

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

Injury No.: 07-053201

Employee: Ibro Merajic  
Employer: Sheraton Clayton Plaza Hotel  
Insurer: Technology Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Denied)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 16, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Suzette Carlisle, issued November 16, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5<sup>th</sup> day of March 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Ibro Merajic Injury No.: 07-053201  
Dependents: N/A Before the  
Employer: Sheraton Clayton Plaza Hotel **Division of Workers'**  
**Compensation**  
Additional Party: Second Injury (Denied) Department of Labor and Industrial  
Relations of Missouri  
Insurer: Technology Insurance Company Jefferson City, Missouri  
Hearing Date: July 23, 2009 Checked by: SC

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged March 16, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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 alleged he developed an occupational disease as a result of his work activities for Employer.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: N/A
16. Value necessary medical aid paid to date by employer/insurer? N/A

Employee: Ibro Merajic

Injury No.:07-053201



## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee:	Ibro Merajic	Injury No.:	07-053201
Dependents:	N/A	Before the	
Employer:	Sheraton Clayton Plaza Hotel	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund (Denied)	<b>Compensation</b>	
Insurer:	Technology Insurance Company	Department of Labor and Industrial	
		Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	SC

### **STATEMENT OF THE CASE**

A hearing was held at the Missouri Division of Workers' Compensation (DWC) St. Louis office at the request of Ibro Merajic, (Claimant), on July 23, 2009, pursuant to Section 287.450 RSMo (2005)<sup>1</sup>. Claimant requested treatment or in the alternative, a final award. Attorney Lisa Murakami represented Claimant. Attorney Kenneth Alexander represented Sheraton Clayton Plaza Hotel (Employer) and Technology Insurance Company (Insurer). The Second Injury Fund did not participate but remained opened during the proceeding. The record closed on August 13, 2009 to allow time for submission of Claimant's Exhibit F. Jurisdiction properly lies with the DWC.

Claimant's Exhibits A-F and Employer's Exhibits 1-5 are all admitted without objection. Any notations contained in the records were present when admitted. Any objections raised in the depositions but not addressed in the award are overruled.

The parties stipulated that on or about March 16, 2007;

1. Employee was employed by Employer, in St. Louis County,<sup>2</sup>
2. Employer and Claimant were subject to the Missouri Workers' Compensation Law;
3. Insurer fully insured Employer's liability;
4. A Claim for Compensation was timely filed;
5. Claimant's average weekly wage was \$297.29, resulting in a rate of \$198.19 for Temporary Total Disability (TTD) and Permanent Partial Disability (PPD); and
6. Employer paid no medical or TTD benefits

The parties presented the following issues for disposition:

1. Did Claimant sustain an occupational disease that arose out of and in the course of employment?
2. Is Claimant's employment the prevailing factor that caused his low back condition?
3. Is the injury medically causally related to a work accident?
4. Is Employer liable for additional medical treatment?

<sup>1</sup> All references are to the 2005 Revised Statutes of Missouri unless otherwise stated.

<sup>2</sup> References to the Employer also include the Insurer.

5. Is Employer liable for past medical expenses totaling \$839.72?
6. What is the nature and extent of Claimant's PPD, if any?

### **SUMMARY OF DECISION**

Based on credible testimony of Dr. Bernardi, medical records, reports, Claimant's demeanor during the hearing and less than credible evidence by Claimant and Dr. Berkin, I find Claimant did not meet his burden to prove he sustained an occupational disease that arose out of and in the course of his employment activities.

### **SUMMARY OF EVIDENCE**

1. Claimant is Bosnian and testified he speaks very little English. Translator Sonja Bakalbasic translated Claimant's testimony.
2. In April 2002, Employer hired Claimant to work in the laundry room of the hotel as a washman. Claimant washed towels and sheets on a full-time basis. Claimant worked with two co-workers and occasional part-time help. Co-employees dried and folded laundry. Claimant last worked on March 17, 2007.
3. Wet towels and sheets were dropped into a shoot. At 8:00 a.m., Claimant opened the door to the shoot and held it open while he placed laundry into boxes on a cart. He picked up laundry from the floor. Claimant placed laundry into four large washing machines. Machines opened at chest level. Claimant testified he washed about 40 loads per day for 40 hours per week.
4. Claimant testified he was required to fill machines to the top. Dry laundry weighed about 50 kilograms and wet laundry weighed 100 to 150 kilograms.
5. While laundry washed, Claimant ironed. He folded laundry when coworkers were absent.
6. Claimant assisted co-employees with the transfer of laundry from washing machines to the dryer. Laundry was placed in a large box, and pushed to the dryer.
7. Three months after Claimant was hired, his co-employees were transferred and he was assigned all the wash duties. Also, he cleaned carpets during slow periods.
8. A year later, Claimant testified he began to refill boxes of detergent, fabric softener, and bleach that weighed about 50 kilograms. He carried boxes about 30 meters. Claimant testified he changed about 20 boxes per week.
9. Claimant trained other employees, who washed laundry while they trained. After workers were trained, they were assigned to fold or iron laundry.
10. Claimant testified his low back pain began prior to March 16, 2007 and gradually increased on March 16, 2007 when he pulled laundry from a washer. Pain started on the left side of his low back and traveled down his leg. He asked co-employees to cover for

him while he took a 10 minute break. But the pain increased and he spoke to his supervisor and human resource representative about seeing a doctor.

11. The supervisor laughed and told him not to worry. The human resource representative said he may need to see a doctor. Claimant testified he requested the name of a doctor and a coworker suggested Dr. Desai.
12. Claimant testified he saw Dr. Desai on one prior occasion, but did not remember the date. Dr. Desai ordered x-rays, prescribed medication, and restricted work to light duty.
13. On cross-examination, Claimant admitted he saw Dr. Desai for back pain on March 8, 2007, a week prior to the alleged lifting accident.
14. Dr. Padda ordered an MRI, and prescribed medication and injections twice a month for 4 months. Claimant testified Dr. Padda recommended surgery after conservative treatment failed, but Claimant declined because Dr. Padda would not guarantee the condition would not get worse. Claimant's last date of back treatment was on August 15, 2007.<sup>3</sup>
15. Claimant testified he has difficulty bending or walking. He has constant back and leg pain, but the back pain is worse. He has leg and back pain with standing, walking and sleeping. His leg feels numbness to his toes 3 to 4 times per day. He is unable to perform physical work, including gardening. His son and son in law assist him with household chores.

#### *Medical treatment before March 16, 2007*

16. In 1995, Claimant received abdominal surgery for injuries he sustained in a motorcycle accident. In addition, Claimant sustained a rib fracture in the accident.
17. On May 20, 2004, Claimant gave **Dr. Sunny Desai** a history of low back pain for several months. No specific injury or trauma was reported, however, Dr. Desai noted Claimant does a lot of lifting at work. X-rays revealed mild degenerative changes at L5-S1 with disc space narrowing and facet joint changes, but no acute abnormality. Dr. Desai diagnosed a low back strain with no radiculopathy. Medication was prescribed and light duty restrictions were imposed for one week.
18. Dr. Desai treated Claimant again on March 8, 2007 for rib and chronic low back pain, but no work injury was reported. Claimant did report a motor vehicle accident in 1995, where he sustained multiple fractures and a splenectomy was performed.
19. Examination revealed lumbar tenderness. Dr. Desai diagnosed low back and rib strains, with no radicular components and prescribed medication. Claimant failed to show for a follow appointment on April 10, 2007.

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<sup>3</sup> Some of Dr. Padda's handwritten records are difficult to read, however, the record contains no evidence that Dr. Padda recommended surgery.

***Medical treatment after March 16, 2007***

20. On March 22, 2007, **Gurpreet Padda, M.D.**, examined Claimant with pain complaints for one year with pushing and pulling, pain from old rib fractures since 1995, and pain of the abdomen, back, and left leg to the foot.
21. An MRI dated April 2, 2007, revealed a degenerative disc with protrusion and an annular tear at L4-L5, disc degeneration and a posterior disc protrusion or spurring at L5-S1, and mild bulging discs at T3-T4, T5-T6, T6-T7, and T8-T9.
22. Dr. Padda diagnosed lumbar spondylolysis w/o myelopathy, lumbar disc displacement, degenerative disc disease, back pain/lumbago, and lumbar radiculopathy. Dr. Padda took Claimant off work for 3 months and provided select nerve root injections on 4/4/07 and 4/19/07, facet joint injections on 5/2/07 and 5/16/07, and a neurolysis on 5/30/07.

***Expert medical opinion***

23. **Shawn L. Berkin, D.O.**, is a certified osteopathic physician and a board certified examiner with a family medicine practice. Dr. Berkin performed an Independent Medical Examination (IME) on September 20, 2007, at the request of Claimant's attorney. A translator was not used.
24. Claimant related his back problems to his work activities. He denied prior injury or treatment to his low back.
25. Examination revealed tightness and increased muscle tone of the low back, tenderness, and positive tests for straight leg raise and Patrick-Fabere. Dr. Berkin opined the injury developed over a period of time, but also made reference to a specific date of injury.
26. Based on the examination, medical records, and Claimant's history, Dr. Berkin diagnosed a lumbar strain with left-sided radiculopathy, protruding discs at L4-L5 and L5-S1, and an annular tear at L4-5. Dr. Berkin opined left leg pain developed from nerve irritation caused by Claimant's work activities. Further, he opined the degenerative condition of Claimant's back was either caused by his work or aggravated by it. He did not review Dr. Desai's records.
27. Dr. Berkin found Claimant had not reached MMI. He recommended physical therapy, and referred Claimant to a physiatrist and a spine surgeon.
28. If no additional treatment was obtained, Dr. Berkin rated 30% PPD of the body for the lumbar spine. Dr. Berkin restricted lifting to 35 pounds occasionally and 25 pounds frequently.
29. **Robert Bernardi, M.D.**, is a board certified neurosurgeon with a subspecialty in spinal surgery. Dr. Bernardi provided an IME on April 8, 2008. Through a translator, Claimant reported a history of back pain for several years before March, 2007.

30. Dr. Bernardi diagnosed degenerative disc disease at L4-5 and L5-S1, and left leg pain of an unknown origin. He noted the annular tear is degenerative and did not develop suddenly.
31. Dr. Bernardi opined the injury was not the prevailing factor that caused Claimant's current complaints. Claimant may have sustained a lumbar strain or temporary aggravation of the degenerative condition from the March, 2007 lifting incident, but Dr. Bernardi found no medical evidence to support that conclusion. Claimant said he did not have a physician, but records show Dr. Desai treated his low back complaints on March 8, 2007 and in 2004. Also, the medical records of Drs. Padda and Desai do not reflect an injury at work. Furthermore, even if Claimant sustained an injury, it would not last up to 2 years.
32. Dr. Bernardi offered no explanation for Claimant's leg pain. Although Claimant's symptoms were consistent with nerve pain, Dr. Bernardi found no evidence of nerve root pressure in Claimant's low back. The MRI showed degenerative disc disease, but no spinal stenosis, ruptured disc, or nerve pressure. Physical examination revealed nothing to suggest nerve root compression.
33. Dr. Bernardi administered two psychological tests which suggested Claimant would not benefit from additional low back treatment. Therefore, Dr. Bernardi concluded Claimant could work unrestricted and found no disability for his low back.
34. Dr. Bernardi found Claimant's cervical complaints were not related to the March 2007 lifting incident.

### **RULINGS OF LAW**

After giving careful consideration to the entire record and based upon the above testimony, competent and substantial evidence presented, and the applicable law of the State of Missouri, I find Claimant did not prove he sustained an occupational disease that arose out of and in the course of his employment activities for the reasons stated below.

#### ***Occupational disease***

Claimant asserts he sustained an occupational low back injury caused by his activities as a laundry worker. Employer contends Claimant's work is not the prevailing factor that caused his current back condition.

Section 287.067.1 defines occupational disease as 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 have been foreseen or expected but after contraction 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.

\* \* \* \*

3. An injury due to repetitive motion is recognized as an occupational disease. . . . 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.

Claimant has the burden of proving all essential elements of a claim, including causation. *Decker v. Square D Co.*, 974 S.W.2d 667, 670 (Mo.App. 1998). The question of causation is one for medical testimony, without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. 1999) (*Overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003)). The claimant's medical expert in an occupational disease case must establish within a "reasonable probability" that the disease was caused by conditions in the work place. *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 902. (Mo.App. 1999) (*Abrogated by Washington v. Barnes Hosp.*, 897 S.W.2d 611, 41 (Mo Banc 1995)).

Where the opinions of medical experts are in conflict, the fact finder 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 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. 1993) (citations omitted).

I find Dr. Bernardi is more credible than Dr. Berkin. Dr. Bernardi is a board certified neurosurgeon with a subspecialty in spinal surgery. Dr. Berkin is not a spine surgeon. In fact, Dr. Berkin recommended Claimant consult with a spine surgeon. I find credible Dr. Bernardi's opinion that Claimant's work activities were not the prevailing factor that caused his back complaints. He noted there was no mention of a work injury in the records of Drs. Padda and Desai. No injury report was made on the alleged date of accident. Also, the MRI did not show any acute abnormality or injury.

Claimant may have sustained a low back strain or an aggravation of the underlying degenerative condition, but there was insufficient medical evidence for Dr. Bernardi to confirm that conclusion. Even assuming a low back sprain was diagnosed, Dr. Bernardi did not find residual disability remained nearly 2 years after the incident.

I find Dr. Berkin's opinion is not credible that Claimant sustained an occupational disease as a result of his work activities. Dr. Berkin did not review treatment records for Claimant's back from 2004 and March 8, 2007. He relied on Claimant's history that he had no prior back injuries. Based on incomplete medical records and Claimant's inaccurate history, Dr. Berkin concluded "...whatever treatment [Claimant] had prior to this date of injury, would not be reflective of any kind of treatment for his back." Also, Dr. Berkin referred to a specific date of injury and also opined the injury did not develop in one day.

I find Claimant's testimony is not credible that he sustained a work injury. On direct examination, he testified that coworkers referred him to Dr. Desai on March 16, 2007 because he did not have a physician. But on cross examination, Claimant testified he saw Dr. Desai one time in 2004. Later, Claimant admitted he saw Dr. Desai on March 8<sup>th</sup> for his back, but did not report a work accident.

Also, Claimant denied telling Dr. Desai and Human Resource Director Roby Bittle that he had prior rib and low back pain. However, as stated above, Dr. Desai treated Claimant on March 8<sup>th</sup> for rib pain and chronic low back pain. The Report of Injury prepared by Ms. Bittle dated April 10, 2007, indicated Claimant had past broken ribs and needed to be on light duty on April 6, 2007 and off from work because of a back injury 3 years earlier.

I find Claimant's testimony is not credible that he lifted over 100 kilograms of wet clothes per load, and 50 kilograms of detergent, fabric softener, and bleach (20 boxes per week). During Dr. Berkin's examination, Claimant stated he lifted 200 pounds. It is not clear from the record how Dr. Berkin recorded the history, because no translator was used and Claimant testified he could not speak English. Also, during the hearing, Claimant testified he could not convert Kilograms to pounds. On cross examination, Claimant was asked if he was required to lift a certain amount of weight at one time, but he did not answer the question.

During Claimant's testimony, he appeared comfortable until the defense counsel mentioned he had been sitting for over an hour without the need to get up. Claimant responded that he had been moving in his seat. However, I did not observe him move until after it was mentioned. At that time, I observed Claimant moved somewhat.

Based on the credible testimony of Dr. Bernardi and medical records, and based on less than credible testimony by Claimant and Dr. Berkin, I find Claimant did not prove his work activities were the prevailing factor that caused his medical condition and disability. I find Claimant did not sustain an occupational disease that arose out of and in the course of his employment. All other issues are moot.

**CONCLUSION**

Claimant's work activities were not the prevailing factor that caused his medical condition and disability.

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

Made by: \_\_\_\_\_

**Suzette Carlisle**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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