI report dated 11/13/06 revealed disc space narrowing at C4-5 and C5-6 with degenerative hypertrophic ridging at both levels, and with ridging that effaced the cerebrospinal fluid pathway and abutted against the cord at C4-5. He also noted the cervical spine x-ray findings contained in the New Life Radiology report (contained in Claimant's Exhibit F) Dr. Nogalski notes that the claimant was making complaint of ongoing and fairly severe pain in the shoulder trapezial area neck and arm since feeling a "pop" in her shoulder while picking up a tray on 8/22/06. He further notes that the claimant stated that subsequent treatment did help, but that she continued to have pain into the trapezial area with tingling and pains that go into the back of the shoulder blade and also into her arm, on the inside of the arm, with pain on the volar forearm region, with tingling in the hand, and with lateral arm and neck pain that will wake her up at night.

Dr. Nogalski concludes that he is unable to point to anything that "clearly identifies that she has a shoulder problem or disorder". He further concludes that the claimant suffers from left shoulder pain "with probable referral from a C4-5, C5-6 discogenic source", and further believes the claimant's current condition "appears to be one of cervical spondylosis and referred radicular pain". Dr. Nogalski goes on to conclude that claimant had preexisting conditions of the neck; that her current condition of cervical spondylosis and radiculopathy are not related to her employment at Ameristar; that he does not believe that her employment at Ameristar was the prevailing factor causing her cervical spondylosis and radiculopathy; and that while the claimant may need further medical care, such medical care is related to the cervical spondylosis and not to anything work related.

In his report dated 11/1/06 as to an examination of Ms. Liggins on 10/31/06, Dr. Niesen noted present complaints of constant left shoulder pain aggravated by motion, radiating down in to the palm of the left hand, keeping the claimant awake at night, with a loss of appetite and an upset stomach from taking Ibuprofen. He relies on the BarneCare West records and the x-ray reports contained therein for his conclusion in the 11/1/06 report, then amended by his report dated 9/11/07 as to his second exam of Ms. Liggins and his review of a copy of the cervical spine report performed on November 13, 2006.

In the 11/1/06 report, under the heading Physical Exam on page 4, Dr. Niesen relates that "The exam consists mostly of the neck and shoulder". He then notes tenderness of the left cervical area with tenderness and muscle spasm in the left trapezius muscle, and goes on to make findings on the left arm. Dr. Niesen makes findings as to the left arm that are traditionally seen by this fact finder as bearing on nerve entrapment at the wrist (positive Tinel and positive Phalens Test; pain with flexion of the wrist; tingling in the

fingers of the hand except for the thumb; diminished sensation in the left palm and mild atrophy of the left thenar eminence). Dr. Niesen goes on to note normal circulation, and a neurological exam that is essentially negative except for the left arm. If you except the more narrow definition of "shoulder" as the ball and socket joint connecting the arm with the torso, then there is nothing in the report of Dr. Niesen dated 11/1/06 to suggest that he performed an evaluation of the left shoulder per se, other than the range of motion that he finds on a separate sheet. His evaluation is also limited under the more inclusive definition of shoulder as the part of the body between the neck and the upper arm, inasmuch as the only apparent finding of note in his evaluation is as to tenderness and muscle spasm in the left trapezius muscle. At page five of his report, Dr. Niesen provides a diagnosis of 1) left carpal tunnel syndrome; and 2) Degenerative disease of the cervical spine. His causation conclusion finds, as a matter of a reasonable degree of medical certainty, that the involved injury on or about 8/22/06 "was the prevailing factor in causing "the problems that the patient has at this time". Inasmuch as the upshot of his deposition testimony as to left carpal tunnel (pp 42- 44 of Claimant's Exhibit A) is an acknowledgment that no nerve conduction study was performed on the left wrist, and that he believes such a study is necessary before making the diagnosis within a reasonable degree of medical certainty, Dr. Niesen has effectively retracted his conclusion, as stated in his 11/1/06 evaluation, that claimant suffers a left carpal tunnel syndrome, and has retracted the implication that an occupational exposure at Ameristar Casino was the prevailing factor causing such a condition. What is left of his diagnosis from 11/1/06 is a finding of degenerative disease of the cervical spine, and no diagnosis offered as to the left shoulder, despite the premise that the present complaints are related to the left shoulder, and that the exam consists mostly of the neck and shoulder.

In his follow up report dated 9/11/07, Dr. Niesen performed a second exam of Ms. Liggins; notes that the claimant had the same range of motion findings as in the first exam; and adds to his prior diagnosis a finding of neuropathy of the nerves extending from the cervical spine and degenerative hypertrophic ridging of C4-5 and C5-6. From that diagnosis Dr. Niesen concludes, within a reasonable degree of medical certainty, "...when the patient was doing repetitive lifting with her trays at Ameristar Casino was the prevailing factor in the cause of the patient's problems with her left shoulder". Dr. Niesen makes no specific diagnosis as to the left shoulder and makes no cause and effect conclusion linking repetitive or other trauma at work to a state of ill being in that shoulder, leaving the fact finder to speculate whether it is the condition of ill being at the cervical spine that leads Dr. Niesen to suppose that repetitive lifting caused a problem at the shoulder that merits further review by diagnostic evaluation (in this matter, a recommendation by Dr. Niesen that the claimant have an MRI performed of the left shoulder).

Dr. Niesen clarifies his position to some degree in his deposition testimony, where he states, at page 45, that he believes that the pain that Ms. Liggins has starts at the left shoulder level and radiates down to her left hand. He also notes, at page 55, when asked as to any changed pathology in the left shoulder, that the claimant has mild changes in the range of motion and complaint of pain, and concludes that those two changes are evidence enough to get an MRI. When counsel for the employer and insurer pointed out that Dr. Niesen did not provide any disability ratings in either of his reports, he responded "I didn't know what was wrong with her". His explanation of wanting an MRI is to acknowledge that the claimant has complaints of pain and some changes, and he does not know the cause. Dr. Niesen also refuses to accept the premise that the chiropractic records document the fact that the claimant was making pain complaints as to the neck and left shoulder as far back as June of 2008 (pages 34-42). Ms. Liggins acknowledged at hearing that she had the same pain in the neck and in the left shoulder dating back to 1997 or 1998.

Dr. Niesen denies that any of the diagnostics reveal any disc protrusion or herniation that could explain the problems Ms. Liggins is having in her neck and shoulders (Claimant's Exhibit A, at page 15). Dr. Niesen further repeats his belief that since the cervical MRI report failed to indicate the presence of degenerative disc disease or of a disc bulge or herniated disc, he does not believe the claimant had any such condition; and further denies there was any impingement in the cervical spine (Exhibit A, at pp. 47-50). When asked whether it was true that the MRI of the neck did not reveal any protrusion or herniation to explain the problems Ms. Liggins was having, Dr. Niesen responded "Well, the neuropathy had to come from somewhere" (Claimant's Exhibit A, at page 17). Dr. Niesen concludes that employment at Ameristar Casino was the prevailing factor in causing degenerative disease of the cervical spine, and is the primary factor in

relation to any other factor causing the resulting medical condition and disability (Claimant's Exhibit A, at p. 50).

NOTICE

The notice requirement of Section 287.420 RSMo was amended effective August 28, 2005 to include injuries by occupational disease, and is applicable to the claim of Ms. Liggins. The statute provides that in proceedings for compensation for any occupational disease or repetitive trauma, failure to give notice to the employer as to time, place, and nature of the injury, and the name and address of the person injured "no later than thirty days after the diagnosis of the condition" operates as a bar to prosecuting a claim for compensation, unless the employee can prove the employer was not prejudiced by the failure to receive the notice.

The application of the notice statute as written to occupational disease (o.d.) cases hardly lends itself to an easy resolution of the question whether an employer has been provided the required notice. As in accident claims, the notice statute for o.d. claims requires that written notice of the "time, place, and nature of the injury, and the name and address of the person injured" be provided to the employer. This information may be readily available to the claimant when the issue is as to an accident, now that "accident" has been defined as "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift." While the occurrence of an "accident" may be easily identifiable in terms of time and place, requiring written notice as to time, place, and nature of the injury in an occupational disease or repetitive motion claim runs counter to the reality of such injuries occurring over the course of time, arguably the result of an exposure to the harm of injury in any number of locations while in the employment of the employer (a carpenter, for example working several jobs at several job sites). Further, the statute sets up a potential argument as to when, where, what, who and how as it relates to the issue of diagnosis of the condition, inasmuch as notice needs to be given within thirty days after the diagnosis of the condition. For example, the condition may be diagnosed with a written diagnosis sitting in a hospital record, but the claimant has not been made privy to the fact that the diagnosis has been made, and is unaware of the "diagnosis of the condition" for well over thirty days after the diagnosis was made. The notice statute does not provide any kind of qualifier to the requirement of notice within thirty days; for example, Section 287.063 .3 RSMo, provides that the statute of limitations in o.d. cases shall not begin to run "until it becomes reasonably discoverable and apparent that an injury has been sustained relating to such exposure..." The notice statute has no such provision providing for notice within thirty days after it has become reasonably discoverable and apparent that a diagnosis of the condition has been made. As for the "who", the question will inevitably arise as to the professional standing of the person making a diagnosis and whether that arguable medical conclusion should qualify as a "diagnosis of the condition" under the statute. The issue as to the proper interpretation of the provisions as to notice in o.d. cases is further compounded by the amendment made to Section 287.800 RSMo, providing a mandate that the provisions of Chapter 287 be construed strictly.

The involved statute does not define the term "diagnosis", nor is any such definition to be found within **Chapter 287**. We interpret the workers' compensation law according to the general rules of statutory construction. *Frazier v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 869 S.W.2d 152, 156 (Mo.App. 1993). We will not create an ambiguity in a statute, where none exists, in order to depart from a statute's plain and ordinary meaning. *Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam County*, 946 S.W.234, 239 (Mo. banc 1997). Our primary goal is to ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms used. *Frazier*, 869 S.W. 2d at 156 In determining legislative intent, we give an undefined word used in a statute its plain and ordinary meaning. *Hoffman v. Van Pak Corp.*, 16 S.W.3d 684 (Mo.App.2000).

Under traditional rules of construction, the word's dictionary definition supplies its plain and ordinary meaning. [Id.](#)

In *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W. 3d 101, 106 (Mo.App. W.D. 2008), the court interpreted the effect of certain language in an amendment to Section 287.110 of the Workers' Compensation Act as contained in SB 1 & 130, the same legislation that adopted the notice provisions of Section 287.420. The court noted as follows with respect to rules of statutory construction:

The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used. United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy, 208 S.W.3d 907, 909 (Mo.banc 2006). In doing so, a court considers the words used in the statute in their plain and ordinary meaning. Id. At 910. Only in those cases “[w]here the language of the statute is ambiguous or where ‘its plain meaning would lead to an illogical result,’ ” will this court “ ‘look past the plain and ordinary meaning of a statute.’ ” Nichols v. Dir. of Revenue, 116 S.W.3d 583, 586 (Mo.App. W.D. 2003)(citation omitted).

The term “diagnosis” is defined in The American Heritage Stedman’s Medical Dictionary as follows: 1. The act or process of identifying or determining the nature and cause of a disease or injury through the evaluation of patient history, examination, and review of laboratory data. 2. The opinion derived from such an evaluation. 3. A brief description of the distinguishing characteristics of an organism, as for taxonomic classification.

Ms. Liggins complained to her employer as to her injury and was sent to BarnesCare, where on 8/22/06 she was provided with a “diagnosis” of left cervical strain; left trapezius strain; and left shoulder strain. Chiropractors Bemis and Rothermich treated Ms. Liggins for years prior to 8/22/06, and both chiropractors treated the claimant for an extended period of time, but there is nothing in their records akin to a diagnosis as to the nature and cause of her disease or injury.

Notice is taken of the filing of the original claim for compensation in this matter with the Division of Workers’ Compensation on 8/28/06, and of the Report of Injury filed by the employer and insurer on 9/19/06. The requirement in Section 287.420 RSMo that the employer be given written notice within 30 days of an alleged injury will not operate as a bar to compensation in a case where the employee provides actual notice to the employer, and the employer was not prejudiced by the failure of the employee to give the required written notice. Providing actual notice of the alleged injury is prima facie evidence that the employer was not prejudiced by the failure to receive a timely written notice; the burden of proof then shifts to the employer to show a prejudice to its ability to investigate the circumstance surrounding the alleged injury, and to provide medical treatment; Pattengill v. General Motors Corp., 820 S.W.2d 112, 113 (Mo.App. E.D. 1991); See also Messersmith v. Missouri-Columbia/Mt. Vernon, 43 S.W.3d 829, 832 (Mo banc 2001).

This is the law as it relates to notice with respect to injuries by accident, and by extension of the same reasoning is hereby deemed to be equally applicable to notice as to injuries by occupational disease.

The record in this matter reveals that it was not until subsequent to her first evaluation by Dr. Niesen on 10/31/06 that the claimant received a “diagnosis” as to having suffered from the repetitive motion injury that is the bone of contention in this matter. The employer and insurer had the opportunity as of 8/28/06 to further investigate the claim for compensation, and chose to have an evaluation by Dr. Nogalski performed on 10/24/07, some five or so months prior to the hearing on this matter on 3/26/08.

From all of the evidence, the employer is found to have had written notice of the claim of injury within 30 days of the date of diagnosis. The claim for compensation in this matter is not barred by the provisions of Section 287.420 RSMo. In the alternative, the employer is found to have received actual notice as to the various diagnoses in this matter, and has failed to overcome proof that it was not prejudiced by the failure to receive a timely written notice.

STATUTE OF LIMITATIONS

Section 287.430 provides, in part, that “no proceedings for compensation under this chapter shall be maintained unless a claim therefore is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death...”

The testimony of Ms. Liggins is found to be credible and worthy of belief where she states that she did not have reason to believe her injury complaints were work related, and that she had not been put on notice by any health care providers prior to August of 2006 that her injury complaints were the result of a repetitive use at work.

Subsection 3 of Section 287.063 provides:

The statute of limitation referred to in section 287.430 shall not begin to run in

accrues, and which insurer must pay it, is the time when incapacity from occupational disease occurs, and not when the exposure commences or the disease begins to develop. Specifically, the Court found "The disability from occupational disease, for which compensation is payable, must necessarily occur when the employee is incapacitated for work". The Court further noted "It is disability after exposure in the employer's business that creates the obligation to compensation." *Id.*, at p. 562. The Court does not say that incapacity from work is the sine qua non for determining when compensation accrues; it can be interpreted as simply making it clear that incapacity from work is one of the forms of disability.

As per *King*, it is disability that creates the obligation to compensation; and compensation is payable when the employee is incapacitated from work. However, *King* does not stand for the proposition that the employee must necessarily be missing time from work before there is a compensable injury. In many cases, there may be a compensable temporary disability that incapacitates the employee from work; or there may not be a temporary disability, yet the employee has suffered a permanent disability by reason of the injury. The Court in *King* did not find lost time from work to be the sine qua non of compensable injury; rather, the Court focused on disability; and, in many cases, a temporary disability which is compensable may in fact precede a permanent disability, and it will be the temporary disability or time missed from work which fixes the liability vis a vis the respective employers and/or insurers. See also *Feltrop v. Eskens Drywall & Insulation*, 957 S.W.2d 408, 412-13 (Mo.App. W.D.1997); *Coloney v. Accurate Superior Scale Co.*, 952 S.W. 2d 755 (Mo.App. W.D. 1997); and *Rupard v. Kiesendahl*, 114 S.W.3d 389 (Mo.App. W.D. 2003) for the proposition that regardless of whether an employee misses work, if the injury is shown to have harmed the employee's earning capacity, it is enough to constitute a disability under the workers' compensation statutes.

If an occupational disease is not compensable until such time as there was missed time from work, then consider this hypothetical situation; a man is exposed at work to the hazard of silicosis, and does in fact contract a case of silicosis, but is not diagnosed with the condition until after he retires from employment, not having missed a day of employment on account of the condition. The man is then diagnosed as having silicosis, found to be contracted in employment, and the silicosis results in permanent disability or death. Is the individual to be deemed not to have suffered a compensable injury because he did not miss any work on account of his complaints?

The court in *Enyard v. Consolidated Underwriters*, 390 S.W.2d 417 (Mo.App. 1965) made it clear that in cases where disability arises after employment is terminated with the last employer with whom there was a causal connection between the injury and an exposure to the risk of contracting an occupational disease, affixing liability as of the date of disability could work an unjust result, assigning the disability on an employer with whom there is no risk involved as to contracting the involved occupational disease, or could result in the employee being denied compensation. In a case where the disability does not manifest until after the last period of exposure to the harm of the disease, *Enyard* provides that "Rather than defeat the claim of the employee where the employment at time of disability was not of a kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation. *Enyard*, at page 429. This last exposure rule is codified at Section 287.063 RSMO. In *Johnson v. Denton*, 911 S.W.2d 286, 288 (Mo.banc 1995), The Court made it clear that the last exposure rule dictates that the liable employer shall be "the last employer to expose the employee to the occupational hazard prior to the filing of the claim" See also *Endicott v. Display Technologies, Inc.*, 77 S.W.2d 612, 615 (Mo. 2002). The occupational disease statute, as amended effective August 28, 2005, now provides, at 287.063.2, that the employer liable for compensation "shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability". In any event, it is apparent that an injury, be it by accident, occupational disease, or by repetitive motion, is not compensable in the absence of disability.

The issue as to date of injury is particularly important in the context of the issues as to injury by occupational disease and medical causation, inasmuch as the applicable legal standard was amended effective August 28 of 2005 by operation of Senate Bills 1& 130. The applicable standard, as contained in Section 287.067 RSMo Cum. Supp. 2006, has been determined to be a substantive change in the law, and to be given prospective application only. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 350, (Mo.App. E.D., 2007). In *Lawson*, the court notes as follows with respect to the change in the legal standard:

As Ford correctly notes, the legislature amended several sections of the Workers' Compensation Act in 2005. In particular, portions of [section 287.067](#) and [287.020](#) were rewritten. Specifically, section 287.067.2 discusses when an injury by occupational disease is considered compensable. Prior to 2005, the section stated that such an injury will be compensable if it "is clearly work related and meets the requirements of an injury which is compensable as provided

in [subsections 2 and 3 of section 287.020](#).” [Subsections 2 and 3 of section 287.020](#) previously contained definitions for “accident” and “injury.” Prior to 2005, those definitions included language which concluded that an injury was compensable if it is work related, which occurs ***349** if work was a “substantial factor” in the cause of the disability.

After the 2005 amendments to the statutes, the definition of a compensable injury by occupational disease was changed to use the language “prevailing factor” in relation to causation. Specifically, section 287.067.2 RSMo. Cum. Supp. 2006 states:

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.

Senate Bills 1 & 130 also amended the prior law to provide as follows:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. 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. Section 287.808 RSMo.Cum. Supp. 2006.

Further, Section 287.800 RSMo. Cum. Supp. 2006 provides as follows:

1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.
2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and 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.

The claimant has the burden of proving all the essential elements of the claim for compensation. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. “Probable” means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986). “Medical causation”, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause”. Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from 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, 105 (Mo.App.1991).

Doctors Niesen and Nogalski both find that the claimant is suffering from cervical spine disease and a cervical neuropathy of the cervical spinal nerves. The doctors disagree as to causal relationship between this neuropathy and the claimant’s work at Ameristar Casino. Medical causation as to a cervical spine neuropathy cannot be considered uncomplicated Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App.1984). “A medical expert’s opinion must be supported by facts and reasons proven by competent evidence that will give the opinion probative force to be substantial evidence.” Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990).

The expert medical opinion of Dr. Nogalski on the issue of causation with respect to the cervical spine disease suffered by Ms. Liggins is found to be supported by the facts and to be more credible than that of Dr. Niesen. Dr. Nogalski had

the benefit of x- rays that revealed that the claimant had findings of severe degenerative disease at C4-5 of the cervical spine. The records further support the conclusion that the claimant had shoulder and neck pain as far back as 1997 or 1998, a fact that Dr. Nogalski took into account in coming to his conclusions as to causation, and a fact that Dr. Niesen was refusing to accept. Further, it is apparent from the medical records as a whole that the claimant had no observable defect to the left shoulder joint, and Dr. Niesen acknowledged that the only findings he had to support his recommendation for a left shoulder MRI were complaints of pain and a mild change in range of motion in that shoulder. In fairness to Dr. Niesen, it needs to be further noted that he did identify the left shoulder as the source of the pain that the claimant was suffering into the forearm and hand, but Dr. Niesen was free to admit that he did not know what was going on there.

The claimant has failed to prove, as a matter of a reasonable probability, that her work as a cocktail waitress at Ameristar Casino was the prevailing factor, defined to be the primary factor, in relation to any other factor, causing a degenerative cervical spine disease and related cervical neuropathy, or as to any ongoing condition of ill being in the left shoulder.** The expert medical opinion of Dr. Nogalski persuades that a work exposure was not the prevailing factor in causing either the medical condition complained of by Ms. Liggins, or any disability. The issues as to injury by occupational disease and medical causation are found in favor of the employer and insurer. The claim for compensation is denied.

FUTURE MEDICAL CARE

A finding in favor of the employer and insurer renders the issue moot as to the need for future medical care.

** This fact finder acknowledges that the physical therapy note dated 8/24/06, page 3 of 4 in Employer and Insurer's Exhibit No.2, includes as a part of the assessment by the physical therapist a notation that the patient presented with "signs and symptoms consistent with thoracic outlet syndrome". There is nothing in this record to suggest that thoracic outlet syndrome or some brachial plexus neuropathy was suspected by any of the treating or evaluating physicians in this matter. A review of the record suggests that none of the standard tests for such condition(s) were performed on Ms. Liggins, which confirms the assumption that those diagnoses were never considered.

Date: June 30, 2008

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ JEFFREY W. BUKER
JEFFREY W. BUKER,
Director
Division of Workers' Compensation