

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

Injury No.: 03-094258

Employee: Ajka Muminovic
Employer: Koller Enterprises, Inc.
Insurer: American Motorists Insurance Company
Date of Accident: Alleged September 22, 2003
Place and County of Accident: Alleged St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 22, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge John Howard Percy, issued March 22, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 19th day of October 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Ajka Muminovic Injury No.: 03-094258

Dependents: N/A Before the
Division of Workers'
Employer: Koller Enterprises, Inc. **Compensation**
Department of Labor and Industrial
Additional Party: None Relations of Missouri
Jefferson City, Missouri
Insurer: American Motorists Insurance Company
Hearing Date: December 8 and 21, 2004 Checked by: JHP:tr

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: N/A
5. State location where accident occurred or occupational disease was contracted: N/A
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: N/A
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: N/A
16. Value necessary medical aid paid to date by employer/insurer? \$6,752.52

Employee: Ajka Muminovic Injury No.: 03-094258

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$501.93
19. Weekly compensation rate: \$334.62 TTD/\$334.62 PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: No

TOTAL: NONE

23. Future requirements awarded: None

Said payments to begin N/A 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Ajka Muminovic	Injury No.: 03-094258
Dependents:	N/A	Before the
Employer:	Koller Enterprises, Inc.	Division of Workers'
Additional Party:	None	Compensation
Insurer:	American Motorists Insurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JHP

A hearing in this proceeding was held on December 8 and 21, 2004. Both parties submitted proposed awards, the latter of which was received on January 18, 2005.

STIPULATIONS

The parties stipulated that on or about September 22, 2003:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was insured by American Motorists Insurance Company;
3. the employee's average weekly wage was \$501.93; and
4. the rate of compensation for temporary total disability was \$334.62 and the rate of compensation for permanent partial disability was \$334.62.

The parties further stipulated that:

- 1.the employer had notice of the alleged repetitive trauma injury/occupational disease and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer/insurer have paid medical expenses in the amount of \$6,752.52.

ISSUES

The issues to be resolved in this proceeding are:

- 1.whether claimant was exposed to an occupational disease due to repetitive trauma which arose out of and in the course of claimant's employment with Koller Enterprises, Inc.;
- 2.if the employee was exposed to an occupational disease by her work-related activities, whether she sustained an injury as a result of the occupational disease exposure;
- 3.whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for any medical expenses, which she may have incurred in obtaining treatment for the injury;
- 4.if the employee sustained a compensable injury, whether she should be provided with any medical treatment for the injury; and
- 5.if the employee sustained a compensable injury, whether she is entitled pursuant to Section 287.170 Mo. Rev. Stat. (2000) to compensation for temporary total disability for any periods of time subsequent to September 22, 2003.

OCCUPATIONAL DISEASE MEDICAL CAUSATION

Ajka Muminovic, employee herein, claims that she developed cervical disk herniations as a result of the repetitive movements and positioning of her neck during the course of her employment with Koller Enterprises, Inc. Employer/insurer contend that employee's cervical disk pathology is due to ordinary, gradual deterioration or progressive degeneration of the body caused by aging and is not related to her employment. They contend that claimant's cervical disk pathology developed as a result of the natural progression of preexisting degenerative disk disease.

An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067 Mo. Rev. Stat. (2000). It 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 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. (1993 additions underlined)

Section 287.067.2, which was added in 1993, provides that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Subsection 2 of section 287.020 provides that an injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability."^[1]

Subsection 3(1) of section 287.020 provides that an injury must arise out of and in the course of the employment and be incidental to and not independent of the employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment."

Subsection 3(2) of section 287.020 provides that an injury arises out of and in the course of the employment "only if (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and (b) It can be seen to have followed as a natural incident of the work; and (c) It can be fairly traced to the employment as a proximate cause; and (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life[.]"

Much of new subsection 3(2) of section 287.020 was contained in the prior definition of an occupational disease set forth in Section 287.067. Section 287.020.3(2)(b), (c), and (d) were part of the former occupational disease statute. Section 287.020.3(2)(a) is a revision of the prior requirement of a direct causal connection between the conditions under which the work was performed and the occupational disease. Direct causal connection is now defined as "a substantial factor in causing

the injury." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). The additional language in section 287.020.3(1) concerning deterioration or degeneration of the body due to aging probably does not overturn any prior court decisions.

Since the 1993 amendments pertaining to occupational diseases have largely readopted the prior statute, caselaw interpreting the prior statute is of some significance. In repetitive motion cases,^[2] as practically all movements of the human body done during the course of employment are also replicated in nonworking environments and as most occupationally induced diseases also sometimes occur in the public at large, the courts have focused on a particular risk or hazard to which an employee's exposure is greater or different than the public at large. Collins v. Neevel Luggage Manufacturing Co., 481 S.W.2d 548, 552-54 (Mo. App. 1972); Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988); Hayes v. Hudson Foods, Inc., 818 S.W.2d 296, 299-300 (Mo. App. 1991). Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort". Id. at 300; Dawson v. Associated Elec., 885 S.W.2d 712, 716 (Mo. App. 1994); Prater at 230; Jackson v. Risby Pallet and Lumber Co., 736 S.W.2d 575, 578 (Mo. App. 1987); Polavarapu v. General Motors Corp., 897 S.W.2d 63, 65 (Mo. App. 1995); Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo. App. 1988).

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Dawson at 716; Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 223 (Mo. App. 1992); Brundige v. Boehringer, 812 S.W.2d 200, 202 (Mo. App. 1991). Claimant must prove that work was "a substantial factor" in causing "the resulting medical condition or disability." Section 287.020.2. Moreover, "an occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.2 Mo. Rev. Stat. (1994). The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 501 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. On the other hand, injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be the "substantial factor" in causing the injury. Kasl, supra.

A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. Dawson at 716; Sellers v. Trans World Airlines Inc., 776 S.W.2d 502, 504 (Mo. App. 1989); Sheehan at 797. The opinion may be based on a doctor's written report alone. Prater v. Thorngate, Ltd., 761 S.W.2d 226, 230 (Mo. App. 1988). "A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). 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, 855 S.W.2d 460 (Mo. App. 1993); Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

Findings of Fact

Based on my observations of claimant's demeanor during her testimony and taking into account the conflicts with the testimony of Jim Shoemaker, I find that employee is only partially credible.^[3] Based on my observations of Jim Shoemaker's demeanor during his testimony, I find that he is a credible witness. Based on my observations of Joseph Lefarth's demeanor during his testimony, I find that he is a credible witness. Based on credible testimony of Jim Shoemaker and Joseph Lefarth and on the partially credible of employee and on the medical records, I make the following findings of

fact.

Claimant began working at Koller Enterprises, Inc. on October 8, 2001. Koller Enterprises manufactures plastic parts. Most of the parts weigh only a few pounds. There are 22 different machines at its St. Louis plant. Employee takes plastic parts out of injection molding machines, trims them, and packs them. All machine operators, including employee, were at all relevant times herein rotated on the machines. Up through 2003 employees worked 12 hour shifts. Most of the time employees worked on two different machines per day. Mrs. Muminovic alternatively worked 3 and 4 day weeks.

On September 22, 2003 Mrs. Muminovic experienced the onset of pain in her right hand, wrist, forearm, and upper arm while working on machines 8, which involved repetitive wrist motion, and 15, which involved repetitive thumb motion. ^[4] (Claimant's Exhibit C & Employer/Insurer's Exhibit 2) She was then 43 years old.

Claimant was examined by Dr. Stuart Bogner at Unity Corporate Health on September 23 for right upper extremity pain. She told him that the onset occurred while working on machines 8 and 15 at Koller Enterprises. She was provided with a thumb splint, advised to use Aleve, and told to limit the use of her right arm. She was reexamined a week later. On examination her right upper extremity was quite tender. Dr. Bogner prescribed Celebrex, told her to continue with the thumb splint and referred her to a hand specialist. (Claimant's Exhibit C)

Dr. David Brown, a hand surgeon, examined claimant on October 13, 2003. She told him that her job entailed using a knife to cut edges on plastic parts. She indicated that on September 22 she developed pain in her right hand and wrist and numbness in her right hand. Her clinical examination, which was largely negative, did not suggest a diagnosis. He prescribed anti-inflammatories and ordered nerve conduction studies. (Claimant's Exhibit A)

Dr. David Peeples, a neurologist, examined employee on October 31, 2003. She complained of pain and swelling in the dorsal forearm and numbness involving the entire right hand and pain extending into the left (sic?) side of her neck and shoulder girdle. Examination of her right arm revealed painful soft tissue swelling in the extensor forearm musculature. A nerve conduction study of the right arm was performed. Dr. Peeples read the study as demonstrating no electrodiagnostic evidence for a right median or ulnar neuropathy. (Claimant's Exhibit D)

Dr. Brown reexamined claimant on November 5, 2003. She again reported that she was having pain in her right upper arm and shoulder and occasional tingling in her hand. Dr. Brown noted that the nerve conduction study was normal. He advised her that she should take non-steroidal anti-inflammatory medication for her arm and that she should see a shoulder specialist if she continued to have shoulder pain. He indicated that he would see her on an as needed basis. He thought that her shoulder pain might prevent her from performing her regular job. (Claimant's Exhibit A)

Claimant sought treatment from St. Luke's Urgent Care on November 9 for complaints of increased right arm and hand pain while working on a press the day before. She also noticed tingling in her fingers. Dr. Linda Fischer diagnosed employee with arm pain and hand paresthesia. She was given pain medication, a splint, and an injection of Toradol and advised not to use her right hand and arm until she was examined by a specialist. (Claimant's Exhibits B & C)

Dr. Richard F. Howard, an orthopedic surgeon, examined claimant on November 20, 2003 for right shoulder pain. Though her husband Mrs. Muminovic told Dr. Howard that she developed pain in September from repetitive motion; there was no specific injury. He reviewed a DVD (Employer/Insurer's Exhibit 3) showing various tasks. He assessed them as light duty with minimal lifting. He reviewed the records of Dr. Brown. On examination he found no consistent pattern of tenderness. Her Spurling's sign for a pinched cervical nerve was negative. The examination was non-diagnostic. As he was not sure what the cause of her pain was, he ordered an EMG and an MRI of the cervical spine and kept her on limited duty. (Employer/Insurer's Exhibit 1, Page 12 & depo ex 2)

An MRI of the cervical spine was performed on December 9, 2003. The radiologist reported that it showed "C4-5 level central disk herniation with pressure on the subarachnoid space, but not the cord. C5-6 level disk herniation on the left with compromise of the existing nerve root in the neural foramen". (Claimant's Exhibits E & G)

Dr. Howard reexamined claimant on December 9, 2003. Claimant told him that when her pain started it radiated from her right hand up towards the neck. She subsequently developed numbness in her hand and pain radiating from her arm to her neck. He noted that the EMG/Nerve Conduction Studies were normal and that the MRI revealed a significant disk herniation at C5-6 which was centrally located and was impinging on the neural elements. He thought that she only had a disk bulge at the C4-5 level. He diagnosed her with cervical radiculopathy. He indicated that her work might be aggravating her symptoms, but did not cause the disk to rupture. He recommended that she undergo cervical epidural steroid injections. (Employer/Insurer's Exhibit 1, Pages 25-27 & depo ex 2)

On December 12, 2003 claimant underwent an epidural steroid injection in the C6-7 interspace by Dr. Sidney J. Bennett. (Claimant's Exhibits G & I)

Dr. Kevin D. Rutz, a colleague of Dr. Howard, examined claimant on December 17. Mrs. Muminovic complained of pain in her neck, right shoulder, forearm, and hand. He noted that the epidural steroid injection had not improved her pain. He also reviewed the MRI and diagnosed claimant with C5-6 disk herniation with central cord pressure. He recommended a C6 selective nerve block and consideration of a C5-6 diskectomy. (Claimant's Exhibit I)

On December 23, 2003 claimant underwent a right C6 nerve root block by Dr. Gregory Cizek. (Claimant's Exhibit I)

Dr. Rutz reexamined claimant on December 30. She told him that her pain was almost 100% improved following the injection. He released her to return to work without restrictions. (Claimant's Exhibit I)

Mrs. Muminovic returned to Dr. Rutz on January 6, 2004 She told him that her arm symptoms had not returned following the injection, but that she was having low back pain. X-rays taken of her lumbar spine revealed "moderate degenerative changes throughout her lumbar spine" without no sign of spondylolisthesis. Dr. Rutz diagnosed her with a cervical disk herniation with residual neck pain and lumbar spondylosis. He prescribed physical therapy for her neck and low back, anti-inflammatory medications and limited duty. She underwent 6 sessions of physical therapy with some improvement of her symptoms. She was told to continue with home exercises. Mrs. Muminovic returned to Dr. Rutz on January 27 and advised him that her neck and low back pain had significantly improved. She requested a release to full duty. (Claimant's Exhibit I)

Dr. Howard reexamined claimant on June 24, 2004. Mrs. Muminovic complained of numbness and tingling in her hands and of dropping her knife at work. He noted that she had received two injections and 6 sessions of physical therapy. Her Spurling's sign was markedly positive with pain radiating into her right arm. She had significantly reduced grip strength with her right hand and diminished biceps reflex on the right side. Dr. Howard again diagnosed her with cervical radiculopathy. He recommended consideration of surgical intervention. He felt that she could continue to work without restrictions. (Employer/Insurer's Exhibit 1, Pages 18-19 & depo ex 2)

Other Findings

A digital videodisc was admitted into evidence which showed different employees working with machines 5, 7, 8, 11, 15, 18, and 23 at employer's plant. The only time an operator bent or turned his neck was on machine 15. (Employer/Insurer's Exhibit 3)

Claimant testified that on September 22, 2003 she experienced pain while working on machine 6. This testimony is not credible. I previously found that on September 23 she told Dr. Stuart Bogner that she was working on machines 8, which involved repetitive wrist motion, and 15, which involved repetitive thumb motion.^[5] (Claimant's Exhibit C) Employer's records document that employee worked only on machines 8 and 15 on September 22, 2003. (Employer/Insurer's Exhibit 2)

Claimant testified that she worked 2/3 of the time on machines 8, 14, and 15. This testimony is not credible. Employer's records for the period from June 30 through September 22, 2003 document that claimant worked most frequently on machines 5 (15 shifts), 6 (10 shifts), 24 (10 shifts), 12 (8 shifts), and 13 (8 shifts). Employer's records for that period establish that she worked 6 shifts on machine 8, 5 shifts on machine 14, and 6 shifts on machine 15. (Employer/Insurer's Exhibit 4) Based on the employer's records, I find that claimant worked most frequently on machines 5, 6, 24, 12 and 13.

Claimant testified that she extended her neck to watch an overhead robot drop parts into a cage on machines 6 and 7. A videodisc of that machine 7 demonstrated that the operator did not extend his neck to watch the movement of the robot. There was no need to watch the robot since it dropped the parts into a cage. I find that employee's testimony was not credible and that she did not extend her neck and watch the robot on machine 7.

Employee testified that on machine 8 she extended her neck to inspect a mesh which she held up to a light, sprayed the mesh, and then placed it in a box. She claimed that she lifted 18-20 boxes weighing 35 pounds each. Jim Shoemaker testified that the mesh is simply carried to a table where is moved back and forth, and then stacked on the floor up to a height of 7 feet. He testified that the operator does not lift any boxes. A videodisc of machine 8 demonstrated that the operator did not lift the panel up to a light; he carried it from the cage to the table, moved it back and forth, placed it on a vertical rack, sprayed it with a liquid (water ?), and then placed it in an open box. The boxes were stacked on a pallet. He climbed three steps on a wide ladder to reach the top box. Even at that level the operator did not lift overhead. The mesh

looked like it weighed less than 5 pounds. The operator was not shown lifting any boxes full of meshes. Based on the employer's more credible evidence, I find that employee's testimony was not credible and that she did not extend her neck while holding the panel up to a light and did not lift any heavy boxes.

Employee testified that she stepped into machine 14, turned her neck, removed two elements, placed the elements on a table, broke off plastic edges, and placed the elements on a pallet. She sprayed the inside of the machine. Employee testified that she also stepped into machine 15, removed two plastic parts, placed them on a bench about waist high, trimmed excess plastic, allowed the parts to cool, leaned into the machine, turned her body and neck to the left, and inserted 4 screws into the machine. The cooled parts were then placed in boxes. Jim Shoemaker testified that the operator uses a spring loader on machine 15. She leaned into the machine 243 times over a period of 6 hours.^[6] A videodisc of machine 15 demonstrated that the operator used a spring loader which took only a couple of seconds per screw. The insertion of the screws required no more than 30 seconds. The videodisc also demonstrated only a slight turning of the neck. Most of the turning was of the operator's trunk. (Employer/Insurer's Exhibit 3)

Based on the evidence I find that machines 14 and 15 are the only machines where employee turned her neck while performing an operation and that she did so only slightly. I further find that her demonstrations during the hearing were exaggerated. I further find that she leaned into the machine approximately 40 times per hour during a six hour shift.

Based on employer's records I find that during the period from June 30 through September 22, Mrs. Muminovic worked on machine 14 for 5 shifts of 6 hours each and on machine 15 for 6 shifts of 6 hours each. (Employer/Insurer's Exhibit 2)

Based on employer's evidence, I further find that machines 5, 11, 18, and 23 required almost no movement of the operator's neck. (Employer/Insurer's Exhibit 2)

Medical Opinions

Dr. Richard F. Howard testified by deposition on behalf of employer/insurer on October 18, 2004. He viewed the videodisc (Employer/Insurer's Exhibit 2) and opined that he could not envision any mechanism where the activities shown could be considered a causative element of employee's disk herniation. He indicated that a disk herniation at the C5-6 level would require "cervical trauma or extremes of neck positioning to be considered work related." He added that while work may have aggravated or brought on symptoms, it did not cause or significantly aggravate her problem. (Employer/Insurer's Exhibit 1, depo ex 2)

Dr. Howard testified that the video did not demonstrate lifting of any significant weight. He described the work as relatively level; it did not require extremes of bending or reaching overhead or awkward postures. (Employer/Insurer's Exhibit 1, Page 13) He further opined that claimant's work duties at Koller Enterprises did not represent a substantial factor in the development of her neck problem or in the need for any further medical treatment involving the neck. Dr. Howard explained that for a herniated disk to be considered caused or significantly aggravated by her work activities, the work would have to involve "some extremes of posture or direct trauma, loading of the neck, that might lead to a herniation." (Employer/Insurer's Exhibit 1, Pages 15-16)

Dr. Howard admitted that he did not get into a detailed discussion with claimant about how she physically performed her job duties. He tried to find out from employee the details of her work, but was not able to because of her inability to speak English. (Employer/Insurer's Exhibit 2, Pages 17 & 31) He testified that even if claimant performed her duties faster than was shown on the videodisc, he would not alter his opinion on causation. However, he agreed that if she performed additional duties which involved different positions of the neck, they could possibly affect his causation opinion depending on what they involved. (Employer/Insurer's Exhibit 1, Pages 32-33)

On cross examination Dr. Howard explained that when he wrote in his December 2003 report that her job might "bring on symptoms", he meant that if someone has a pinched nerve in his neck and he does things with his arms to tug on that nerve, it will bring on symptoms. The nerve is irritable and any kind of activity that puts traction on the nerves is going to bring on symptoms. Virtually any activity with the arm has the potential to cause pain in the presence of a ruptured disk in the neck. He indicated that having a bad posture while sitting in a chair can bring on symptoms. He added that it does not make the disk herniation worse, but it can aggravate the symptoms. He noted that claimant did not have a specific time when her pain started. She told him that it just seemed to come on gradually during the time of her employment. (Employer/Insurer's Exhibit 1, Pages 33-35)

On redirect examination Dr. Howard further opined that, even assuming the history of job activities set forth in Dr.

Volarich's April 7, 2004 report, employee's cervical disk herniation would not have been cause by her work activities. (Employer/Insurer's Exhibit 2, Pages 40-41)

David T. Volarich testified by deposition on behalf of claimant on November 4, 2004. He examined Ajka Muminovic on April 7, 2004. Through her son, claimant told Dr. Volarich that her duties included cutting the edges of plastic with a knife and pliers. She told him that on September 21, 2003 she cut plastic for 12 hours and while doing so she looked upward pulling the plastic down toward her.^[7] She stated that while performing similar work with plastic bottles on September 22, she developed pain in her right wrist, hand and forearm. Dr. Volarich reviewed the medical records.

Claimant apparently told Dr. Volarich that while standing or sitting at a machine, she bent her neck to look down. She indicated that she opened a door to retrieve parts, placed them on a table, and trimmed the excess plastic with a knife and pliers. She told him that she packed the parts in a box and manually lifted boxes onto a pallet, stacking them so high that she had to climb steps to place boxes at the top of the stack.^[8] (Claimant's Exhibit F, depo ex B)

Employee complained of right hand, elbow, and shoulder pain with intermittent neck pain. On examination Dr. Volarich found strength diffusely weak throughout the right upper extremity. The C-7 reflex was unobtainable. Her worst pain in her neck occurred with rotation to the right. Dr. Volarich diagnosed claimant with repetitive trauma of the cervical spine and right shoulder girdle causing diffuse right upper extremity weakness and pain with disk herniations at C5-6 and C4-5. He opined that employee's job activities were the substantial factors causing her overuse syndrome to the cervical spine, right shoulder girdle, and right upper extremity.^[9] On that date he found claimant to be a maximum medical improvement. (Claimant's Exhibit F, depo ex B)

After reviewing Dr. Howard's report of June 24, 2004 Dr. Volarich opined that claimant's symptoms had worsened up to June 24, 2004 and that she required additional care, probably surgical intervention to decompress the C4-5 and C5-6 disk herniations to relieve her right arm symptomatology. (Claimant's Exhibit F, depo ex C)

After reviewing the videodisc (Employer/Insurer's Exhibit 3), Dr. Volarich wrote that several of the jobs involved moving and reaching in awkward positions that would strain the neck and shoulder areas. He added that the videodisc failed to show the lifting and stacking of boxes which claimant described. (Claimant's Exhibit F, depo ex D) Dr. Volarich testified that the videodisc showed several jobs where the operator was sitting or standing at a table and trimming edges. He indicated that those activities would not cause a disk herniation. However there was one machine (#15) where the operator leaned forward at the waist into the machine, reached forward with the arm and right shoulder, and turned the head and neck to the left. He opined that such activity would strain the neck and cause a neck injury. He opined that the videodisc failed to show the machine which required stacking of sheets of material on a pallet. He indicated that she could strain her neck on lifting up over her head. (Claimant's Exhibit F, Pages 9-10) Dr. Volarich opined that claimant's work activities as described to him on April 7, 2004 and as shown in the videodisc were substantial factors in causing her cervical disk herniations. (Claimant's Exhibit F, Pages 11-12)

Dr. Volarich acknowledged that claimant did not tell him how often she was rotated between machines or how long she worked on any machine. She did not describe the height of her work tables. He agreed that claimant had not told him that she stacked sheets of material. Nor had she told him that she reached into a machine in an awkward position. (Claimant's Exhibit F, Page 22, 24, & 26) Dr. Volarich agreed that, to the extent that claimant may have looked down while performing her duties, such positioning of her neck would not be a substantial factor in causing her disk herniations. (Claimant's Exhibit F, Page 27) Dr. Volarich stated that the duration of exposure of certain types of activities would be important in determining whether an activity would be a substantial factor in causing a disk herniation. However, he did not know of any authority defining when the length of exposure to a particular activity becomes significant for disk herniations. (Claimant's Exhibit F, Page 28)

Additional Findings

Whether the employee's work activities caused the disk pathology in her cervical spine is a complex medical question. Proof of causation in this case is not within the realm of lay understanding nor, in the absence of expert opinion, is the finding of medical causation within the competency of this administrative body. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 704 (Mo. App. 1974); Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970) (herniated disc); Jackson v. H.D. Lee Co., Inc., 772 S.W.2d 742, 747 (Mo. App. 1989) (stroke).

"A medical expert's opinion must be supported by facts and reasons proven by competent evidence that will give the

opinion sufficient probative force to be substantial evidence." Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990); see Gilley Raskas Dairy, 903 S.W.2d 656, 657 (Mo. App. 1995).

While claimant testified at great length about her work activities at Koller Enterprises, she was not entirely credible. The only activity which involved any awkward positioning of her neck involved machine 15. Even with that machine she turned her neck only slightly to the left. Most of the awkward positioning while operating machine 15 was of her trunk. While she testified that machine 15 was one of three machines on which worked the most, I found that she worked on this machine during only 6 shifts between June 30 and September 22, 2003.

More importantly, Dr. Volarich was not informed of claimant's work activities. He had a very limited understanding of her activities. He obtained most of his information from the videodisc. He testified that the one activity shown on the videodisc which involved an awkward positioning of the neck was machine 15. Yet Dr. Volarich had no idea how often claimant worked on that machine. Claimant incorrectly told him that this machine was one of her most frequent machines. I found that claimant's testimony concerning frequency was not credible and that she had worked on machine 15 only 6 shifts during the three months which preceded her right upper extremity symptoms. Dr. Volarich also assumed that claimant was lifting many heavy boxes. I found that claimant's testimony in this regard was not credible and that she did not lift heavy boxes.

As Dr. Volarich had so little accurate information concerning claimant's work activities, I find that his opinion on causation of claimant's cervical disk pathology is not credible. Silman v. Montgomery & Associates, 891 S.W.2d 173, 176 (Mo. App. 1995); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 903 (Mo. App. 1990).

While Dr. Howard also had very limited knowledge concerning claimant's work activities, he also viewed the videodisc. He opined that he could not envision any mechanism where the activities shown (including machine 15) could be considered a causative element of employee's disk herniation. He indicated that a disk herniation at the C5-6 level would require "cervical trauma or extremes of neck positioning to be considered work related." As Dr. Howard is an orthopedic surgeon, I find his opinion concerning the lack of any mechanisms for causing a herniated disk to be more credible than the opinion of Dr. Volarich. Based on the credible opinion of Dr. Howard, I find that claimant's turning of her neck while working with machine 15 was not extreme and could not have caused any cervical disk herniation.

While Dr. Howard testified that claimant's job might bring on her symptoms, he explained that he meant that if someone has a pinched nerve in his neck and he does things with his arms to tug on that nerve, it will bring on symptoms. The nerve is irritable and any kind of activity that puts traction on the nerves is going to bring on symptoms. He stated that virtually any activity with the arm has the potential to cause pain in the presence of a ruptured disk in the neck. He indicated that having a bad posture while sitting in a chair can bring on symptoms. He added that it does not make the disk herniation worse. This testimony does not equate to admission that claimant's work aggravated any preexisting disk pathology. He was merely indicating that any movements which put traction on the nerves are going to bring on symptoms. He was not stating that those activities caused her disk pathology to worsen, though it may have temporarily increased her pain.

Based on the credible opinions of Dr. Howard, I find that claimant's cervical disk pathology was not caused or aggravated by her work activities at Koller industries. The claim is accordingly denied.

Date: _____
JOHN HOWARD PERCY

Made by: _____

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[1] Subsection 2 of Section 287.020 repeats the exclusion of injuries where work was merely a triggering or precipitating factor.

[2] The 1993 addition of section 287.067.7, which modifies the last exposure rule with respect to occupational diseases due to repetitive motion, could be construed as a legislative recognition that injuries caused by repetitive activities may be viewed as due to an occupational disease.

[3] For other conflicts see footnotes 4 and 7.

[4] While claimant testified that she was working on machine 6, I find this testimony is not credible as it conflicts with contemporaneous statements made by claimant to Dr. Bogner and with employer's business records.

[5] See page 7 supra.

[6] This number is based on employee's testimony that she inserted 4 screws each time she leaned into the machine and that she inserted 972 screws per shift.

[7] This is another instance in which claimant has confabulated. September 21, 2003 was a Sunday. Koller Enterprises did not operate on Sunday. Employer's records indicate that employee worked on two machines on September 20 (8-1/4 hours) and two machines on September 22 (12 hours). (Employer/Insurer's Exhibit 3)

[8] The inference is that employee was lifting boxes full of materials. While she probably carried empty boxes and placed them on top of a stack of closed boxes, there is no credible evidence that she carried heavy boxes up any steps.

[9] On cross examination he clarified that she did not have a separate shoulder pathology, but that her shoulder was symptomatic as a result of her cervical disk herniations. He agreed that with Dr. Howard that claimant's right arm pain was due to her cervical radiculopathy. (Claimant's Exhibit F, Pages 32-34)