

FINAL AWARD ALLOWING COMPENSATION
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 10-111727

Employee: Tamara L. Lynn
Employer: McClelland Marketing, Inc.
Insurer: Auto Owners Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

Introduction

The parties submitted the following issues for determination by the administrative law judge: (1) whether on or about April 2010 employee sustained an accident or occupational disease arising out of and in the course of her employment; (2) whether employer had notice of employee's accident; (3) whether employee's injury was medically causally related to the accident or occupational disease; (4) whether employer is liable for \$54,319.46 in past medical bills; (5) whether employee is entitled to future medical treatment; (6) whether employee was temporarily and totally disabled from March 15, 2011, to July 1, 2011; (7) the nature and extent of permanent partial disability; and (8) the applicability of a Medicaid lien in the amount of \$3,751.30.

The administrative law judge rendered the following findings and conclusions: (1) employee made the requisite prima facie case showing of accident; (2) employee experienced an occupational injury that arose out of and in the course of her employment; and (3) employee's claim is barred because employee did not provide employer with proper notice. The administrative law judge rendered a number of other findings and conclusions as to the remaining disputed issues, while noting that the issues were moot because of his conclusion that employee's claim is barred.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred because: (1) employee suffered occupational disease in the course and scope of employment; (2) appropriate or proper notice was given to the employer, including the filing of a formal claim; and (3) the medical evidence suggests that the occupational disease was caused by the employee's work activities.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

Findings of Fact

Employee worked for employer as an office assistant from January 2008 until April 24, 2010. Employee's duties included data entry, filing, and customer service. Employee estimates she performed data entry work involving typing on a computer for about 5 or 6 hours per day, but

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acknowledged this task was interrupted by other duties such as answering phones and handling boxes of files.

In 2008 or 2009, employee began to develop pain and discomfort in her hands, wrists, and fingers. Employee's arms were falling asleep while driving and she was having burning, tingling, and numbness in her hands. Employee's symptoms gradually worsened.

In December 2010, employee sought treatment for hand numbness at Madison Memorial Hospital. On February 17, 2011, employee saw Dr. Ed Burke for hand pain. Dr. Burke diagnosed carpal tunnel syndrome and recommended employee see a specialist. On March 9, 2011, employee saw Dr. Bruce Schlafly, who confirmed the diagnosis of bilateral carpal tunnel syndrome, and recommended carpal tunnel release surgeries.

On March 15, 2011, employee underwent a right carpal tunnel release, and on April 21, 2011, she underwent a left carpal tunnel release. It appears that Dr. Schlafly last saw employee on May 25, 2011, but his handwritten notes are not legible and so we are unable to determine when (if ever) he took employee off work, found employee to be at maximum medical improvement, or released employee to return to work. At the hearing before the administrative law judge, employee answered "yes" to her attorney's leading question asking whether as part of her claim she's claiming she's unable to work from March 15, 2011, through July 1, 2011. Employee did not identify the symptoms she was experiencing that purportedly prevented her from working during this time period, nor did she provide any other testimony or evidence to prove up this assertion. We find employee's affirmative response to her attorney's leading question lacking persuasive force on this issue. Consequently, we decline to make any findings that employee was rendered unable to work during any time period as a result of her carpal tunnel syndrome or related surgeries.

The bilateral carpal tunnel release surgeries provided employee with some relief, but she continues to experience tingling and numbness in her hands and fingers. Employee has difficulty with gripping, and can no longer open jars. Employee's hands still fall asleep while driving.

On August 31, 2011, Dr. Shawn Berkin saw employee for purposes of providing an independent medical examination on behalf of the employee. Dr. Berkin opined that employee's repetitive hand intensive activities performed in the course of her duties for employer were the prevailing factor causing her to suffer bilateral carpal tunnel syndrome. Dr. Berkin rated employee's permanent partial disability resulting from bilateral carpal tunnel syndrome at 35% of each upper extremity at the level of the wrist. Dr. Berkin opined employee should use nonsteroidal anti-inflammatory medications for arm and hand pain.

On November 21, 2011, Dr. Richard Rende saw employee for purposes of providing an independent medical examination on behalf of the employer. Dr. Rende opined that employee's bilateral carpal tunnel syndrome was likely the result of repetitive microtrauma sustained in the course of her employment as an office assistant. Dr. Rende opined that employee had reached maximum medical improvement, and rated employee's disability referable to bilateral carpal tunnel syndrome at 3% permanent partial disability of each

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wrist. Dr. Rende opined that employee would not need any future treatment in connection with the work injury.

We find persuasive the unanimous medical causation opinions from Drs. Rende and Berkin (and so find) that employee's bilateral carpal tunnel syndrome resulted from repetitive trauma caused by her work as an office assistant for employer. We note that employee, in her brief, concedes that "[t]here has not been substantial evidence to show that the employee needs additional ongoing medical care associated with future medical." *Brief of Employee/Petitioner*, page 8. Especially in light of this concession, we find persuasive Dr. Rende's opinion (and so find) that employee does not have any need for future medical treatment referable to bilateral carpal tunnel syndrome. We find that employee's bilateral carpal tunnel syndrome results in a 12.5% permanent partial disability of each upper extremity at the wrist.

Before her evaluations by Drs. Rende and Berkin, no other physician informed employee that her carpal tunnel syndrome was work-related. On May 31, 2011, employee filed a Claim for Compensation with the Division of Workers' Compensation. This document alleges employee suffered a repetitive trauma injury affecting both upper extremities in April 2010 in High Ridge, Jefferson County, Missouri. This document also includes employee's name and address. This was the first notice employee provided to employer of her injury. Throughout her course of treatment for bilateral carpal tunnel syndrome, employee received treatment from providers of her own choosing, and never requested that employer provide her with medical treatment. Employer did not have any notice of employee's need for treatment in connection with bilateral carpal tunnel syndrome.

Conclusions of Law

Notice

Section 287.420 RSMo sets forth the requirements for the notice an employee must provide her employer regarding a work injury, and provides, in relevant part, as follows:

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

Under the foregoing provision, the triggering event in the context of an injury by occupational disease is "diagnosis of the condition." The parties appear to have overlooked the relevant and controlling case law interpreting the meaning of this language:

Strictly construing Mo. Rev. Stat. § 287.420 (Cum. Supp. 2005), "the condition" is referring to the previously stated occupational disease or repetitive trauma. Therefore, the question then becomes, at what point is an occupational disease or repetitive trauma diagnosed? Looking to the plain, obvious, and natural import of the language, it follows that a person cannot be diagnosed with an occupational disease or repetitive trauma until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure.

Allcorn v. Tap Enters., 277 S.W.3d 823, 829 (Mo. App. 2009).

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Pursuant to *Allcorn*, the thirty-day notice period did not begin to run for this employee until a diagnostician made a causal connection between her injuries and some work-related activity or exposure. We have found that the date a diagnostician first made a causal connection between employee's carpal tunnel syndrome and some work-related activity or exposure was August 31, 2011, when Dr. Berkin evaluated employee and offered his opinion that her carpal tunnel syndrome was caused by her work for employer. We have also found that on May 31, 2011, employee filed a Claim for Compensation with the Division of Workers' Compensation, which amounts to a written notice meeting each of the requirements under § 287.420. "[T]he statute does not require that the notice be given after the diagnosis, but only that it be given *no later than* thirty days after the diagnosis of the condition." *Allcorn*, at 830 (emphasis in original). Applying the relevant and controlling case law, we conclude that employee provided timely notice to employer meeting each of the elements of the statute. We conclude that employee's claim is not barred by § 287.420.

Occupational disease arising out of and in the course of employment

Section 287.067.1 RSMo 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 an 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 had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

We have credited the opinions from Drs. Berkin and Rende that employee suffers from bilateral carpal tunnel syndromes caused by her work for employer. The credible findings of Drs. Berkin and Rende demonstrate that employee sustained an occupational disease that appears to have had its origin in a risk connected with the employment, and that appears to have flowed from that source as a rational consequence. We conclude employee sustained an occupational disease arising out of and in the course of employment for purposes of the foregoing section.

Medical causation

Section 287.067.3 RSMo provides, as follows:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. 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.

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We have credited the opinions from Drs. Berkin and Rende that employee suffers from bilateral carpal tunnel syndromes, and that employee's work for employer caused these conditions. Given the credible findings from Drs. Berkin and Rende, we conclude that employee's occupational exposure was the prevailing factor in causing the resulting medical conditions of bilateral carpal tunnel syndrome and associated disability to the extent of 12.5% permanent partial disability of each upper extremity at the 175-week level.

Past medical expenses

Section 287.140.1 RSMo provides, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

The courts of Missouri have declared that an employer is not responsible for an employee's past medical expenses where the employee has received treatment with her own providers and where employer had no notice that the employee was in need of treatment. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). We have found that employee sought treatment with providers of her own choosing, that employee never requested that employer provide her with treatment, and that employer had no notice that employee was in need of treatment. We conclude that employee is not entitled to any past medical expenses.

Future medical treatment

We have noted that employee concedes, in her brief, that she did not provide substantial evidence to meet her burden of proving her claim for future medical treatment. We have also credited the opinion of Dr. Rende that employee does not have any need for future medical treatment referable to the work injury. Accordingly, we conclude employer is not liable under § 287.140 RSMo to provide any future medical treatment to the employee.

Temporary total disability

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ her during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). We have noted that the handwritten records of the treating surgeon, Dr. Schlafly, are illegible and inconclusive as to the issue of temporary total disability. We have also found unpersuasive employee's testimony on this issue. Employee merely answered a leading question from her attorney acknowledging that she is claiming temporary total disability benefits in this matter. She did not provide any testimony or other evidence that would establish her physical condition during the claimed period, much less persuasively demonstrate that no employer would reasonably be expected to employ her. We conclude that employee has failed to meet her burden of proving she was temporarily and totally disabled during any time period. Employer is not liable for temporary total disability benefits under § 287.170.

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Permanent partial disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee sustained a 12.5% permanent partial disability of the right upper extremity at the 175-week level, and a 12.5% permanent partial disability of the left upper extremity at the 175-week level as a result of the injury. This amounts to 43.75 weeks of permanent partial disability at the rate of \$333.33. We conclude, therefore, that employer is liable for \$14,583.19 in permanent partial disability benefits.

Medicaid lien

We have determined that employer does not have any liability to pay employee's past or future medical expenses. It follows that the Missouri Department of Social Services, MO HealthNet Division, is not entitled to the payment of any portion of the compensation awarded in this matter in connection with its Notice of Lien filed on July 22, 2011, and amended on September 19, 2011, December 9, 2011, and February 8, 2013. See § 287.266 RSMo and *Doran v. Mo. Dep't of Soc. Servs.*, No. 07-4158-CV-C-NKL (W.D. Mo., Jan. 8, 2008).

Award

We reverse the award of the administrative law judge. Employer is liable for \$14,583.19 in permanent partial disability benefits.

This award is subject to a lien in favor of Gary G. Matheny, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

The award and decision of Administrative Law Judge Gary L. Robbins, issued May 24, 2013, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 19th day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

INTER-OFFICE COMMUNICATIONS

DIVISION OF WORKERS' COMPENSATION

May 22, 2013

Ms. Naomi Pearson
Division of Workers' Compensation
PO Box 58
Jefferson City, Missouri 65102-0058

In Re: Injury Number: 09-106509, 10-073931, 10-111727
 Employee: Tamara L. Lynn
 Employer: McClelland Marketing Incorporated
 Insurer: Auto Owners Insurance Company

Dear Ms. Pearson:

I have enclosed final awards in the above referenced workers' compensation case. The employee's claims were denied. The employer-insurer is not ordered to pay any benefits in these cases.

Sincerely,

Gary L. Robbins
Administrative Law Judge
Cape Girardeau, Missouri

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Tamara L. Lynn Injury Nos. 09-106509, 10-073931,
and 10-111727

Dependents: N/A

Employer: McClelland Marketing Incorporated

Insurer: Auto Owners Insurance Company

Appearances: Gary G. Matheny, attorney for employee.
Brandy L. Johnson, attorney for the employer-insurer.

Hearing Date: March 4, 2013 Checked by: GLR/rm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? November 30, 2009 in 09-106509. April 20, 2010 in 10-073931. April 2010 in 10-111727.
5. State location where accident occurred or occupational disease contracted: Jefferson County, Missouri in all three cases.
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 in 09-106509. No in 10-073931.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: In 09-106509, the employee was carrying a box when she tripped and fell over a generator on the floor. In 10-073931, the employee claims she injured her neck when helping Mr. McClelland lift a tiller into the back of a truck. In 10-111727, the employee claims she injured her bilateral wrist due to performing clerical duties for her employer.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: In 09-106509, the employee claims she injured her neck, left hip and right shoulder. In 10-073931, the employee claims she injured her neck. In 10-111727, the employee claims she injured her bilateral hands and wrists.
14. Nature and extent of any permanent disability: None. See Award.
15. Compensation paid to date for temporary total disability: The employer-insurer paid no temporary disability payments in any of the three cases.
16. Value necessary medical aid paid to date by employer-insurer: In 09-106509, the employer-insurer paid \$3,562.65 in medical aid. In 10-073931 and 10-111727 the employer-insurer provided no medical aid.
17. Value necessary medical aid not furnished by employer-insurer: The employee did not split medical care in each case. The employee claims that for all three cases she has medical bills amounting to \$54,319.46.
18. Employee's average weekly wage: In each case the parties agreed that the employee's average weekly wage is \$500.00.
19. Weekly compensation rate: The employee's compensation rate for all purposes is \$333.33 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: \$0. See Awards.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None. See Awards.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW

On March 4, 2013, the employee, Tamara L. Lynn, appeared in person and with her attorney, Gary G. Matheny for a hearing for a final award. The employer-insurer was represented at the hearing by their attorney, Brandy L. Johnson.

Assistant Attorney General, Kevin Nelson appeared to represent the interests of the Second Injury Fund and was present for the trials. However, he did not participate in the trials as prior to trial the employee and the employer-insurer stipulated that the employer-insurer had no liability for permanent total disability and that any liability of the Second Injury Fund will be litigated at a future date.

At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS IN 09-106509:

1. McClelland Marketing Incorporated was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Auto Owners Insurance Company.
2. On November 30, 2009, Tamara L. Lynn was an employee of McClelland Marketing Incorporated and was working under the Workers' Compensation Act.
3. On November 30, 2009, the employee sustained an accident arising out of and in the course of her employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The parties agreed that employee's average weekly wage was \$500.00 resulting in a compensation rate of \$333.33 for all purposes.
7. The employer-insurer paid \$3,562.65 in medical aid.
8. The employer-insurer paid \$0 paid in temporary disability benefits.
9. The employee has no claim for mileage.
10. The employee has no claim for permanent total disability as to the employer-insurer.

UNDISPUTED FACTS IN 10-073931:

1. McClelland Marketing Incorporated was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Auto Owners Insurance Company.
2. On April 20, 2010, Tamara L. Lynn was an employee of McClelland Marketing Incorporated and was working under the Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The parties agreed that the employee's average weekly wage was \$500.00 resulting in a compensation rate of \$333.33 for all purposes.

5. The employer-insurer paid \$0 in medical aid.
6. The employer-insurer paid \$0 in temporary disability.
7. The employee has no claim for mileage.
8. The employee has no claim for additional medical care.
9. The employee has no claim for temporary disability.
10. The employee has no claim for permanent total disability as to the employer-insurer.

UNDISPUTED FACTS IN 10-111727:

1. McClelland Marketing Incorporated was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Auto Owners Insurance Company.
2. In April 2010 Tamara L. Lynn was an employee of McClelland Marketing Incorporated and was working under the Workers' Compensation Act.
3. The employee's claim was filed within the time allowed by law.
4. The parties agreed that the employee's average weekly wage was \$500.00 resulting in a compensation rate of \$333.33 for all purposes.
5. The employer-insurer paid \$0 in medical aid.
6. The employer-insurer paid \$0 in temporary disability.
7. The employee has no claim for mileage.
8. The employee has no claim for permanent total disability as to the employer-insurer.

ISSUES IN 09-106509:

1. Medical Causation.
2. Past Medical Bills.
3. Additional Medical Care.
4. Temporary Disability.
5. Permanent Partial Disability.

ISSUES IN 10-073931

1. Accident.
2. Notice.
3. Medical Causation.
4. Past Medical Bills.
5. Permanent Partial Disability.

ISSUES IN 10-111727

1. Accident/Occupational Disease.
2. Notice.
3. Medical Causation.
4. Past Medical Bills.

5. Additional Medical Care.
6. Temporary Disability.
7. Permanent Partial Disability.
8. Medicaid Lien of \$3,751.30.

EXHIBITS IN ALL CASES:

Employees Exhibits:

- A. Deposition of Shawn L. Berkin, D.O.
- B. Statement from Anesthesia Consultants of Jefferson County.
- C. Lien of Missouri Department of Social Services.

Joint Exhibits:

1. Medical records from Madison Medical Center.
2. Withdrawn.
3. Medical records of Kenneth E. Ross, M.D.
4. Medical records of Chandra Shekar, M.D.
5. Records from Metro Imaging.
6. Medical records of Ryan W. Couchman, M.D.
7. Medical records from St. Clare Health Center of Fenton.
8. Medical records of Albanna Neurosurgical Consultants, P.C.
9. Medical records of Edward Burke, M.D.
10. Medical records of Bruce Schlafly, M.D.
11. Medical records of Advanced Pain Center.
12. Withdrawn.
13. Medical report of Richard J. Rende, M.D.
14. Deposition of Richard J. Rende, M.D.
15. Deposition of Tamara Lynn.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

The employee, Tamara L. Lynn, Allen McClelland and Melinda McClelland personally testified at trial. All other evidence was received in the form of written records, medical records or deposition testimony.

The Court found the testimony of Mr. and Mrs. McClelland to be credible. The Court did not find the testimony of the employee to be credible. Some illustrations of areas where the employee's credibility is suspect are:

- The employee testified that she had no neck problems prior to her accident yet the records show that she was in a motor vehicle accident, had MRI testing and was prescribed Hydrocodone.
- The employee maintains that the medical records concerning her fall are wrong in that they do not have the complaints she reported.
- The employee maintains that the medical records regarding her hip complaints are wrong as the doctor did not put in her hip complaints.
- The employee maintains that Dr. Burke's records are wrong in that he reported she had chronic neck pain since 2009.
- The employee maintains that the records that say she has a prior back injury are wrong.
- The employee testified that the sworn testimony that she gave at her deposition was not correct.

STATEMENT OF THE FINDINGS OF FACT IN 09-106509 AND 10-073931:

The employee worked as an office assistant for the employer from January of 2008, to approximately April 20, 2010. She worked as an office assistant throughout her employment with the employer.

McClelland Marketing is a family owned business. Allen McClelland and Melinda McClelland, a married couple, ran the business and were the employee's supervisors. Mrs. McClelland is the employee's sister.

On November 30, 2009, the employee testified that she was in the warehouse retrieving a file box when she caught her left foot on a generator and fell. She testified she landed on the whole right side of her body, taking the brunt of the fall on her right hip. She denied hitting her left hip when she fell, but did claim it felt like the hip pulled away and loosened after she caught her left foot on the generator. In addition to left hip pain, the employee also reported jarring her neck, instant neck pain, and bruising to her right shoulder, right knee, and right hip. She returned to work the day after the accident.

On April 20, 2010, the employee helped Mr. McClelland lift a tiller into the back of a truck. When she lifted, she testified the left side of her neck immediately started hurting.

At trial, the employee admitted she did not report the accident on April 20, 2010. The day after the alleged accident, she called Mr. McClelland and advised she could not work because her neck was hurting. She had two further conversations with Mr. McClelland about whether she was able to return to work. Although asked to come back to work, she never returned to her position at McClelland Marketing. Despite having at least three conversations with Mr. McClelland after April 20, 2010, the employee admitted that, at no time, did she advise her employer that she had sustained an injury to her neck from lifting the tiller. The testimony of both Mr. and Ms. McClelland confirms the employee's admission.

Prior to November 30, 2009, the employee testified that she only had a stiff neck that she saw the doctor for one time. However, the medical records reflect that the employee had a pre-existing neck condition. She also had pre-existing back, left hip, and psychiatric conditions.

On August 24, 2004, the employee was involved in a motor vehicle accident that resulted in injuries to her back, neck, right knee, and right forearm. She was diagnosed with back pain, a right forearm contusion, and sprains to her neck and right knee.

On January 16, 2009, Dr. Ross, saw the employee for complaints involving her neck, back, hips, and knees that she had been experiencing for two weeks. She was diagnosed with osteoarthritis, prescribed Naprosyn, and x-rays were ordered. The neck x-rays showed degenerative disc disease at C4-C5 and C6-C7, which was greater at C6-C7, with disc space narrowing and small endplate spurs.

On February 17, 2009, the employee underwent a cervical MRI that showed right sided disc disease at C4-C5 and C6-C7, focally effacing the anterior subarachnoid space, and causing stenosis to the right foramen at those levels. At C4-C5, there was a central, right sided herniation causing significant stenosis, particularly at the entry to the right foramen. At C6-C7, there was a right paramedian disc herniation with focal anterior subarachnoid space narrowing. Two days later, Dr. Ross noted the employee's herniated discs.

Dr. Shekar saw the employee on May 19, 2009. Dr. Shekar reported that the employee had complaints of left hip and neck pain for "a long time." His diagnoses included left hip pain and x-rays were ordered.

Medical records establish that the employee was receiving care for symptomatic, severe osteoarthritis of the left hip and, possibly, some degenerative disc disease with sciatica as of July 8, 2009. Dr. Couchman recommended a total hip replacement. On August 26, 2009, the employee underwent a left total hip replacement. When she was released from treatment on September 30, 2009, she only complained of occasional tightness in the hip. She was instructed to continue weight control measures, an exercise program, and be seen on a yearly basis.

On the date of the first accident, November 30, 2009, the employee presented to St. Clare Health Center. She testified that she related all of her injuries and complaints to the ER personnel. The ER records reveal that the employee reported the fall at work, advising she hit her right shoulder and caught herself with her right wrist. However, the employee further reported she then fell onto the concrete on her buttocks and left hip. She complained of pain in these areas, her low back, and her left groin. She denied any head trauma or loss of consciousness. On exam, she had left pelvic tenderness that did not extend over the hip. She had full range of motion in the left hip and her x-rays were negative. The employee had mild tenderness over the right shoulder and wrist, full range of motion, and no swelling. There were no neck complaints recorded and no positive findings related to her neck on exam. The employee was diagnosed with right upper arm and shoulder contusions and prescribed medication.

The employee's next medical record is from December 21, 2009, when she underwent an MRI ordered by Dr. Shekar. The MRI showed degeneration of the cervical intervertebral discs, broad based posterior hypertrophic spurring, and mild diffuse disc bulges of the intervertebral discs at C4-C5 and C6-C7 with slight narrowing of the neural foramen on the right side. Two days later, Dr. Shekar saw the employee for neck and shoulder pain. She was prescribed medication and referred to a neurosurgeon.

On January 6, 2010, the employee saw Dr. Albanna, a neurosurgeon, for right and posterior neck pain that radiated, bilaterally, to the shoulders, upper arms, forearms, and hands. The employee alleged the complaints started after a fall at work. Dr. Albanna reviewed the December 2009, MRI and concurred there was osteophyte formation at C4-C5. Dr. Albanna, however, disagreed with other aspects of the MRI reading. Specifically, Dr. Albanna believed the radiologist erred in finding no pathology at C3-C4, as Dr. Albanna was of the opinion there was a very mild spur at that level. Dr. Albanna diagnosed the employee with cervical spondylosis, cervical radiculopathy, cervicgia, and headache/cephalgia. Surgery was recommended.

On January 22, 2010, the employee underwent a cervical microdiscectomy, osteophyctomy, partial corpectomy, fusion arthrodesis, and anterior cervical instrumentation at C3-C4 and C4-C5. Her pre and post-operative diagnosis was cervical spondylosis secondary to osteophyte formation at C3-C4 and C4-C5. Post-surgery, the employee reported the resolution of her headaches, dizziness, and her bilateral arm/shoulder pain, numbness, and tingling. She continued to complain of neck stiffness and right deltoid pain. She returned to work on February 23, 2010.

The employee last saw Dr. Albanna on April 20, 2010. She reported that her right arm, right deltoid, neck pain, headaches, and dizziness were completely resolved. She had not yet begun the recommended therapy, but had an appointment to do so that week. She was to continue conservative treatment and return in three months. Although the employee allegedly suffered her second accident to her neck after seeing Dr. Albanna on April 20, 2010, she did not return to him for an evaluation of her new complaint or her three month follow-up appointment.

Dr. Shekar saw the employee on April 26, 2010. Her complaints did not include her neck.

The employee saw Dr. Burke, her primary care physician, on December 2, 2010, for complaints of chronic neck pain and headaches. The symptoms were recorded as being present since her neck surgery in January of 2010. On exam, the employee's musculoskeletal system had normal findings. The employee was diagnosed with cervical dysplasia and Lorcet Plus was prescribed.

On December 29, 2010, the employee presented to Madison Medical Center for right hand numbness and right shoulder and elbow pain. She was noted to have a history of chronic neck, right shoulder, and left hip pain. The ER personnel noted that the employee had been seen two years prior for a c-spine fracture and "since then have [sic] chronic neck and shoulder pain." She was diagnosed with chronic neck and right shoulder pain from an old injury.

On January 4, 2011, Dr. Burke saw the employee for back pain and arm pain that she thought stemmed from her neck. Her musculoskeletal system had normal findings. She was diagnosed

with arthritis and was given a trial with a Lidoderm patch. On April 4, 2011, the employee presented to Dr. Burke for her three month follow-up. She alleged she could not walk more than twenty feet. On exam, the employee's musculoskeletal system again had normal findings. The employee was referred to a pain clinic for her neck pain and her Vicodin was increased to three times daily. On the same date, the employee's blood test was positive for marijuana and, on April 8, 2011, Dr. Burke discontinued her narcotic medication. The employee thereafter discontinued her care with Dr. Burke.

The employee was seen at Advanced Pain Clinic on July 7, 2011, for an evaluation of her cervical pain. It was noted that she had been experiencing cervical pain for one year. Her diagnosis was recorded as being from degenerative disease of the spine, status-post neck fusion. A serious back injury was also noted. The employee complained of back pain, neck pain, joint pain, pain with muscle usage, stiff joints, joint swelling, weakness, and range of motion limitations. Her diagnoses included cervical spondylosis without myelopathy, cervicalgia, and chronic pain.

The employee returned for pain management care on August 5, 2011. Her cervical exam revealed moderate tenderness, diffusely, off midline bilaterally in a symmetrical distribution, moderate to severe tenderness, posteriorly, at C5, full flexion to fifty degrees, left suboccipital pain, left posterior neck pain, moderate interscapular pain, and left trapezius pain that was described as severe. She was proscribed Hydrocodone-Acetaminophen, Naprosyn, and a Lidocaine patch.

On September 8, 2011, the employee was seen for left-sided neck and left hip complaints. An injection was recommended in addition to her medication regimen. On October 5, 2011, a cervical epidural/subarachnoid injection was administered. The employee's diagnoses, on this date, included cervical spondylosis, cervicalgia, brachia neuritis or radiculitis not otherwise specified and post-laminectomy syndrome of the cervical spine.

The employee testified that she did not inform her employer that she had a neck injury from the fall on November 30, 2009. She further admitted, after the ER visit, she neither requested treatment for her neck nor asked for further treatment for any of the other body parts allegedly injured in the work accident. She maintained, at that time, she did not know she had a workers' compensation claim and planned to use her group insurance for the neck surgery. The testimony offered on behalf of the employer confirms that the employee did not request any treatment after November 30, 2009, and that the employer was unaware that the employee hurt her neck at work. In fact, Ms. McClelland testified, prior to November 30, 2009, the employee had neck pain she attributed to the way she had to sit during the car ride to and from work.

Ms. McClelland testified that the employer had the required postings instructing employees as to the steps to take and who to contact in the event of a work related injury.

Currently, the employee indicated that she has ongoing complaints from the work injuries. She testified she has constant headaches, limited range of motion when turning her neck to the left, muscle spasms in the neck, pain down her shoulder blades, pain down her left arm, and tightness that extends from the back of her neck over the top of her head. She testified her left hip feels

loose, like it is going to break mid-thigh, and has progressively worsened since November 30, 2009. She alleged that her symptoms limit her activities. Due to her neck and left hip complaints, the employee testified she is prescribed Hydrocodone, Flexeril, and the anti-depressant Nortriptyline. She denied any ongoing problems with her right shoulder or right hip.

Dr. Berkin, the employee's expert, saw her for an independent medical evaluation on August 31, 2011.

With regard to the November 30, 2009, injury, the employee told Dr. Berkin she fell at work and struck her right shoulder, neck, and right hip. She reported feeling a pop in her left hip. On April 20, 2010, the employee reported that she lifted a tiller onto a truck and developed pain in her neck that extended into her left arm.

The employee related ongoing complaints of neck pain, stiffness, tightness, muscle spasms, and a limitation in her range of motion. She also reported headaches, left hip pain, left hip limitation in movement, and right shoulder weakness and pain.

On examination, the employee had neck tenderness but no muscle spasms or trigger points. Her range of motion was limited by 10° in flexion, 20° in extension, 20° of right rotation, 10° of left rotation, and 10° of right and left lateral flexion. Her right shoulder was tender and her impingement and empty can testing were positive. Her rotator cuff strength was 5+/5. The employee's left hip was tender over the anterior and posterior surfaces and her anterior thigh. Her range of motion was only limited by 10° of extension, abduction, and external rotation.

Dr. Berkin made the following diagnoses and findings:

- As related to the accident of November 30, 2009:
 - (1) A cervical strain with right sided radiculopathy;
 - (2) Herniated nucleus pulposus of C4-C5 and C6-C7 intervertebral discs;
 - (3) A right shoulder contusion; and
 - (4) A left hip contusion.

Dr. Berkin found the work accident on November 30, 2009, was the prevailing factor of these diagnoses.

- The employee was diagnosed with a cervical strain from the accident on April 20, 2010. Dr. Berkin opined the work accident on April 20, 2010, was the prevailing factor of this diagnosis.
- Dr. Berkin felt that the employee should utilize anti-inflammatory medication, muscle relaxers, and analgesics for her neck, arm, hand, and hip pain in the future. He also felt the employee should continue seeing a pain management specialist for her chronic pain syndrome. Dr. Berkin did not feel any future treatment was necessary for the April 20, 2010, injury.

Dr. Berkin provided the following restrictions:

- In general, Dr. Berkin recommended no lifting over ten to fifteen pounds occasionally and avoidance of excessive lifting or working with her arms above shoulder level. The employee was advised to pace herself and take frequent breaks to avoid an exacerbation of her symptoms or further injury.
- Related to her cervical condition, Dr. Berkin recommended avoidance of rapid and extreme neck movements. He also advised against maintaining a fixed position for extended periods of time.
- With respect to her chronic left hip condition, Dr. Berkin recommended avoiding squatting, kneeling, stooping, turning, twisting, lifting, climbing, climbing ladders, and working at heights above ground level.

Dr. Berkin opined that the employee had the following permanent partial disability ratings:

- With regard to the accident on November 30, 2010:
 - (1) 42.5% of the body as a whole related to the cervical spine;
 - (2) 12.5% of the right shoulder; and,
 - (3) 15% of the left hip.
- The employee had no permanent partial disability from the accident on April 20, 2010.
- With regard to her conditions pre-existing November 30, 2009:
 - (1) 10% of the body as a whole related to the cervical spine for degenerative arthritis;
 - (2) 50% of the left hip; and,
 - (3) 20% of the body as a whole for bipolar disorder.

Dr. Berkin testified that the employee had experienced neck symptoms before the work accident of November 30, 2009. He recognized the MRIs the employee underwent before and after the 2009 injury were consistent. He further acknowledged neither MRI showed pathology at C3-C4. Dr. Berkin testified that both spondylosis and osteophytes were degenerative in nature and usually take more than a couple months to develop. Dr. Berkin opined that the employee had limitations in her left hip from the pre-existing total hip replacement.

The employee saw Dr. Rende for an independent medical evaluation, on behalf of the employer-insurer, on November 21, 2011.

The employee related, on November 30, 2009, she fell at work and landed on the right side of her body and shoulder. She felt immediate pain in her right shoulder, right hip, and neck.

She reported that she suffered a second work injury on April 20, 2010, while lifting a tiller into the back of a pick-up truck. She felt a sudden onset of recurrent left sided arm and neck pain. She then began having headaches and her numbness returned.

Dr. Rende noted that the employee's medical records and past medical history established chronic problems with her cervical spine that have been present for many years. He recognized that the employee had an injury to her neck in 2004, and complaints related to the neck and

cervical spine in 2009 before the work accident. She had, in early 2009, pathology at C4-C5 and C6-C7 that Dr. Rende described as appearing to be of "longstanding duration." Dr. Rende advised a comparison of the pre and post injury MRIs showed there was "essentially no difference" and there was "no change or progression of the disease process between" the two tests.

On the date of the evaluation, the employee complained of neck pain that extended into the superior aspect of her left shoulder and posterior scapula. Rarely, she would experience numbness in her left arm. She also reported bilateral hip pain that she attributed to the fall on November 30, 2009. She indicated the pain was in her groin and anterior thigh. Although she had undergone a total left hip replacement in 2009, the employee maintained her hip pain worsened since the fall and, occasionally, involved her buttock cheek. Additionally, she alleged her right hip was painful and popped at times.

An exam of the employee's left hip revealed full range of motion in internal and external rotation. She flexed easily from zero to 110°. Dr. Rende advised these were normal findings. The employee's right hip had abduction of 20°, was limited to 100° in flexion, had some loss of external rotation, and had a slightly fixed external rotation contraction. X-rays of both hips, taken that day, revealed her hip replacement was in good position without any sign of acetabular or femoral loosening. Her right hip x-ray demonstrated obvious longstanding congenital dysplasia, lateral migration of the femoral head in a very shallow acetabulum, and some degenerative narrowing of the hip with early degenerative osteoarthritis.

The employee's neck displayed full range of motion in flexion and extension, but she had a fifty percent loss in side bending and rotation. There were neither paraspinal spasms nor tenderness.

Dr. Rende diagnosed the employee with cervical degenerative disc disease, left hip congenital dysplasia, and left hip degenerative osteoarthritis. Dr. Rende opined these conditions pre-dated the November 30, 2009, work injury and were not causally related to it. Thus, any treatment for these conditions was also unrelated to the work accident. He further found there was no injury attributable to the accident on April 20, 2010.

Dr. Rende did not feel that the employee would need future treatment related to the November 30, 2009 or April 20, 2010, work accidents. He did not believe work restrictions were necessary due the work accidents.

Having found the neck and left hip condition to be unrelated to the work accidents, Dr. Rende opined that the employee had no permanent partial disability related to either work injury.

Dr. Rende concluded the December 21, 2009 MRI did not reveal any pathology at the C3-C4 level. He also advised bone spurs are degenerative and develop over time.

Dr. Rende disagreed with the treatment provided by Dr. Albanna, and explained the cervical surgery was not indicated without conservative care. No attempt was made at conservative care for the employee's cervical condition before surgery was performed. Dr. Rende felt Dr.

Albanna's "aggressive treatment" was inappropriate without some degree of conservative management before surgery. As Dr. Rende explained:

Well, normally, first of all, if you look at the MRI Scan of both levels, it talked about mild bulging of her discs and the degenerative disc disease. Typically, you do surgical fusion and discectomies in the cervical spine for herniations and, for severe changes or stenosis, there are many steps that could have been performed prior to the surgical intervention that she had and I questioned Dr. Albanna's hurry to do surgery without any conservative measures first.

But this is actually a problem that I am very familiar with Dr. Albanna about and, when I was Chief of Orthopedics at St. Anthony's Hospital, he ultimately lost his privileges because he was too aggressive in the treatment of many injuries and I was on the board that recommended that he lose those privileges.

Further, Dr. Rende noted there was no pathology seen at C3-C4 and no diagnostic report showing pathology at those levels that warranted surgical intervention.

STATEMENT OF THE FINDINGS OF FACT IN 10-111727:

The employee worked as an office assistant for the employer from January of 2008, to approximately April 20, 2010. She worked as an office assistant throughout her employment with the employer.

McClelland Marketing is a family owned business. Allen McClelland and Melinda McClelland, a married couple, ran the business and were the employee's supervisors. Ms. McClelland is the employee's sister.

The employee testified that her duties included data entry, filing, customer service over the telephone, and handling boxes of files. Although the employee testified she, daily, spent three hours filing and five to six hours performing the monthly change of the price sheets for eleven manufactures and updating customer lists, she later admitted she could not say how much time straight she spent performing data entry, filing, answering phones, and handling file boxes.

Ms. McClelland testified that the office work was divided up equally between three employees, including her sister, and included order entry, filing, and answering phones. The employees rotated tasks, spending two to three hours on each job.

The employee recalled, that sometime in the past, she saw Dr. Ross and underwent an EMG/nerve conduction study that showed moderate carpal tunnel syndrome. She was informed she would need surgery down the road.

In late 2009 or early 2010, the employee began experiencing symptoms in her hands bilaterally. She experienced burning, tingling, and numbness in both hands. Her hands would also feel as if they were falling asleep, especially when driving. The employee testified that her hands would really bother her after performing data entry.

The employee testified that she did not notify her employer of the symptoms in her hands, her diagnosis of bilateral carpal tunnel syndrome, or the connection between her employment and the condition. She advised neither Mr. McClelland nor Ms. McClelland that she had sustained a work related injury. Ms. McClelland confirmed she did not learn of the alleged work injury until the employee's Claim for Compensation was filed.

The employee also admitted that she did not request treatment from the employer for her bilateral carpal tunnel syndrome. Ms. McClelland testified that the employee did not request treatment for her bilateral carpal tunnel syndrome.

Although Ms. McClelland testified she was not aware of a work injury involving the employee's hands, she was aware that the employee had complained, before her employment with McClelland Marketing, of constant movement in her hands while she slept.

On December 29, 2010, the employee was seen at Madison Memorial Hospital and complained of hand numbness. Her sensation was found to be normal and the hospital personnel noted that she already had an appointment with Dr. Burke.

Dr. Burke saw the employee on February 17, 2011, for hand pain. Dr. Burke noted that the employee had been told she needed surgery a few years prior. The employee's numbness, tingling, and pain were now of such a severity she wanted to pursue surgery. She was diagnosed with carpal tunnel syndrome and referred to a hand specialist.

On March 9, 2011, the employee saw Dr. Schlafly. She complained of numbness and pain in her hands bilaterally. It was noted the symptoms had been present for several years. After an examination, the employee was diagnosed with bilateral carpal tunnel syndrome and surgery recommended. She underwent a right carpal tunnel release on March 15, 2011, and a left carpal tunnel release on April 21, 2011.

Dr. Schlafly noted the right carpal tunnel release helped the numbness and improved the tingling in that hand. On May 25, 2011, Dr. Schlafly indicated that the employee had good sensation and range of motion bilaterally and the release procedure helped with the tingling she had experienced. The employee did not return for her scheduled follow-up appointment.

The employee testified that she has the following limitations or complaints regarding the work injury: tingling, numbness, a loss of grip strength, and, at times, a burning sensation in hands. Occasionally, her hands feel as if they are falling asleep. She felt limited in driving and opening jars. However, in her June 1, 2011, deposition, the employee testified that her only complaints on the right were a loss of strength and a little pain. On her left side, she had a loss of strength and tingling.

The employee filed her Claim for Compensation on April 15, 2011, alleging repetitive trauma from her work as an office assistant.

Dr. Berkin saw the employee for an independent medical evaluation on August 31, 2011. The employee complained of bilateral hand pain and difficulty gripping. Dr. Berkin provided the following findings and opinions:

- On examination, the employee had full flexion and extension bilaterally. She had bilaterally negative Phalen's, Allen, and Finkelstein testing. Her Tinel's testing was negative on the right, but present on the left. The arm raising test, on the right, was negative for numbness and tingling.
- Dr. Berkin diagnosed the employee with bilateral carpal tunnel syndrome and said that her employment was the prevailing factor of the occupational disease.
- Dr. Berkin felt that the employee should utilize anti-inflammatory medication in the future and, if she experienced an exacerbation of her hand symptoms, may have to seek treatment from a doctor.
- Dr. Berkin provided a lifting restriction of ten to fifteen pounds occasionally related to her carpal tunnel syndrome in combination with her pre-existing neck, right shoulder, and left hip conditions. He also advised avoiding forceful gripping, squeezing, pinching, pulling, twisting, reaching for extended periods of time, operating power/vibratory tools, and torque-like or high-impact stresses to her hands.
- Dr. Berkin opined that the employee had a thirty-five percent permanent partial disability of each wrist from the work-related bilateral carpal tunnel syndrome.

The employee saw Dr. Rende for an independent medical evaluation, on behalf of the employer-insurer on November 21, 2011. The employee described the numbness and tingling she had in her hands, which Dr. Rende noted was in the median nerve distribution and in her little finger on occasion. Dr. Rende advised her symptoms were better since undergoing surgery. Dr. Rende provided the following findings and opinions:

- On examination, the employee had normal sensation, a strong grip, and negative provocative testing.
- Dr. Rende diagnosed the employee with bilateral carpal tunnel syndrome and opined, per the employee's description of her job duties, he could not rule out her employment as the prevailing factor of the condition. He also felt that the employee had a very good outcome from her treatment.
- Dr. Rende did not feel that the employee would need future treatment and released her to work without restrictions.
- Dr. Rende opined that the employee had a three percent permanent partial disability of each wrist from the work-related bilateral carpal tunnel syndrome.

RULINGS OF LAW IN 09-106509 AND 10-073931:

ISSUE 1 in Injury Number 10-073931: Whether, on or about, April 20, 2010, the employee sustained an accident or occupational disease arising out of, and in the course of, her employment.

The Court finds that the employee has not established a right to recover from the employer-insurer. A claimant, in a worker's compensation proceeding, has the burden of proving all elements of his or her claim to a reasonable probability. **Cardwell v. Treasurer of State of Missouri**, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). To recover in a workers' compensation suit, the employee has the burden of proving, by a preponderance of the evidence that the injury arose out of and in the course of his or her employment. **Gardner v. Contract Freighters, Inc.**, 165 S.W.3d 242, 245 (Mo. App. S.D. 2005). To meet the test of an injury "arising out of" the employment, the injury must be a natural and reasonable incident of the employment, and there must be a causal connection between the nature of the duties or conditions under which employee is required to perform and the resulting injury." **Simmons v. Bob Mears Wholesale Florist**, 167 S.W.3d 222, 225 (Mo. App. S.D. 2005). "In the course of employment" refers to the time, place and circumstance of an employee's injury." **Id.**

In this case, the employee alleged she injured her neck while helping Mr. McClelland lift a tiller into the back of a truck. Mr. McClelland testified that, after lifting the tiller, the employee and he talked for approximately fifteen minutes. Both the testimony of the employee and Mr. McClelland establish that the employee made no statements about injuring her neck. Further, the medical records do not support the employee's allegations.

On April 20, 2010, the employee was still under the care of Dr. Albanna for her neck condition. In fact, she attended an appointment with him before coming to work that day. However, she did not return to see Dr. Albanna for either her claim of the worsening of her symptoms or the new ones she says she developed right after lifting the tiller.

The employee did not see any doctor until April 26, 2010. On that date she saw Dr. Shekar, but her complaints did not include her neck. The first treatment received for the neck was on December 2, 2010. At that appointment, Dr. Burke recorded complaints of chronic neck pain and headaches that had been present since the employee's neck surgery. None of the medical records document an injury on April 20, 2010, or a lifting injury.

The only evidence of this alleged accident is the employee's testimony. The Court finds that the employee was not a credible witness. Her hearing testimony was contradictory and, at times, inconsistent with both the medical records and her deposition testimony. Given her lack of credibility and an absence of proof, there is no credible evidence supporting the occurrence of the alleged accident. The Court also finds that the testimony of Mr. McClelland and Ms. McClelland was credible.

The Court finds that the employee failed to meet her burden of proof showing that she experienced an accident that arose out of, and in the course of, her employment. The Court finds that the employee's testimony lacked consistency and credibility. The Court finds that the employee did not offer any evidence that credibly supported her claim that she injured her neck

while lifting a tiller on April 20, 2010. The Court concludes that the competent and substantial evidence on the whole record does not demonstrate a compensable work accident occurred on April 20, 2010.

ISSUE 2 in Injury Number 10-073931: Whether the employer received notice of the accident on April 20, 2010.

Even if the employee had suffered an injury that arose out of, and in the course of, her employment she admittedly did not give her employer notice of the accident.

Missouri Revised Statute §287.420, in part, states:

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

RSMo. §287.420 (2005). The purpose of this section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. **Alcorn v. Monroe City R-1 School District**, 2009 WL 965799 (Mo.Lab.Ind.Rel. Com. 2009); **Gander v. Shelby County**, 933 S.W.2d 892, 895 (Mo.App. E.D. 1996). However, the failure to give timely notice may be excused if there was good cause for the failure or if the failure did not prejudice the employer. **Soos v. Mallinckrodt Chem. Co.**, 19 S.W.3d 683, 686 (Mo.App. E.D. 2000).

A claimant may demonstrate lack of prejudice where evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the trier of fact. **Pursifull v. Braun Plastering & Drywall**, 233 S.W.3d 219 (Mo. App. W.D. 2007). If the employer does not admit actual knowledge, the issue becomes one of fact. **Soos**, 19 S.W.3d at 686. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer. **Gander**, 933 S.W.2d at 892.

However, when the claimant does not show either written notice or actual knowledge, the burden rests on claimant to supply evidence and obtain a finding that no prejudice to the employer resulted. **Soos**, 19 S.W.3d at 686. If no such evidence is adduced, it can be presumed that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation. **Gander**, 933 S.W.2d at 896-97.

The employee testified that, at no time, did she advise her employer that she suffered a work related injury. She maintained she felt immediate pain in her neck and shoulder after lifting the tiller at work. Her testimony establishes that she was aware she suffered an injury to her neck and the connection to work immediately after lifting the tiller. Yet, she failed to notify her employer.

The testimony of the McClellands' confirms that the employee did not report a work injury to her neck. The evidence clearly shows that the employee's actions were in violation of the notice requirement in Section 287.420.

There was also no evidence that the employer had actual notice of the injury. The employee did not return to her job after April 20, 2010. She spoke to Mr. McClelland after April 20, 2010, but only discussed her neck pain and her inability to return to work. The employee testified, when she called in to work, she told Mr. McClelland she could not work due to neck pain. However, she did not inform him the pain was related to a work accident. The employee testified that she did not speak to Ms. McClelland after January of 2010. The record is devoid of any indication that the employer had actual notice of the alleged work accident. As there is nothing to indicate the existence of actual notice, the employee has the burden of showing there was no prejudice to the employer. She has failed to do so.

The employee offered no credible evidence that established there was a good reason she did not report the work injury. She testified that she and Ms. McClelland were no longer speaking to each other after January 2010, but this fact does not relieve the employee of her duty to report a work injury. The employee could have sent Ms. McClelland an email or written a letter advising of the injury. She could have also reported the injury to Mr. McClelland. There was no evidence that the employee and Mr. McClelland had a hostile relationship. In fact, the employee spoke to Mr. McClelland on at least two occasions after she stopped working on April 20, 2010. Additionally, as the employee had stopped working for her employer, there was no reason to fear the loss of her job if she reported a work injury.

Likewise, there was no evidence presented by the employee that even suggested her employer was not prejudiced by her failure to give notice. The converse appears to be true. The employee clearly had a history related to her neck that pre-dated April 20, 2010. She had undergone surgery and was receiving neck treatment as late as the morning of the accident. By failing to give notice, the employer was denied the opportunity to investigate the causal relationship between the condition and the employee's claimed work accident. As the employee sought no treatment until December 2, 2010, her condition could have worsened and/or new pathology could have developed between April 20, 2010 and when care was received. The employer lost the chance to examine the employee's neck condition near the date of injury, ascertain any condition caused by the accident, or offer treatment that may have prevented further worsening of any related problem. By being denied the right to direct and control treatment, the employer lost the opportunity to ensure compliance with treatment and, thereby, the best possible minimization of disability.

The Court finds that the employee failed to make the prima facie case of actual notice to the employer. She admittedly did not give notice. Her failure to do so was without justification and prejudiced the employer. The Court finds that the competent and substantial evidence on the whole record demonstrates that the employee did not provide the employer with proper notice. Consequently, the employee's claim is barred.

ISSUE 1 in Injury Number 09-106509 and ISSUE 3 in Injury Number 10-073931: Whether the employee's injury is medically causally related to the accident.

Pursuant to Section 287.020.3(1):

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.

RSMo. §287.020.3(1) (2005). Thus, for an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. **Clark v. FAG Bearings Corp.**, 134 S.W.3d 730, 734 (Mo. Ap. S.D. 2004); **Lingerfelt v. Elite Logistics, Inc.**, 255 S.W.3d 1, 6 (Mo.App. S.D. 2008). Claimant has the burden of proving all the essential elements of her claim, including causation. **Lawrence v. Joplin R-VIII School Dist.**, 834 S.W.2d 789, 793 (Mo.App. S.D. 1992).

With regard to the injury on November 30, 2009, the employee has claimed injuries to her left hip, right shoulder, right hip, and neck. The evidence, however, does not support a causal relationship between the work accident and all of these alleged injuries.

The employee went to the ER on November 30, 2009. At that time, she reported many injuries, but did not claim an injury to her neck. She was diagnosed with a right shoulder and forearm contusion. The first record related to treatment for the neck was an MRI on December 19, 2009. This MRI showed the same pathology as the MRI taken in February of 2009. There is no credible evidence that the employee injured her neck on November 30, 2009, or that the fall caused any injury to the cervical spine.

Further, the surgery the employee underwent was for bone spurs, a degenerative condition, and spondylosis secondary to the osteophyte formation. There is no medical evidence showing a causal connection between the accident and either condition. Dr. Rende and Dr. Berkin explained osteophytes were degenerative and develop over time. Dr. Berkin also advised spondylosis was a degenerative condition. Additionally, Dr. Albanna operated on C3-C4, despite a lack of pathology on the MRI. Dr. Rende and Dr. Berkin confirmed neither MRI showed pathology at C3-C4.

Dr. Rende found no causal connection between the employee's neck condition and the work injury. Rather, Dr. Rende opined that the employee had pathology of "longstanding duration" in the neck and there was "essentially no difference" in the MRIs taken pre and post the November 30, 2009, accident. In fact, a comparison of the MRIs showed "no change or progression of the disease process between" the two tests.

Dr. Berkin found that the employee suffered a causally related cervical strain with radiculopathy and herniated discs at C4-C5 and C6-C7 as a result of the work accident on November 30, 2009. Dr. Berkin, however, admitted that the employee had experienced neck symptoms from, at least,

February through May of 2009. He recognized the MRIs the employee had undergone before and after the 2009 injury were consistent.

The medical evidence shows that the employee's surgery was for a pre-existing degenerative condition. Her pre-existing condition was bothersome enough in early 2009, that she underwent an MRI and had seen a doctor with neck complaints as late as May of 2009. The totality of the evidence indicates that the employee's neck condition and cervical treatment was not causally related to her work accident on November 30, 2009.

Regarding the employee's left hip, there is no evidence of an injury from the work accident. The record contains several contradictory versions of the employee's description of how she landed when she fell. She had a pre-existing left hip dysplasia condition for which she had a total hip replacement. In the ER, the employee was not found to have any injury to her hips. X-rays taken on at least two occasions after the work injury indicate the replacement to be in good position without weakening.

Dr. Rende attributed the employee's hip complaints to her pre-existing condition. Dr. Berkin diagnosed the employee with a left hip contusion that was causally related to the work injury.

The Court finds that the testimony and opinions of Dr. Rende is more credible than the medical opinions and testimony of Dr. Berkin. The Court also finds that the opinions of Dr. Rende are more credible than the opinions of Dr. Albanna. The Court finds that Dr. Rende's opinions to be more credible and consistent with the medical evidence. The employee's cervical condition was clearly degenerative and pre-existed the work injury. The employee's left hip complaints are also more consistent with those that naturally occur with hip replacements than a bruise to the left hip area. The diagnosis of a contusion is also not consistent with the mechanism of injury, as the employee was adamant, at hearing, that she did not hit her left hip. The employee's symptoms, as described at hearing, are neither consistent with her objective testing nor any diagnosis attributable to the work injury. For the reasons discussed above, the Court finds that the only causally related work injury the employee suffered was a right shoulder contusion that has now resolved completely.

With regard to the injury on April 20, 2010, the employee has failed to prove accident or notice, preventing compensation for any injury. Consequently, the issue of whether the employee suffered a work related cervical strain, as found by Dr. Berkin, is moot.

The employee has shown she suffered a causally related injury to her right shoulder on November 30, 2009. She has failed to connect any of her other conditions with a compensable work injury. The Court concludes that the competent and substantial evidence on the whole record demonstrates the employee only suffered a work injury to her right shoulder on November 30, 2009.

ISSUE 2 in Injury Number 09-106509 and Issue 4 in Injury Number 10-073931: Whether the employee is entitled to receive payment for her past medical bills and whether the past

medical treatment was authorized by employer, reasonable and necessary, and causally related to the work accident.

Under Section §287.140, the employer-insurer is to “provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” RSMo. §287.140 (2005). However, an employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer does not provide the needed treatment. **Hawkins v. Emerson Electric Co.**, 676 S.W.2d 872, 880 (Mo.App. S.D. 1984); **Blackwell v. Puritan-Bennett Corp.**, 901 S.W.2d 81, 85 (Mo. App. E.D. 1995). Further, for past medical expenses to be awarded, such medical care and treatment must flow from a work related accident, via evidence of a medical causal relationship between the condition and the compensable injury. **Modlin v. Sunmark**, 699 S.W.2d 5, 7 (Mo. App. E.D. 1985); **Tillotson v. St. Joseph Med. Ctr.**, 347 S.W.3d 511, 520 (Mo. App. W.D. 2011)

The employee has requested that she be directly provided with the costs of her unpaid past medical care. It should be noted Medicaid apparently paid for a majority, if not all, of the employee’s treatment. A Medicaid/Medicare lien has been asserted in Claimant’s companion case, Injury No. 10-111727.

The employee has submitted medical bills mainly related to the treatment of her neck condition. Given the lack of conservative treatment for the neck before surgery, there is some question as to the reasonableness and necessity for the care provided. Dr. Rende questioned the need for surgery without conservative care and both he and Dr. Burke recognized there was no pathology at C3-C4 on the MRIs. Moreover, the treatment was unauthorized. The record indicates that the employee did not request treatment and the employer had no notice of a need for treatment due to a work related neck condition.

Regardless, the unauthorized nature of the treatment or its reasonableness and necessity need not be decided. As discussed above, the only causally related injury from the November 30, 2009, work accident was a right shoulder contusion. As none of the medical bills submitted relate to the treatment of a right shoulder contusion, the employee has failed to meet her burden of showing a medical causal relationship.

Further, the employee has failed to prove accident or notice, preventing compensation for any injury on April 20, 2010. Even if this claim were compensable, the evidence establishes that the employee did not request treatment and the employer had no notice treatment was needed for a work injury. The causal connection between the injury and treatment is also suspect, as the employee did not seek treatment for her neck until December 2, 2010, and, on that date, the treatment was connected to her pre-existing neck surgery. The medical records are devoid of any mention of an accident on April 20, 2010, or the need for treatment related to said accident.

The employee has failed to meet her burden for an award of past medical benefits. There is no medical causal relationship between the employee’s neck injury and the accident on November

30, 2009. The employee admittedly did not give the employer notice of the April 20, 2010, accident and cannot recover in that case. The Court finds that the competent and substantial evidence on the whole record demonstrates that the employee is not entitled to an award of past medical benefits in either the November 30, 2009 or April 20, 2010 claims.

ISSUE 3 in Injury Number 09-106509: Whether the employee is entitled to an award of future care.

By statute, an employee is entitled to receive, at the employer's expense, such "medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." RSMo. 287.140.1 (2004). In order to hold an employer liable for benefits, however, the evidence must demonstrate that the required future medical care flows from the accident. **Mickey v. City Wide Maintenance**, 996 S.W.2d 144, 149 (Mo. App. W.D. 1999), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003). An employer is not responsible for compensation for future medical care unless the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury, even if the treatment will also provide a benefit to a non-compensable condition. **Landers v. Chrysler Corp.**, 963 S.W.2d 275, 283 (Mo. App. E.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003), **Sullivan v. Masters Jackson Paving Co.**, 35 S.W.3d 879, 888-89 (Mo. App. S.D. 2001), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. banc 2003).

The employee has asserted a claim for future medical care for the injuries she allegedly suffered in the work accident on November 30, 2009. The Court finds that additional or future medical benefits are not warranted.

Dr. Rende did not feel that the employee would need future treatment related to the November 30, 2009 work accident. Dr. Berkin felt that the employee should utilize anti-inflammatory medication, muscle relaxers, and analgesics for her neck, arm, hand, and hip pain in the future. He also felt the employee should continue seeing a pain management specialist for her chronic pain syndrome.

In this case, the only alleged injury found to be causally related, as discussed above, to the work accident was the employee's right shoulder contusion. The employee testified, at hearing, that she had no ongoing problems with her right shoulder. Given her testimony and the nature of her right shoulder injury, the Court finds that Dr. Rende's opinion to be the most credible and consistent with the evidence. The totality of the evidence does not support a reasonable probability that additional medical treatment is needed for the employee's right shoulder contusion and, to a reasonable degree of medical certainty, that the need arose from the work injury.

The employee has failed to meet her burden for an award of future medical benefits. The Court concludes that the competent and substantial evidence on the whole record demonstrates the employee is not entitled to future medical benefits in the November 30, 2009, claim.

ISSUE 4 in Injury Number 09-106509: Whether the employee is entitled to \$3,921.81 in past temporary total disability from November 30, 2009 to February 23, 2010.

A “total disability” exists when there is an inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. RSMo. § 287.020.6 (2005). The purpose of TTD benefits is to cover the employee's healing period to compensate the employee for the reduction in his working ability during the healing period. **Herring v. Yellow Freight Sys., Inc.**, 914 S.W.2d 816 (Mo. App. W.D. 1995), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003). (This is the only time *Hampton* will be noted for cases it overruled.); **Williams v. Pillsbury Company**, 694 S.W.2d 488, 489 (Mo. App. E.D. 1985). TTD benefits should be awarded only for the period before the employee can return to work. **Williams v. Pillsbury Company**, 694 S.W.2d 488, 489 (Mo. App. E.D. 1985). The benefits are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. **Williams v. Pillsbury Company**, 694 S.W.2d 488, 489 (Mo. App. E.D. 1985); **Phelps v. Jeff Wolk Const. Co.**, 803 S.W.2d 641, 645 (Mo. App. E.D. 1991).

The employee has requested temporary total disability benefits from November 30, 2009 to February 23, 2010. The employee has alleged she was unable to work during this period due to her cervical surgery. The evidence, however, showed that the employee worked until her surgery on January 22, 2010. Dr. Albanna's records do not establish a period during which he restricted the employee from working. However, the employee claims to have returned on February 23, 2010. Thus, any temporary total disability award would, at most, be from January 22, 2010 to February 23, 2010. This equals four weeks and six days or \$1,619.03.

As discussed in an earlier portion of this Award, the only causally related work injury the employee has proven is a right shoulder contusion. The evidence reveals the only treatment she received for this condition was the initial ER visit on November 30, 2009. The period of temporary total disability being sought is not related to the right shoulder and, therefore, unrelated to a compensable injury.

The employee has not met the burden of showing an entitlement to requested temporary total disability benefits. It is impossible to determine from the records the period during which the employee would have been restricted from working due to her neck surgery. Further, the time she was off of work for her neck surgery was not related to a compensable work injury. The Court finds that the employee's request for temporary total disability is not supported by credible and competent evidence and fails.

ISSUES 5 in Injury Number 09-106509 and in Injury Number 10-073931: Whether the employee is entitled an award of permanent partial disability.

Workers' compensation awards for permanent partial disability are authorized pursuant to RSMo. § 287.190. “The reason for an award of permanent partial disability benefits is to compensate an injured party for lost earnings.” **Rana v. Landstar TLC**, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001), *overruled in part by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. banc 2003), *quoting Hankins Const. Co. v. Mo. Ins. Guar. Ass'n*, 724 S.W.2d 583, 587 (Mo. App. E.D. 1986), *overruled on other grounds by Mo. Prop. & Cas. Ins. Guar. Ass'n v. Pott Indus.*, 971 S.W.2d 302, 306 (Mo. banc 1998). Permanent partial disability is defined in § 287.190.6 as being permanent in nature and partial in degree. RSMo. § 287.190.6 (2003). The amount of compensation to be awarded for a permanent partial disability is determined pursuant to the “SCHEDULE OF LOSSES” found in RSMo. § 287.190.1 (2003). “[I]n a workers' compensation case, in which the employee is seeking benefits for [permanent partial disability], the employee has the burden of proving, *inter alia*, that his or her work-related injury caused the disability claimed.” **Id.** at 629. *See also Smith v. Donco Const.*, 182 S.W.3d 693, 699 (Mo. App. S.D. 2006).

The employee has alleged permanent partial disability related to the work injury on November 30, 2009. Dr. Berkin found the following permanent partial disability from this work accident: (1) 42.5% of the body as a whole related to the cervical spine; (2) 12.5% of the right shoulder; and (3) 15% of the left hip. He found that the employee had no permanent partial disability from the accident on April 20, 2010. Having found the neck and left hip condition to be unrelated to the work accidents, Dr. Rende opined that the employee no permanent partial disability related to either work injury.

For the reasons discussed in an earlier section of this Award, the only causally related injury that the employee suffered as a result of the work injury on November 30, 2009, was a right shoulder contusion. The employee testified she no longer has ongoing problems with her right shoulder. Consequently, the employee has no resulting disability for which she would be entitled to receive compensation in the form of permanent partial disability benefits.

The employee is also not entitled to permanent partial disability benefits for the alleged work injury of April 20, 2010. As stated above, the employee has failed to prove accident and notice in this case, preventing the recovery of permanency benefits. Moreover, even if the claim were compensable, the evidence would mandate the same result. Neither medical expert found any permanent partial disability related to this accident. Without residual disability, there is no basis for an award of permanent partial disability benefits.

The evidence shows that the employee did not suffer any permanent partial disability as a result of the accident on November 30, 2009. The alleged accident on April 20, 2010, even if it were compensable, also did not result in any permanent disability. The Court finds that the competent and substantial evidence on the whole record demonstrates that the employee is not entitled to an award of permanent partial disability in either case.

In summary, 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, the Court finds the following:

1. The credible evidence establishes that the employee did not suffer an accident that arose out of, and in the course of, her employment on April 20, 2010. Even if there had been a compensable accident, the evidence established that the employee failed to provide notice to the employer pursuant to Section 287.420 of the Missouri Workers' Compensation Act for the accident on April 20, 2010.
2. The evidence revealed that the employee suffered a contusion to her right shoulder and forearm as a result of the accident on November 30, 2009. The employee's cervical and left hip conditions pre-existed this accident date and are not causally related to her fall at work on November 30, 2009.
3. The employee did not sustain a neck injury on April 20, 2010, that was medically, causally related to her employment activities.
4. The employee is not entitled to past medical care for the November 30, 2009 or April 20, 2010 claims. The employee's outstanding past medical treatment was not causally related to either work injury, was unauthorized by the employer, and was not reasonable and necessary to cure and relieve the effects of the work injuries.
5. The employee is not entitled to temporary total disability from November 30, 2009 through February 23, 2010, related to the November 30, 2009 claim.
6. The employee is not entitled to future medical care for the November 30, 2009 claim. Her future medical treatment recommendations are related to conditions that are not causally related to the work injury.
7. The employee is not entitled to permanent partial disability for the November 30, 2009 or April 20, 2010 claims.

It is the Court's overall intent that the employee receives no benefits for Injury Number 09-106509 and Injury Number 10-073931.

RULINGS OF LAW IN 10-111727:

ISSUE 1: Whether, on or about, April of 2010, the employee sustained an accident or occupational disease arising out of, and in the course of her employment.

The employee has not established a right to recover from the employer-insurer. A claimant, in a worker's compensation proceeding, has the burden of proving all elements of his or her claim to a reasonable probability. **Cardwell v. Treasurer of State of Missouri**, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). To recover in a workers' compensation suit, the employee has the burden of proving, by a preponderance of the evidence, that the injury arose out of and in the course of his or her employment. **Gardner v. Contract Freighters, Inc.**, 165 S.W.3d 242, 245 (Mo. App.

S.D. 2005). To meet the test of an injury “‘arising out of’ the employment, the injury must be a natural and reasonable incident of the employment, and there must be a causal connection between the nature of the duties or conditions under which employee is required to perform and the resulting injury.” **Simmons v. Bob Mears Wholesale Florist**, 167 S.W.3d 222, 225 (Mo. App. S.D. 2005). “‘In the course of employment’ refers to the time, place and circumstance of an employee’s injury.” **Id.**

In this case, the employee was employed as an office assistant. She, among other duties, performed several hours of typing and filing a day. Although the evidence showed that the employee had, in the past, been diagnosed with mild carpal tunnel syndrome, she testified she began experiencing symptoms in late 2009 or early 2010. Her symptoms then worsened to the point she sought treatment. Both experts found the prevailing factor of the employee’s bilateral carpal tunnel syndrome to be her job duties. At the very least, the employee’s employment duties aggravated her condition to the point treatment was necessary.

The employee has made the requisite prima facie case showing of accident. The Court finds that the competent and substantial evidence on the whole record demonstrates that the employee experienced an occupational injury that arose out of, and in the course of, her employment.

ISSUE 2: Whether the employer received proper notice.

Missouri Revised Statute §287.420, in part, states:

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

RSMo. §287.420 (2005). The purpose of this section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. **Alcorn v. Monroe City R-1 School District**, 2009 WL 965799 (Mo.Lab.Ind.Rel. Com. 2009); **Gander v. Shelby County**, 933 S.W.2d 892, 895 (Mo.App. E.D. 1996). However, the failure to give timely notice may be excused if there was good cause for the failure or if the failure did not prejudice the employer. **Soos v. Mallinckrodt Chem. Co.**, 19 S.W.3d 683, 686 (Mo.App. E.D. 2000).

A claimant may demonstrate lack of prejudice where evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the trier of fact. **Pursifull v. Braun Plastering & Drywall**, 233 S.W.3d 219 (Mo. App. W.D. 2007). If the employer does not admit actual knowledge, the issue becomes one of fact. **Soos**, 19 S.W.3d at 686. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer. **Gander**, 933 S.W.2d at 892.

However, when the claimant does not show either written notice or actual knowledge, the burden rests on claimant to supply evidence and obtain a finding that no prejudice to the employer resulted. **Soos**, 19 S.W.3d at 686. If no such evidence is adduced, it can be presumed that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation. **Gander**, 933 S.W.2d at 896-97.

The employee testified that at no time did she advise her employer that she suffered a work related injury. Prior to April 30, 2010, the employee had recognized her data entry duties caused her to have hand pain. The employee, as of December 29, 2010, had been seen in the ER for hand complaints and had an appointment with Dr. Burke. Dr. Burke diagnosed her with bilateral carpal tunnel on February 17, 2011, and referred her to a specialist for surgery. The records suggest that the employee was not ignorant of the nature of her condition in 2010, or its connection to work. Indeed, the employee had enough knowledge and forethought to seek legal assistance and file a Claim for Compensation while treating for her bilateral carpal tunnel syndrome. Yet, she still failed to notify the employer. The evidence clearly reveals that the employer's actions to be in violation of the notice requirement in Section 287.420.

There was also no evidence that the employer had actual notice of the injury. The employee testified she did not speak to Ms. McClelland after January of 2010. She spoke to Mr. McClelland after April 20, 2010, but only discussed her neck pain and returning to work after an unrelated absence. As there is nothing to indicate the existence of actual notice, the employee had the burden of showing there was no prejudice to employer. She has failed to do so.

The employee offered no evidence that established there was a good reason she did not report the work injury. She testified that she and Ms. McClelland were no longer speaking to each other, but this fact does not relieve her of her duty to report. The employee could have sent Ms. McClelland an email or written a letter advising of the injury. She could have also reported the injury to Mr. McClelland. There was no evidence that the employee and Mr. McClelland had a hostile relationship. In fact, the employee spoke to Mr. McClelland on at least two occasions after she stopped working on April 20, 2010. Additionally, as the employee had stopped working for the employer, there was no reason to fear the loss of her job if she reported a work injury.

Likewise, there was no evidence presented by the employee that even suggested that the employer was not prejudiced by her failure to give notice. The converse appears to be true. The employee clearly had a history related to carpal tunnel syndrome that pre-dated her employment with the employer. She also did not seek treatment for hand symptoms until over six months after she ended her employment with the employer. By failing to give notice, the employer was denied the opportunity to investigate the causal relationship between the condition and employee's work duties. The employee did not undergo an EMG/nerve conduction study during her treatment in 2010 and 2011. Thus, the employer lost the opportunity to obtain such a study and have it compared to the previous EMG/nerve conduction study to determine whether there had been any change in the employee's condition. The employer did not have the chance to obtain an evaluation of the employee pre-surgery or to determine whether the condition could have been successfully treated conservatively. Finally, the employee stopped attending her appointments with Dr. Schlafly before being placed at maximum medical improvement. By being

denied the right to direct and control treatment, the employer lost the opportunity to ensure compliance with treatment and, thereby, the best possible minimization of disability.

The employee failed to make the prima facie case of actual notice to the employer. She admittedly did not give the employer notice. Her failure to do so was without justification and prejudiced the employer. The Court finds that the competent and substantial evidence on the whole record demonstrates that the employee did not provide the employer with proper notice. Consequently, the employee's claim is barred.

ISSUE 3: Whether the injury is medically causally related to the accident or occupational disease.

For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. **Clark v. FAG Bearings Corp.**, 134 S.W.3d 730, 734 (Mo. App. S.D. 2004); **Lingerfelt v. Elite Logistics, Inc.**, 255 S.W.3d 1, 6 (Mo.App. S.D. 2008). Thus, Claimant bore the burden of proving all the essential elements of her claim, including causation. **Lawrence v. Joplin R–VIII School Dist.**, 834 S.W.2d 789, 793 (Mo.App. S.D. 1992).

In this case, there is evidence of a pre-existing carpal tunnel syndrome diagnosis. However, both experts connected the employee's condition to her work with her employer. The medical and expert evidence indicate that the employee experienced a work related occupational disease or, at the very least, an aggravation of a pre-existing occupational disease. Despite this finding, the employee did not give proper notice, as fully discussed in Issue 2, and consequently, cannot recover benefits. The issue of a medically causally relationship is, therefore, moot.

ISSUES 4 & 8: Whether the employee is entitled to receive payment for her past medical bills and applicability of the Medicaid lien of \$3,751.30.

Under Section §287.140, the employer/insurer is responsible to provide medical treatment related to a work injury. RSMo. §287.140 (2005). However, an employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer does not provide the needed treatment. **Hawkins v. Emerson Electric Co.**, 676 S.W.2d 872, 880 (Mo.App. S.D. 1984); **Blackwell v. Puritan-Bennett Corp.**, 901 S.W.2d 81, 85 (Mo. App. E.D. 1995). Further, for past medical expenses to be awarded, such medical care and treatment must flow from a work related accident. **Modlin v. Sunmark**, 699 S.W.2d 5, 7 (Mo. App. E.D. 1985).

The employee has requested she be directly provided with the costs of her past medical care. It should be noted Medicaid apparently paid for a majority, if not all, of the employee's treatment with Dr. Schlafly and has asserted a lien under this Injury Number. The lien is for the amount of \$3,751.30 and includes treatment unrelated to the employee's bilateral carpal tunnel syndrome care. A review of the lien shows only \$1,085.45 to be related to the employee's bilateral carpal tunnel syndrome condition.

As discussed in Issue 2, the employee's claim is barred for failure to give notice. As a result, the employee is not entitled to any past medical expenses and the employer is not liable for any past medical expenses. The employer is not liable to satisfy any part of the Medicaid lien.

It is worth noting, though, the employee would not have prevailed in her request for past medical expenses even if the claim had not been barred. The employee testified she did not request treatment from the employer. As the employer was unaware of the bilateral carpal tunnel syndrome condition until the Claim had been filed and processed, there is no indication the employer was aware of the need for treatment before the employee undertook care on her own. The employee's treatment was unauthorized and the employer would not be liable for the cost of said care or any part of the Medicaid lien.

Due to the employee's failure to provide notice to employer, the Court finds that the employee's request for past medical expenses is barred. The employer is not liable for the satisfaction of the Medicaid lien.

ISSUE 5: Whether the employee is entitled to an award of future care.

By statute, an employee is entitled to receive, at the employer's expense, such "medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." RSMo. 287.140.1 (2004). In order to hold an employer liable for benefits, however, the evidence must demonstrate that the required future medical care flows from the accident. **Mickey v. City Wide Maintenance**, 996 S.W.2d 144, 149 (Mo. App. W.D. 1999), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003). An employer is not responsible for compensation for future medical care unless the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury, even if the treatment will also provide a benefit to a non-compensable condition. **Landers v. Chrysler Corp.**, 963 S.W.2d 275, 283 (Mo. App. E.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003), **Sullivan v. Masters Jackson Paving Co.**, 35 S.W.3d 879, 888-89 (Mo. App. S.D. 2001), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. banc 2003).

Dr. Rende opined there was no future care needed for the employee's wrists and hands. Dr. Berkin felt that the employee should utilize anti-inflammatory medication in the future and, if she experienced an exacerbation of her hand symptoms, may require treatment from a doctor.

As discussed above in Issue 2, the employee's claim is barred for failure to give notice. Therefore, she is not entitled to future medical care. Further, even if the claim were not barred, the evidence does not support an award of future medical care. Dr. Berkin's testimony does not establish there is a reasonable probability the employee will have to seek further treatment from a doctor that is related to the work injury.

Claimant's violation of Section 287.420 prevents a recovery of future medical care. The Court finds that an award of future medical benefits is not proper in this case and denies the employee request for this benefit.

ISSUE 6: Whether the employee is entitled to \$5,043.00 in past temporary total disability from March 15, 2011 to July 1, 2011.

A “total disability” exists when there is an inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. RSMo. § 287.020.6 (2005). The purpose of TTD benefits is to compensate the employee for the reduction in his working ability during the healing period. **Herring v. Yellow Freight Sys., Inc.**, 914 S.W.2d 816 (Mo. App. W.D. 1995), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. banc 2003). (This is the only time *Hampton* will be noted for cases it overruled.); **Williams v. Pillsbury Company**, 694 S.W.2d 488, 489 (Mo. App. E.D. 1985). TTD benefits should be awarded only for the period before the employee can return to work. **Williams v. Pillsbury Company**, 694 S.W.2d 488, 489 (Mo. App. E.D. 1985). The benefits are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. **Williams v. Pillsbury Company**, 694 S.W.2d 488, 489 (Mo. App. E.D. 1985); **Phelps v. Jeff Wolk Const. Co.**, 803 S.W.2d 641, 645 (Mo. App. E.D. 1991).

The employee in this matter has requested temporary total disability benefits from March 15, 2011 to July 1, 2011. She has alleged she was unable to work during this period due to her bilateral carpal tunnel releases. Dr. Schlafly's records do not address the employee's ability to work. It appears the period for which the employee is seeking benefits begins on the date of her first carpal tunnel release. The significance of the end date the employee proposes, July 1, 2011, is unexplainable, as she did not return to see Dr. Schlafly after May 25, 2011, and had never returned to work.

The employee's unemployed state at that time may explain why Dr. Schlafly did not address work restrictions. Given the fact Dr Schlafly did not address the employee's ability to work, it is impossible to determine the period the employee would have been restricted from working due to her bilateral carpal tunnel syndrome.

As discussed above, the employee failed to give proper notice in this case. Consequently, she is not entitled to temporary total disability benefits. Further, even if the employee's claim were not barred, she still would not be entitled to temporary total disability benefits because the record is devoid of evidence establishing a period during which the employee was restricted from working. The employee's request for said benefits is denied.

ISSUE 7: Whether the employee is entitled an award of permanent partial disability.

Workers' compensation awards for permanent partial disability are authorized pursuant to RSMo. §287.190. “The reason for an award of permanent partial disability benefits is to compensate an injured party for lost earnings.” **Rana v. Landstar TLC**, 46 S.W.3d 614, 626 (Mo. App. W.D.

2001), *overruled in part by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. banc 2003), *quoting Hankins Const. Co. v. Mo. Ins. Guar. Ass'n*, 724 S.W.2d 583, 587 (Mo. App. E.D. 1986), *overruled on other grounds by Mo. Prop. & Cas. Ins. Guar. Ass'n v. Pott Indus.*, 971 S.W.2d 302, 306 (Mo. banc 1998). Permanent partial disability is defined in §287.190.6 as being permanent in nature and partial in degree. RSMo. § 287.190.6 (2003). The amount of compensation to be awarded for a permanent partial disability is determined pursuant to the “SCHEDULE OF LOSSES” found in RSMo. §287.190.1 (2003). “[I]n a workers' compensation case, in which the employee is seeking benefits for [permanent partial disability], the employee has the burden of proving, *inter alia*, that his or her work-related injury caused the disability claimed.” *Id.* at 629. *See also Smith v. Donco Const.*, 182 S.W.3d 693, 699 (Mo. App. S.D. 2006).

In this case, the treating physician did not provide a disability rating. Dr. Rende opined that the employee had a three percent permanent partial disability of each wrist Dr. Berkin opined that the employee had a thirty-five per cent permanent partial disability of each wrist.

Per the discussion in Issue 2, the competent and substantial evidence on the whole record demonstrates that the employee did not provide the employer with proper notice. Consequently, the employee's claim is barred and an award of permanent partial disability benefits improper. The Court finds that the employee is not entitled to any permanent partial disability.

In summary, 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, the Court finds the following:

The credible evidence establishes that the employee sustained a work related occupational disease, but failed to provide notice to the employer pursuant to Section 287.420 of the Missouri Workers' Compensation Act. Consequently, the employee's claim is barred.

The employee is not entitled to temporary total disability or permanent partial disability related to this claim.

The employee is not entitled to past medical care or future medical care related to this claim. The employer-insurer is not liable for any portion of the Medicaid lien held by the Missouri Department of Social Services.

ATTORNEY'S FEE:

No attorney fees are awarded in this case.

Employee: Tamara L. Lynn

Injury Nos. 09-106509, 10-073931 and 10-111727

INTEREST:

There will be no interest in this case.

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

CASE SUMMARY			
INJURY NUMBER		ALJ	
09-106509, 10-073931, 10-111727		Gary L. Robbins	
EMPLOYEE		EE'S ATTORNEY	
Tamara L. Lynn		Gary G. Matheny	
EMPLOYER		ER'S ATTORNEY	
McClelland Marketing Incorporated		Brandy L. Johnson	
INSURER		INS ATTORNEY	
Auto Owners Insurance Company		Brandy L. Johnson	
SIF		SIF ATTORNEY	
DATE OF INJURY	HEARING DATE	DATE AWARD WRITTEN	TYPE OF AWARD
November 30, 2009 in 09-106509. April 20, 2010 in 10-073931. April 2010 in 10-111727	March 4, 2013	May 22, 2013	Final Everything is denied
RULING			
The Court denied all three of the EE's cases.			
STATEMENT OF FACTS			
EE alleges three accidents.			
POINTS OF INTEREST			
EI counsel prepared a good brief. Notice was found against the EE.			
KEY WORDS FOR INDEX TOPICS			
Accident/Occupational Disease			
Medical Causation			
Notice			
TTD			
Future Medical			
Medical Bills			
PPD			