

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

Injury No.: 01-160830

Employee: Paula Miller  
Employer: Roger Mertens Distributor, Inc.  
Insurer: Federated Mutual Insurance  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

Date of Accident: June 16, 2001

Place and County of Accident: Versailles, Morgan County, Missouri (Alleged)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge (ALJ) dated October 4, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge R. Carl Mueller Jr., issued October 4, 2004, is attached and incorporated by this reference.

The Commission finds that the ALJ correctly weighed and evaluated the medical and lay evidence in reaching his conclusions. We adopt the findings of the ALJ as to the credibility, reliability and probative worth of the medical and lay evidence. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. S.D. 2001); *Chatmon v. St. Charles County Ambulance District*, 55 S.W.3d 451 (Mo. App. E.D. 2001).

Given at Jefferson City, State of Missouri, this 15<sup>th</sup> day of March 2005.

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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DISSENTING OPINION FILED

Attest: John J. Hickey, Member

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Secretary

DISSENTING OPINION

I must respectfully dissent from the opinion of the majority of the Commission. In my opinion, the administrative law judge (ALJ) has selectively evaluated the testimony of employee, the lay witnesses and the medical testimony with too narrow a view. The ALJ has sifted the testimony to fit into his picture of the whole. In reality, the whole of

the testimony contradicts the findings and conclusions of the ALJ.

The decision of the ALJ to allow the time card of employee is erroneous. The time card was not in employee's writing and was not properly identified as a business record. In fact the times reflected in this specious card do not correlate with the events of the night in question.

I find the testimony of employee to be credible. She testified, truthfully, that the employer had notice of the injury on at least two occasions. The store manager called employee the morning after she had gone to the emergency room. At that time, the manger inquired as to employee's back and admitted that a co-employee had left a note advising the manager of the injury. The ALJ chose to ignore this testimony. Employee also testified that she spoke on the phone with the owner of the store and told him she had hurt her back on the job. The ALJ chose to ignore this testimony. To do so flies in the face of the intent and spirit of the compensation law which requires a liberal construction and mandates that questions as to the right of an employee to compensation should be resolved in favor of the employee. Section 287.800 RSMo; *State ex rel. Doe Run Co. v. Brown*, 918 S.W.2d 303 (Mo. App. E.D. 1996).

The ALJ incorrectly evaluated the testimony of witness Hughes to surmise a time frame for this testimony, which would be at odds with employee.

The ALJ incorrectly and narrowly evaluated the testimony of Dr. Cox. The ALJ refers to the testimony of Dr. Cox as stating that the work can be one of many factors causing the condition.

When asked whether he had an opinion "based on a reasonable degree of medical certainty as to whether or not continuous lifting...can be a substantial factor in causing the type of disk protrusion that this young lady had" the Doctor opined that "repetitive, consistent bending and heavy lifting could certainly contribute to the condition that she presented with." I would conclude that this testimony, taken as a whole, establishes medical causation. *Bock v. Broadway Ford Truck Sales, Inc.*, 55 S.W.3d 427, 438 (Mo. App. E.D. 2001).

I would find this compensable and would issue a temporary award allowing past and future medical benefits and appropriate temporary total disability.

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John J. Hickey, Member

## FINAL AWARD

Employee: Paula Miller Injury No: 01-160830  
Dependents: N/A  
Employer: Roger Mertens Distributor Inc.  
Additional Party: State Treasurer as Custodian of the Second Injury Fund  
Insurer: Federated Mutual Insurance  
Hearing Date: September 2, 2004  
Briefs Filed: September 22, 2004 Checked by: RCM/rm

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 on or about June 16, 2001.
5. State location where accident occurred or occupational disease was contracted: Alleged Versailles, Morgan County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? No.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee alleged that she injured her back while emptying trash and stocking beer in a convenience store cooler.
12. Did accident or occupational disease cause death? No                      Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? N/A
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$216.66
19. Weekly compensation rate: \$144.44
20. Method wages computation: by agreement of the parties.

### **COMPENSATION PAYABLE**

21. Benefits Currently Due: None; claim is not compensable.
22. Second Injury Fund liability: None
23. Future requirements awarded: None

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

Employee: Paula Miller Injury No: 01-160830  
Dependents: N/A  
Employer: Roger Mertens Distributor Inc.  
Additional Party: State Treasurer as Custodian of the Second Injury Fund  
Insurer: Federated Mutual Insurance  
Hearing Date: September 2, 2004  
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On September 2, 2004, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to MO.REV.STAT. §287.110. The employee, Paula Miller, appeared in person and with counsel, Jerry Kenter. The Employer and its insurer appeared through counsel, Susan Turner. Although the Second Injury Fund is a party it was not represented at hearing as the benefits Mrs. Miller sought were temporary in nature. The primary issues the parties requested the Division to determine were whether or not Mrs. Miller suffered an accident - or series of accidents - arising out of and in the course and scope of her employment; whether she notified the employer of her injury as required by law; and, whether she needs future medical care. For the reasons noted below, I find that Mrs. Miller did not sustain a compensable accident or series of accidents on June 16, 2001. In addition, I find that she failed to notify the Employer of her alleged accident as required by law. Therefore, I deny her claim.

### **STIPULATIONS**

The parties stipulated that:

1. On or about June 16, 2001, Roger Mertens Distributor, Inc., was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by the Federated Mutual Insurance Co.;
2. Mrs. Miller was its employee working subject to the law in Versailles, Morgan County,

Missouri;

3. Mrs. Miller's contract of employment was made in Missouri;
4. Pettis County was the proper venue to hear this case;
5. The nature and extent of any disability Mrs. Miller may have is not an issue for this hearing;
6. Mrs. Miller filed her claim within the time allowed by law;
7. Mrs. Miller earned a \$216.66 average weekly wage resulting in a weekly compensation rate of \$144.44 for temporary total and permanent partial disability compensation; and,
8. The Employer has not provided Mrs. Miller either with any medical care or temporary total disability payments.

### ISSUES

The parties requested the Division to determine:

1. Whether Mrs. Miller sustained an accident or series of accidents arising out of and in the course of employment?
2. Whether Mrs. Miller notified Roger Mertens Distributor Inc. of the alleged accident as required by law?
3. Whether Roger Mertens Distributor Inc. must reimburse the employee for medical expenses totaling \$4,090.18?
4. Whether Roger Mertens Distributor Inc. must provide the employee with additional medical care? And,
5. Whether the alleged accident or series of accidents caused the employee's alleged injuries and need for medical treatment that Mrs. Miller claims?

### FINDINGS

Mrs. Miller testified on her own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A – Report of Injury
- Exhibit B – Medical records:
  - A. Capital Regional Medical Center
  - B. Bothwell Regional Health Center
  - C. Mary Ann Kurek, D.O.
  - D. Thomas Hoeft, M.D.
  - E. Donald Eldenburg, M.D.
  - F. Ryan Kelly Edwards, M.D.
  - G. Curtis Cox, M.D.
- Exhibit C – Deposition of Curtis Cox, M.D.
- Exhibit D – Report of James Stuckmeyer, M.D.
- Exhibit E – List of Medical Bills from Eldenburg Family Practice, Bothwell Regional Health Center, Ravinder Arora, M.D., Capital Regional Medical Center, and Wal-Mart Pharmacy.

The following, in addition to the claimant, were called as witnesses: Donald Hughes, Hazel Wilson, Roger Mertens, Sue Reiken, Bob Ferguson, and Calvin Miller.

The employer offered Exhibit 1, Mrs. Miller's time card for the period including June 16, 2001, into evidence. Counsel for the Employee objected that the exhibit lacked foundation and was a statement included under §287.215 and was not provided pursuant to that provision. The Court overruled these objections and admitted the exhibit into evidence.

Based upon the above exhibits and the testimony of Mrs. Miller and the other witnesses, I make the following findings. Paula Miller is a 40-year-old female who lives with her husband in Tipton, Missouri, and formerly lived in Versailles, Missouri. She earned a high school diploma and completed six months of general studies at Southeast Missouri State University.

Mrs. Miller held a variety of jobs before working for the present employer. The Employee worked for a sewing factory in Farmington, Missouri; for a realty company as a part-time receptionist answering telephones; and at a donut shop. Also, she was self-employed in catalog sales for eight months and worked for Casey's General Store as a stocker and cashier.

Mrs. Miller started working for Roger Mertens Distributor, Inc., on October 26, 2000. The company operates a series of gas stations/convenience stores in central Missouri. Her duties at the convenience store were as a clerk and cashier with general cash register duties. She also had to keep the store clean and empty the trashcans by the gas pumps. She also had to stock the coolers with soda and beer and had to stock other grocery items as well. Occasionally, Mrs. Miller was required to deposit the store's daily cash in the local bank.

The Employee alleges she suffered an accident on Saturday, June 16, 2001. Mrs. Miller testified that she began work at about 2:50 p.m. However, the time card introduced as Exhibit 1 showed that Mrs. Miller worked for 7 ½ hours from 1:30 p.m. until 9 p.m. Although the times that she worked are in dispute, the time card clearly shows that she worked on June 16, 2001.

When Mrs. Miller came to work on June 16, 2001, the store's beer cooler needed restocking and the trash cans by the gas pumps were filled to capacity with debris lying on the ground. She had to alternate between helping customers at the cash register and stocking beer.

All the witnesses were in basic agreement as to the duties of a cashier such as Mrs. Miller. She had to take beer from the garage and move it by dolly into the walk-in coolers. This involved moving several cases at a time and pushing the beer to the back of the cooler.

Mrs. Miller's testimony was clear that she attributed her injury to her back to twisting it while emptying the trash. As the night went on, she had to make three trips to the cooler with the dolly with 2-3 cases of beer at a time, with the cases holding 12 packs of beer. She testified that the pain started in her left leg and prevented her from putting weight on it. She testified that at 8:30 p.m. she called the home of a co-employee, Hazel Wilson, and left a message with Ms. Wilson's son to have his mother come to Mrs. Miller's assistance at the store. Mrs. Miller also called her husband. Later, after Mr. Miller arrived at the store, Ms. Wilson arrived at the store. Mrs. Miller asked Ms. Wilson to leave the store manager, Susan Reiken, a note that she had been injured. Mrs. Miller testified that she thought Ms. Wilson did not appear to be happy when she arrived at the store.

After leaving the store with her husband in their car, Mrs. Miller spent about 15-20 minutes at home. Mrs. Miller and her husband then drove to the emergency room at the Capital Regional Medical Center in Jefferson City.

Mrs. Miller identified all the bills for treatment related to her back. See, Claimant's Exhibit E. As the epidural injections that Mrs. Miller was given have not helped she wants to proceed with surgery as recommended by Curtis S. Cox, M.D. See, Claimant's Exhibit C at 10:6-12.

Mrs. Miller admitted at the time of this injury that she was suffering from a bad knee and subsequently had surgery on the knee on February 11, 2002. Mrs. Miller stopped working at the convenience store on February 10, 2002. From June 16, 2001, to February 11, 2002, she reduced her work hours from 32 to 17 hours a week.

Mrs. Miller testified that she could lift only about 10-15 pounds and indicated that her left leg felt like a

“noodle”. Mrs. Miller went to vocational rehabilitation but they would not really help her until her back condition had improved. Mrs. Miller indicated she tried working at a restaurant in Versailles for one day and the pain got to her and she could not work anymore.

Calvin Miller - the Employee's husband - was called as a witness by the employee. Mr. Miller testified that he went to the convenience store by bicycle after Mrs. Miller called him and told him she was injured. Mr. Miller saw her “sort of leaning on the corner on the counter” when he got there at about 8:35 p.m. Ms. Wilson got there after Mr. Miller arrived and he testified that she was upset that Mrs. Miller was leaving her shift early with the cooler not fully stocked. After leaving the store, the Millers went to their home and then Mr. Miller drove his wife to the Capitol Regional Medical Center emergency room in Jefferson City. Mr. Miller indicated that just two days before, his wife was able to walk and jog.

The employee called Don Hughes to testify. Mr. Hughes is not affiliated with any party. Mr. Hughes lives near the convenience store and was familiar with Mrs. Miller. He was a frequent customer of the convenience store and went there several times every day. He identified Mrs. Miller in court as the cashier who often waited on him. Mr. Hughes remembered the last time he saw the Employee was an evening and that Mrs. Miller was in pain and obviously hurting, noting that she “was near tears”. This was the first - and only - time that Mr. Hughes had ever seen her in distress at work. Although Mr. Hughes could not remember the date he saw Mrs. Miller in distress, he was very clear that it was at the end of her employment with the Employer, perhaps even the last night she worked there. This fact is made clear by the following testimony he offered during direct examination by the claimant's attorney at trial:

Q. Do you recall going over there to buy something on the night of June 16, 2001?

A. This is -- I'm not sure about the date. But we're talking about probably toward the end of the last time I saw Paula. When she was still working there, right?

...

Q. Can you describe to the Court what you saw on that night, the last night you saw her there?

A. She was in tears and had hurt herself, I think lifting one of the beer cases. I can't remember if I saw her actually take the case to the cooler or what. But I think she had come out of the room in back of the, where the stand is and she was in tears.

(Emphasis added)

Hazel Wilson testified she works full time at Fasco in Eldon in addition to various shifts at the convenience store in Versailles. She recalled being asked to relieve the employee at work but did not recall the exact date or whether the employee's husband had been present at the store when she arrived although she said he was there from time to time visiting the employee. Ms. Wilson did not recall seeing the employee drag her leg or have trouble walking and indicated the trash container at the convenience store was the same size as those at other area convenience stores. Ms. Wilson was aware the employee had had back problems before June 16<sup>th</sup> and testified she was not angry the employee asked her to work that evening nor did she recall the employee telling her she had hurt herself at work that night. According to Ms. Wilson, she did not leave a note for the store's manager, Sue Reiken, telling her the employee had injured her back at work as the employee had testified. Instead, Ms. Wilson testified that she left a note stating only that Mrs. Miller had not restocked the cooler so Ms. Wilson would not get in trouble.

Sue Reiken, the manager of the convenience store in Versailles, testified the employee told her she had injured her back before coming to work at Mertens. She said the employee did not call on June 16, 2001 to report a back injury or that she had been treated for back pain in the emergency room that night. She also said Hazel Wilson did not leave a note indicating the employee had hurt her back at work on June 16, 2001. Ms. Reiken is in charge of workers' compensation for the store in Versailles and testified if an injury is reported she notifies Mr. Mertens whose office makes arrangements for any necessary treatment. She said had the employee reported an

injury on either June 16 or June 17 she would have notified Mr. Mertens indicating at no time did the employee request medical treatment for any work related back injury. She did not consider Mrs. Miller to be a good employee and said if her work hours were reduced as the employee testified, it was at the employee's request. She also noted the employee was not fired but voluntarily quit on February 10, 2002.

The employee called Roger Mertens, the owner of the company, as an adverse witness. Mr. Mertens testified that he had owned various gas stations/convenience stores in central Missouri since the early 1970's. He admitted that although the store had a video camera on June 16, 2001, it focused outward toward the gas pumps and not inside the store. Mr. Mertens had one conversation with Mrs. Miller where she freely admitted to him that she had prior back problems. However, this one conversation with Mrs. Miller occurred in February 2002 when she decided to quit her job. Mr. Mertens did not receive any complaints from Mrs. Reiken about Mrs. Miller being a bad employee. Mr. Mertens had about 85 total employees in his stores. Mr. Mertens believed Mrs. Miller to be a good employee.

Robert Ferguson, another Mertens Distributor employee, testified the employee told him she had injured her back before coming to work at Mertens Distributor but did not tell him specifically how the injury had occurred. He said he occasionally helped the employee stock the cooler but that he also helped other employees stock if he wasn't busy. He recalled a conversation after the employee left Roger Mertens Distributor during which she told him she wished she had her job at Mertens back and he understood her to say it had been a mistake to file her workers' compensation claim; he testified she specifically told him she had not injured her back while working for Mertens. The employee denied telling Mr. Ferguson the injury had not occurred at work but said she did tell him she would like to have had her job back and was sorry she had quit. She did not recall ever telling him she was sorry for filing a claim for compensation.

Claimant's Exhibit B contains all of Mrs. Miller's relevant medical records. The emergency room record from Capital Regional Medical Center showed that Mrs. Miller arrived at the hospital at approximately 11:06 p.m. on June 16, 2001. See, Claimant's Exhibit B at 107. The initial record indicates that Mrs. Miller complained of a "sudden onset of pain" in the right side of the lumbar region, radiating into the right hip. *Id.* at 107. However, the more detailed typewritten report on her treatment notes that she has had "hip pain and lumbar back pain for about one year now." *Id.* at 108. In addition, Mrs. Miller reported "she has noticed some increase in it in the past several weeks to months." *Id.* Moreover, the report specifically states, "The patient denies any trauma or falls." *Id.* These records contradict her testimony in a two ways. First, it shows that her pain was not a "sudden onset" and secondly, that she did not have pain in her left leg at that time.

On June 20 and again on June 25, 2001, Mrs. Miller sought treatment at the Capital Regional Versailles Clinic. *Id.* at 47-48. She complained of low back pain and numbness in the right leg. *Id.* at 48. On the June 25, 2001, visit, she told Dr. Kurek that her chronic back pain felt worse after lifting 12 packs of beer at work. *Id.* at 47. When the claimant saw Dr. Cox, a neurosurgeon in Jefferson City, Missouri, on July 15, 2002, she indicated that her symptoms were present for about 10 months but became intolerable the last five months and had prevented her from working. She indicated the epidural steroid injections and physical therapy had not helped. *Id.* at 9. This history of symptoms again is inconsistent with her trial testimony in that her disabling back complaints long preceded an alleged June 16, 2001 injury and extended back to as early as February 2001.

On June 27, 2001, Mrs. Miller reported to the Eldenburg Family Practice Clinic in Sedalia. *Id.* at 18. She indicated that although the recent bout of back pain had started on June 16, 2001, her back "had ached for some time" and that she had "no known injury" on June 16.

Records created on March 1, 2002, long after her alleged injury, from Bothwell Regional Health Center Physical Therapy unit indicate that the claimant told the physical therapist that she had been experiencing lower back pain for about a year but in June of 2001, a lot of lifting caused an increase in the pain. *Id.* at 59. However, other records indicate her back problems long preceded even February 2001. The records of Thomas Hoeft, M.D., an orthopedic surgeon located in Osage Beach, Missouri, indicate that the patient had complained on January 14, 1999 of back pain that she had experienced for "several months" - or, well into 1998. *Id.* at 42.

Dr. James Stuckmeyer saw Mrs. Miller at her attorney's request on September 18, 2003. She told him her

duties as a cashier were to stock heavy items such as 30 can packs of beer, and dump large trash bags. He noted as a result of the repetitive stresses and strains placed on her lumbar spine and the repetitive lifting, twisting and carrying trash cans and stocking beer, the employee developed symptoms of low back pain radiating primarily into the left lower extremity which she told him became so severe she “ ‘lost control of movement of her left leg’ ” causing her to drag her left leg and walk with a significantly painful gait. See, Claimant’s Exhibit D at 1-2. She said she was unemployed due to ongoing symptoms of pain and dysfunction in the lower back and left lower extremity and described low back pain with numbness and burning in her left leg but denied any right leg symptoms. She also reported difficulty walking, standing, sitting, bending and lifting and difficulty with sleep. *Id.* at 3.

On physical examination Dr. Stuckmeyer noted tenderness at L4-5 and L5-S1 but none over the SI joint. Straight leg raising was “slightly positive” on the left at 60 to 90 degrees which he indicated was “very mildly positive.” Straight leg raising was negative on the right and Dr. Stuckmeyer did not detect any evidence of sensory abnormalities and indicated the claimant walked with a non-antalgic gait. *Id.* at 4. It was his opinion her occupational duties were a substantial factor in “her present condition of lower back pain and radicular symptoms into the left lower extremity.” *Id.* He recommended further diagnostic studies noting the employee was very hesitant to proceed with lumbar instrumentation and fusion but was interested in getting “fixed.” He limited prolonged standing, sitting or walking, repetitive lifting or handling and no lifting heavier than 10 or 15 pounds. *Id.* at 5.

Dr. Curtis Cox, a neurosurgeon in Jefferson City, saw the employee on July 15, 2002 for a history of low back pain for ten months which had become “intolerable in the last five months” and had prevented her from working. See, Claimant’s Exhibit B at 9. Dr. Cox also testified by deposition on May 6, 2004. When he saw the employee, her chief complaint was low back pain with pain radiating into the lower extremity. See, Claimant’s Exhibit C at 7. On neurological examination, straight leg raising was positive on the left which indicated a “pinched nerve in the lumbar region.” *Id.* at 8. Upon review of the MRI taken six months after her alleged injury, Dr. Cox noted abnormal discs at L4-5 and L5-S1 which were degenerative and bulging and impinging on the dural sac which he said could cause back and radiating leg pain. *Id.* at 8-9. The EMG he reviewed indicated evidence of acute and chronic denervation of the nerves indicative of nerve damage. *Id.* at 10. Dr. Cox’s treatment recommendation was a decompression and fusion because conservative therapy had failed. *Id.* at 10.

When Dr. Cox saw the employee again on November 25, 2002 her physical examination was unchanged and she continued to complain of low back pain with radiation into the left lower extremity and surgery was again discussed. *Id.* at 10-11. It was his opinion repetitive, constant bending and heavy lifting could “certainly be one of many factors” causing her condition. *Id.* at 11. According to Dr. Cox, the employee had a bulging but not ruptured disc and he noted she had not given him a history of having hurt her back at work; his diagnosis was a degenerative condition of the lumbar spine. *Id.* at 12-13. He was not aware the employee had been treated for low back pain in 1999 or that until December 2001 her radicular complaints had been to the right lower extremity. Moreover, Mrs. Miller did not tell him her back pain had slowly improved after the first epidural injection until her February 11, 2002 knee surgery, after which her back pain worsened. *Id.* at 13. He noted the only abnormality on physical examination was a positive straight leg raising on the left which he indicated was not always a constant finding. *Id.* at 13.

## RULINGS

- I find based on the medical evidence the employee did not sustain an accident or series of accidents arising out of and in the course and scope of her employment which caused the need for medical treatment. Although the employee testified she had to restock the beverage cooler three times between the hours of 2:50 p.m. and 8:00 p.m on June 16, 2001, she did not indicate this activity resulted in an injury or symptoms of an injury such as low back or leg pain. Instead, she testified to a very specific incident involving the removal of the bag from a trash container as the cause of her symptoms which she repeatedly testified were low back and left leg pain.

The employee’s medical records between June 16, 2001 and July 10, 2001, however, are devoid of any reference to such an incident or to symptoms involving her left leg. The emergency room records from Capital Regional Medical Center for June 16, 2001 reflect a history of increased right hip and buttock pain at work and is

also noted the employee denied numbness or tingling in her leg. In addition, the records of the employee's treatment between June 20, 2001 and July 10, 2001 indicate she was seen four times during that period by two separate physicians for low back pain and numbness in the right leg (Dr. Kurick, June 20, 2001); low back pain with right hip discomfort which became worse after lifting two twelve packs of beer at work (Dr. Kurick, June 25, 2001); low back pain that started on June 16, 2001 with no known trauma and which had ached for some time ( Dr. Eldenburg, June 28, 2001); and continuing pain in the right hip and back area (Dr. Eldenburg, July 10, 2001.) There is also no reference in either of Dr. Eldenburg's entries to work or to lifting. In addition, Dr. Eldenburg saw the employee on July 24, 2001 and July 31, 2001 and Dr. Kurick on August 6, 2001 and October 29, 2001 for various other complaints but there are no references during any of these appointments to back or leg pain and/or numbness.

There is also no reference in any of the treatment records to symptoms involving the left leg until an MRI report on December 18, 2001 which notes a clinical history of low back and left leg pain. All records thereafter refer to complaints of low back and left leg pain; there are no references to the right lower extremity.

Testimony by Donald Hughes, the customer who frequented the convenience store daily - in fact, several times a day - leads me to believe that he actually saw the employee in pain from problems that stemmed from her knee injury, not her back complaints. Mr. Hughes was very clear that he saw Mrs. Miller in pain "probably toward the end of the last time I saw" her. Mrs. Miller continued working for the Employer until February 10, 2002 - eight months after her alleged June 16, 2001 back injury. Even the Claimant's attorney acknowledged that when Mr. Hughes saw Mrs. Miller in pain at work it was "the last night you saw her there." Clearly, since Mr. Hughes went to the convenience store several times each and every day, the time he saw Mrs. Miller - near the end of her employment, and, perhaps the last night she worked there - was not on June 16, 2001, but in February 2002. This conclusion is bolstered by the fact that Mrs. Miller quit her job on February 10, 2002 . . . the day before she underwent knee surgery. See, Claimant's Exhibit B at 76.

The medical opinions offered by the Employee to support her claim are not persuasive. Dr. Stuckmeyer, who the Court is well familiar with and considers credible, first examined the employee only over two years had elapsed after her alleged injury. It is clear that Mrs. Miller did not fully inform Dr. Stuckmeyer of the extent of her chronic back problems. Dr. Stuckmeyer noted that Mrs. Miller "states that the pain had been present for approximately one year" before her alleged injury. See, Claimant's Exhibit D at 2. In fact, Mrs. Miller had lumbar problems dating back for more than two years prior to her alleged injury. See, Claimant's Exhibit B at 42. Had Dr. Stuckmeyer been aware of the true chronicity of her back problems, his opinion may have differed as to the cause of her complaints. In any event, I do not accept Dr. Stuckmeyer's opinion on this matter, but wanted to note that he was not fully aware of the duration of her complaints. Even Dr. Cox, the neurosurgeon whom Mrs. Miller sought treatment from on her own in July 2002, could testify only that the Employee's work "can certainly be one of many factors" in causing her back condition. See, Claimant's Exhibit C at 11:24.

Our courts have held that:

Whether or not the employment is a substantial factor in causing the injury is a question of fact. Cahall v. Cahall, 963 S.W.2d at 372. The Commission, and not the physician, is the trier of fact in workers' compensation cases. Counts v. John Fabick Tractor Co., 745 S.W.2d at 840. Therefore, even if a testifying physician fails to use the exact words of Section 287.020.3, we will affirm the Commission's award if the substance of the physician's testimony establishes that there is substantial evidence upon which to base the award. See, e.g. Mayfield v. Brown Shoe Co., 941 S.W.2d 31, 36 (Mo.App. S.D.1997).

Sanderson v Porta-Fab Corp., 989 S.W. 2d 599 (MoApp ED 1999).

In Mrs. Miller's case, there is nothing in Dr. Cox's testimony to indicate that her work was a substantial factor in causing her current condition. And, that is true, not because he failed to quote the statute. The Legislature clearly sought to limit workers' compensation benefits to those workers whose conditions of ill resulted substantially from work. Here, Dr. Cox only could testify that Mrs. Miller's work *can* certainly be one of many factors causing her condition. He did not even testify that it *was* one of those factors causing her condition. In other words, his opinion was no more than speculation that her work *can* cause back problems. He did not testify

that her work *did* cause her back problems. Dr. Cox, however, was clear that Mrs. Miller did not ever give him a history of hurting her back at work. See, Claimant's Exhibit C at 12:21-24. In addition, his true diagnosis of her back was a degenerative condition. *Id.* at 12:25-13:2.

The employee has the burden of proving an accident occurred on June 16, 2001 and that it resulted in injury, Griggs v. AB Chance Company, 503 S.W.2<sup>nd</sup> 687, 703 (1974), as well as establishing a causal connection between the accident and the claimed injuries, Kerns v. Midwest Conveyer, 126 S.W. 3<sup>rd</sup> 445, 453 (Mo.App. W.D. 2004). To be entitled to benefits Mrs. Miller has the burden of proving not only that she suffered an accident that arose out of and in the course and scope of employment but that her alleged injury was directly caused by the accident. Kerns at 453. I find the employee has not met her burden of proof and I therefore deny her claim.

Even if I had found that she met this burden, I would have denied her claim, as she did not give notice of her injury as required by law. I conclude that Mrs. Miller never reported her alleged accident until her attorney filed her Claim for Compensation (which was not signed by her) on April 3, 2002 - two months after she quit. When a workers' compensation claimant does not show either that she provided timely written notice of an accident, or that the employer had actual knowledge of the accident, the burden rests on the claimant to supply evidence that no prejudice to the employer resulted from the lack of timely written notice. Soos v. Mallinckrodt Chemical Co., 19 S.W.3d 683, Mo.App ED 2000. Here, Mrs. Miller offered absolutely no evidence that no prejudice to the Employer resulted from her lack of timely written notice.

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

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

R. Carl Mueller, Jr.  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Renée Slusher  
*Director*  
*Division of Workers' Compensation*