

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

Injury No.: 04-001827

Employee: Melicia Lytle  
Employer: City of St. Louis  
Insurer: Self-Insured/Cannon Cochran Management Services  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having heard oral argument, reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 29, 2010, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John A. Tackes, issued September 29, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 25<sup>th</sup> day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## FINAL AWARD

|                   |                                    |             |                                    |
|-------------------|------------------------------------|-------------|------------------------------------|
| Employee:         | Melicia Lytle                      | Injury No.: | 04-001827                          |
| Dependents:       | N/A                                |             | Before the                         |
| Employer:         | City of St. Louis                  |             | <b>Division of Workers'</b>        |
|                   |                                    |             | <b>Compensation</b>                |
| Additional Party: | Second Injury Fund                 |             | Department of Labor and Industrial |
|                   |                                    |             | Relations of Missouri              |
|                   |                                    |             | Jefferson City, Missouri           |
| Insurer:          | Cannon Cochran Management Services |             |                                    |
| Hearing Date:     | July 6, 2010                       | Checked by: | JAT                                |

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: January 7, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant alleges that the repetitive use of a mechanical lift lever operated from inside a truck she drove for employer caused injury to her right upper extremity.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right shoulder and elbow
14. Nature and extent of any permanent disability: 0%
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$1,097.48

Employee: Melicia Lytle

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$581.12
- 19. Weekly compensation rate: \$387.41/\$347.05
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: \$0.00

22. Second Injury Fund liability: \$0.00

TOTAL: \$0.00

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kurt Hoener

## FINDINGS OF FACT and RULINGS OF LAW:

|                   |                                    |                                    |           |
|-------------------|------------------------------------|------------------------------------|-----------|
| Employee:         | Melicia Lytle                      | Injury No.:                        | 04-001827 |
| Dependents:       | N/A                                | Before the                         |           |
| Employer:         | City of St. Louis                  | <b>Division of Workers'</b>        |           |
| Additional Party: | Second Injury Fund                 | <b>Compensation</b>                |           |
| Insurer:          | Cannon Cochran Management Services | Department of Labor and Industrial |           |
| Hearing Date:     | July 6, 2010                       | Relations of Missouri              |           |
|                   |                                    | Jefferson City, Missouri           |           |
|                   |                                    | Checked by:                        | JAT       |

On July 6, 2010, a hearing in this Matter was held in the City of St. Louis at the Division of Workers' Compensation by Administrative Law Judge John A. Tackes. Claimant, Melicia Lytle, personally appeared and testified. Claimant was represented by attorney Kurt C. Hoener. Attorney Tom Goeddel represented the City of St. Louis. Assistant Attorney General Michael Finneran represented the Second Injury Fund (the "Fund"). The parties request a final award for injury numbers 04-001827.

Employee offered seventeen exhibits (A-Q) which were received into evidence. Employer offered two exhibits (1-2) which were offered into evidence. The Fund did not offer any additional exhibits. Some of the exhibits have additional marks and notations, all of which were on the documents when submitted.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

### STIPULATIONS

The parties stipulated to the following prior to hearing:

1. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.;
2. The Missouri Division of Workers' Compensation has jurisdiction to hear this matter;
3. Venue in the City of St. Louis is proper;
4. Parties stipulate that the date of injury for purposes of this award is January 7, 2004 but disagree as to whether the injury at issue is an occupational disease or an accident;
5. Claimant's average weekly wage is \$581.12 resulting in a compensation rate of \$387.41 for temporary benefits (TTD); and a permanent partial disability rate of \$347.05; and
6. Employer has paid no TTD benefits or medical expenses.

### ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Was there a compensable injury by accident or occupational disease sustained by Claimant on or about January 7, 2004?
2. What is the nature and extent of Claimant's disability?
3. Are TTD benefits owed and payable?
4. Is Employer liable for past medical treatment?
5. Does the Second Injury Fund have any liability?

#### FINDINGS OF FACT

Based on the competent and substantial evidence and my observations of Claimant at trial, I find:

1. At the time of the hearing, Claimant was a 43 year old resident of the City of St. Louis. She was educated through the 10<sup>th</sup> grade and received training to work as a Certified Nurse Aide (CNA) at Des Peres Health Center. She has a Class B Commercial Drivers License (CDL) which she used in the course of her duties with the City of St. Louis (Employer). At the time of hearing Claimant was unemployed. She is seeking a final award for an alleged injury which occurred on or about January 7, 2004 (04-001827).
2. Prior to her employment with Employer, Claimant settled a claim for bilateral carpal tunnel syndrome against a different employer. The claim settled against her former employer in April 1996 for 17 ½ % of each wrist.
3. In 1995 Claimant began employment with the City of St. Louis in the Parks Department. She began as a part time laborer before advancing to a Clerk II (utility worker). In 2003 she was promoted to a heavy equipment operator which qualified her to drive different types of refuse and parks vehicles. Her last day of employment with Employer was January 23, 2009 because of a non work related motor vehicle accident in which she sustained serious injuries.
4. Each position held by Claimant with this Employer had similar physical requirements. As a utility worker, driver, and park keeper she was required from time to time to lift 50 lb. bags of salt or mulch in addition to shoveling and weeding. Her regular hours as a driver for the Employer were 6:30 a.m. to 5:30 p.m. Monday through Friday.
5. Claimant alleges an upper right extremity occupational injury by repetitive use arising out of and in the course of her employment on or about January 7, 2004.
6. On January 7, 2004 (04-001827), Claimant alleges an injury to her right arm and shoulder from the repetitive use of a lift control in the cab of the trash truck. The control mechanism was manipulated by use of Claimant's right hand and arm to operate the device which lifted the garbage bins and emptied them into the truck. The control lever was located between the driver and passenger seats. Claimant operated the mechanism with her right hand at a level between her lap and chest. She alleges that the onset of the injury to her right shoulder was caused by her manipulation of the lever during the four months prior to January 7, 2004 when she began work as a heavy equipment operator.

Claimant emptied about 150 trash cans a day. Claimant recalls complaining of pain in her right arm during the fall of 2003. The onset of pain coincides with her period of employment as a truck driver with Employer.

7. On January 5, 2004, Claimant was seen by her primary care physician, **Dr. Susan Threats**, for complaints of pain in her right arm. Dr. Threats examined Claimant and diagnosed right shoulder impingement, right carpal tunnel syndrome, and cervical spine strain. She was released to return to work on January 6, 2004 and referred to a workers' compensation doctor. On January 6, 2004, Claimant was seen at Concentra Medical Center for pain and tingling in her right arm radiating into her neck. **Dr. Muhammed Jamil** performed the evaluation and found Claimant had full range of motion with no restriction or localized area of tenderness. He recommended Claimant seek treatment from her primary care physician because the condition was not a work related injury.
8. After her release to return to work by Dr. Jamil, Claimant continued to perform her regular duties until an accident at work which occurred July 20, 2004.
9. In January 2006, Claimant was referred by her current primary care physician to Dr. Laurence Kinsella, a neurologist, for examination. Dr. Kinsella found evidence of persistent right rotator cuff injury in the right shoulder and recommended occupational therapy. Studies performed on February 1, 2006 were negative for cervical radiculopathy in the right upper extremity. Cortisone injections were given in March 2006 for treatment of right rotator cuff tendonitis. At Forest Park Hospital on April 3, 2006, Claimant reported pain in her right shoulder and neck.
10. Claimant was referred to **Dr. Clayton Perry** by her primary care physician. On October 31, 2006, Dr. Perry diagnosed rotator cuff irritation and ordered an arthrogram/MRI scan of the right shoulder. On November 10, 2006 an arthrogram was performed which was negative for a rotator cuff tear. She had a corticosteroid injection in her right shoulder which relieved her symptoms for a period of time. Two subsequent injections did not help relieve the symptoms.
11. On March 14, 2007, Dr. Perry performed an open acromioplasty and rotator cuff repair on Claimant's right shoulder. This improved her symptoms by significantly reducing the pain. On March 14, 2007, Claimant still complained of persistent right shoulder pain and limited range of motion following physical therapy. Dr. Perry assigned permanent lifting restriction of 30 pounds.
12. In January, 2009, Claimant was involved in a non-work related motor vehicle accident. In addition to injuries to her femur and tibia, she sustained serious injuries to her spinal cord (T5-6), pelvis and face (fractures). After the injury Claimant has experienced persistent right foot drop and uses a cane for ambulation. She retired in July, 2009 and has not returned to work with this Employer or any other.
13. On June 24, 2010, the deposition of **Dr. Bruce Schlafly** was taken on behalf of Claimant. Prior to the deposition Dr. Schlafly had twice evaluated Claimant for the injuries relevant to this award. He evaluated her on September 12, 2006 and June 3, 2008. Prior to

January 7, 2004, Claimant had a history of preexisting conditions including bilateral carpal tunnel releases in 1995 with tendon sheath release at the right wrist. She had a good recovery from this treatment. She also had a minor low back injury in 1995 from which she also recovered well.

14. For the IME, Dr. Schlafly performed a physical examination and reviewed medical records. He diagnosed torn rotator cuff of the right shoulder and lateral epicondylitis of the right elbow, and a previous history of carpal tunnel releases.
15. In his deposition testimony Dr. Schlafly admitted that it is unusual for someone with a rotator cuff injury like the Claimant to wait two years for treatment. From January 7, 2004 to January 27, 2006 Claimant had no treatment referable to her right shoulder. Dr. Schlafly opined that the right rotator cuff injury occurred sometime around the time of the onset of pain in January 2004. He based this on the entire sequence of the history of the pain. Dr. Schlafly also testified, however, that Claimant may have only had inflammation or tendonitis prior to 2007.
16. Dr. Schlafly opined that Claimant's work duties are the substantial and prevailing factor in causing her right shoulder injury of January 7, 2004. He opines she has a PPD of 27½% of the right shoulder. Dr. Schlafly opines that the treatment provided by Dr. Perry for the right shoulder was reasonable and necessary for Claimant's injuries of January 7, 2004. Dr. Perry's bill was \$3,951.50 for treatment of the right shoulder; St. Joseph's bill was \$13,896.64 for the surgery. Dr. Schlafly opined that Claimant's restrictions or limitations on ability to work from the injuries are a limited to lifting 30-50 pounds. Claimant was temporarily and totally disabled for eight weeks following the right shoulder surgery.
17. Dr. Schlafly further opined that Claimant's right arm and shoulder complaints are due to her work with the Employer and that the repetitive work is the substantial and prevailing factor in causing the right rotator cuff injury and the lateral epicondylitis of the right elbow.
18. On January 13, 2010, Claimant was seen by **W. Chris Kostman, M.D.**, an orthopedic surgeon, at Employer's request for an independent medical evaluation (IME). Dr. Kostman performed a physical examination and reviewed medical records related to her care and treatment. An x-ray performed the day of the evaluation revealed right shoulder with screw-type metal suture anchor device, mild degenerative change, moderate ossification and calcification surrounding the AC joint, moderate to severe AC joint arthropathy. He diagnosed right shoulder rotator cuff tear status post repair of March 14, 2007. Medically he did not attribute causation of her rotator cuff tear to her injury to her right shoulder described on January 7, 2004. He questioned whether she had a previous fall on her right shoulder because of calcification and ossification around the AC joint which may be related to a fall.
19. Dr. Kostman reviewed the report of injury which described the cause of injury from repeated movement of the lift control handle by Claimant. Dr. Kostman opines that the injury of January 2004 to the right shoulder is not the "prevailing factor" in causing her

right shoulder tear requiring the surgery of March 14, 2007. Even though he applied the more stringent prevailing factor standard in analyzing medical causation, he did go on to opine that there is no direct relationship in the medical records, history, and physical examination to demonstrate that the injury complained of and requiring surgery was caused medically by the incident described on January 7, 2004. Dr. Kostman opines no further medical treatment is necessary for the January, 2004 injury and places her at maximum medical improvement (MMI) for this injury. He assigns no percentage of disability related to that injury. I find Dr. Kostman's opinion credible and consistent with medical evidence.

20. The expert opinion Dr. Kostman is more credible and therefore more persuasive because it is more consistent with the medical evidence, and testimony of the Claimant including her complaints and concerns regarding her injuries throughout her treatment and recovery.

### RULINGS OF LAW

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

Claimant requests an award for benefits because of an occupational injury from repetitive trauma referable to her right upper extremity on January 7, 2004. According to Claimant's testimony she had been experiencing pain in her right arm and shoulder since becoming a heavy equipment operator for the Employer. Claimant does not assert that her injury by a specific accident but rather by repetitive trauma. Claimant has the burden of proof to show by competent and substantial evidence that the occupational injury arose out of and in the course of her employment.

An occupational disease is defined to mean an identifiable disease arising with or without human fault out of and in the course of the employment. §287.067.1. After its contraction, the disease 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. *Id.* The disease is compensable if it is clearly work related but is not compensable merely because work was a triggering or precipitating factor. §287.067.2.

For an occupational disease claim to be compensable, Claimant must show by competent and substantial evidence that the disease is not an ordinary disease of life. The exposure to the disease must be greater than that or different from that which affects the public generally and there is a recognizable link between the disease and some distinctive feature of the Claimant's job which is common to all jobs of that sort. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43 (Mo.App. E.D., 1999). There must be a direct causal connection between the conditions under which the work is performed and the occupational disease. *Kelley*, at 48.

The claimant must also establish through expert testimony the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Electric*, 885 S.W.2d 712, 716 (Mo.App. W.D. 1994). The claimant must prove a "direct causal connection between the conditions under which the work is performed and the occupational

disease.” *Webber v. Chrysler Corp.*, 826 S.W.2d 51,54 (Mo.App. 1992). While it has been held that a single medical opinion can support a finding of compensability even when the cause of the disease is indeterminate, (*Dawson* at 716), where the medical opinions of experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo.App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party’s expert testimony in which it does not consider credible and accept as true the contrary testimony given by the other litigant’s expert. *George v. Shop-N-Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo.App. E.D. 1993).

Claimant alleges that the injury was brought about by repetitive use of her shoulder at work while driving a trash truck. Claimant’s rotator cuff tear, an identifiable occupational disease, cannot reasonably be said to have had its origin in the risk connected with the employment (operation of the lift lever) nor does it appear to have flowed from that source as a rational consequence. Claimant complained of right shoulder pain which was conservatively treated and resolved. She returned to work doing her same job for months and then years without further treatment of the occupational disease alleged. If, however, Claimant sustained an injury on or about January 7, 2004, that injury resolved with no permanency prior to July 20, 2004.

No direct causal connection between the conditions under which the work was performed and the occupational disease has been proven. The evidence does not support Claimant’s assertion that her work duties led to the injury she sustained. Claimant has not met her burden to prove that she sustained an injury by occupational disease/repetitive trauma on January 7, 2004 which arose out of and in the course of her employment.

Claimant’s own doctor diagnosed impingement and cervical strain on January 6, 2004. When seen by a company doctor the next day Claimant had full range of motion in her right shoulder and was released to return to work full time with only conservative treatment. Claimant sought no additional treatment for her shoulder for nearly two years. Even when she fell in July 2004, there was no finding of acute injury or repetitive trauma to the right shoulder when examined at Concentra. Claimant in fact made no concurrent complaint of an injury to her shoulder in July 2004.

Furthermore, the arthrogram performed in 2006 was negative for a right shoulder rotator cuff tear. It cannot be reasonably concluded with any reasonable probability that the development of a rotator cuff tear in her right shoulder is an identifiable disease referable to the injury date of January 7, 2004. Neither can it be found that the right shoulder injury arose out of and in the course of her employment based on the mechanism of injury described. I do not find Dr. Schlafly’s opinion persuasive. His method of determining causation by tracing the complaints of pain is only persuasive to indicate the time period when the complaints were initially made but not the reason for the injury.

Claimant has not proven with reasonable probability that the injuries to her shoulder and right upper extremity arose out of and in the course of her employment from a repetitive trauma initially diagnosed in January 2004. Her symptoms were treated conservatively and she recovered to the point she could continue to work her job without complaint of pain or further injury to her right shoulder for two years.

Having ruled that Claimant did not sustain an occupational injury on January 7, 2004 arising out of and in the course of her employment, the remaining issues of nature and extent of permanent disability (PPD), temporary total disability (TTD), liability for past medical bills relating to treatment, and liability of the Second Injury Fund are moot.

CONCLUSION

Claimant has not met her burden of proof to show that a compensable injury arose out of and in the course of her employment on or about January 7, 2004. Claimant's request for benefits including PPD, TTD, and medical bills is denied. Her claim against the Fund is also denied.

Date: \_\_\_\_\_

\_\_\_\_\_  
John A. Tackes  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*

Exhibit List

*Claimant*

- A. Medical records of Susan Colbert Threats (1/5/04-6/21/05)
- B. Medical records of St. Mary's Health Center (6/4/06)
- C. Medical records of Forest Park Hospital (1/30/06-4/3/06)
- D. Medical records of Concentra Medical Center (1/6/04)
- E. Medical records of Concentra Medical Center (7/20/04-8/4/04)
- F. Medical records of Health South (7/23/04-8/4/04)
- G. Medical records of Dr. Rosa Kincaid (1/4/06) and Dr. Laurence Kinsella (1/4/06-7/12/06)
- H. Itemized statement of SLUCare (Dr. Kinsella) for \$2,207.00, (1/27/06-4/17/06)
- I. Medical records of Dr. Clayton Perry (10/31/06-8/15/07)
- J. Itemized statement of Dr. Clayton Perry (\$3,951.50) (10/31/06-8/15/07)
- K. Medical records of St. Joseph's Hospital (3/14/07)
- L. Itemized statement of St. Joseph's Hospital (\$13,896.64) (3/14/07)
- M. Physical therapy records of Hand & Physical Therapy of Ferguson-Florissant (4/9/07-7/20/07)
- N. Report of Dr. Bruce Schlafly (9/12/06)
- O. Report of Dr. Bruce Schlafly (6/3/08)
- P. Deposition of Dr. Bruce Schlafly (6/24/10), and
- Q. Compromised Lump Sum Settlement re Claim number 94-094935

*Employer*

- 1. Medical records
- 2. Deposition of Dr. William Christopher Kostman

*Second Injury Fund*

No exhibits were offered by the Fund.