

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award of Administrative Law Judge by Separate Opinion)

Injury No. 05-068917

Employee: Angela C. Neese  
Employer: Chrysler LLC, Inc.  
Insurer: Old Carco LLC  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award of the administrative law judge by separate opinion.

**Preliminaries**

The parties asked the administrative law judge to resolve the following issues: (1) incidence of occupational disease, which includes exposure and medical causation; (2) permanent disability; and (3) liability of the Second Injury Fund.

The administrative law judge concluded that claimant failed to establish by a preponderance of credible evidence that permanent disability, if any, was the result of the exposure and not that of a non-compensable, or prior, or subsequent event.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in misinterpreting and/or ignoring the testimony from employee's experts; (2) in determining that employee lacks credibility; (3) in interpreting the last exposure rule; (4) in interpreting the facts and the law with regard to the issue of notice; and (5) in declining to award permanent total disability benefits from the Second Injury Fund.

The Commission affirms the award of the administrative law judge with this separate opinion.

**Findings of Fact**

On January 9, 1984, employee began working for employer in Huntsville, Alabama, as a Tech III. For over 20 years, her primary duties for employer involved working on an assembly line producing components for automobile manufacturing. Employee stood and walked continuously on concrete floors and performed repetitive overhead reaching and lifting tasks.

On March 21, 2005, employee transferred to employer's plant in St. Louis, Missouri. Employee worked 30 hours for employer during the week ending March 27, 2005, and 32 hours during the week ending April 3, 2005. Of that time, employee spent about 2 days in a classroom, and about 2 weeks undergoing training, during which employee

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split her duties with another transferee. Employee performed no work for employer during the weeks ending April 10 and 17, 2005. Employee then worked 36.1 hours during the week ending April 24, 2005. After April 22, 2005, employee performed no actual work duties for employer in the St. Louis plant. Instead, she attended a stress class, then took a leave of absence. We find that employee performed less than 3 weeks of actual work in employer's St. Louis plant.

Employee claims that she suffered an occupational disease in Missouri affecting her right shoulder as a result of this approximate 3 weeks of performing her work duties for employer. Employee provides expert medical testimony from Drs. Shawn Berkin and Robert Poetz. We have carefully reviewed the reports and deposition testimony from both doctors. After careful consideration, we find that both of these doctors were provided such limited information regarding employee's job duties in Missouri, the duration of her employment in Missouri, and the timing and onset of her complaints that their opinions lack any persuasive force with respect to the disputed issues in this matter.

For example, when asked whether he knew how long employee worked in Missouri, Dr. Berkin revealed his erroneous assumption that it was "probably" a couple of months, and that he "guess[ed]" employee developed symptoms at that time. *Transcript*, pages 298, 304. Dr. Poetz, meanwhile, seemed even less sure of the relevant facts involved in employee's claim: he admitted he didn't know the duration of employee's work in Missouri, and did not even know the significance of her claimed date of injury. Both doctors rendered purely conclusory opinions in their reports, and failed to persuasively explain any causative interaction between employee's job duties in Missouri and the purported occupational disease sustained in Missouri. Both doctors also failed to persuasively distinguish the purported occupational disease sustained in Missouri from employee's preexisting conditions affecting the right shoulder.

It may have been (indeed it appears to be the case) that employee's years of work for employer in Alabama contributed to or caused some of the injuries she claims herein, but we find that employee has failed to provide persuasive medical evidence that she contracted any identifiable occupational disease in this state.

Employer hired employee in Alabama; it follows (and we so find) that her contract for employment was not made in Missouri. Because employee only performed her actual job duties for employer for about 3 weeks in Missouri before participating in the stress class and taking a leave of absence, we find that her employment was not principally localized in Missouri within 13 calendar weeks of her suffering any identifiable injury or occupational disease.

### **Conclusions of Law**

#### *Application of Chapter 287*

Section 287.110.2 RSMo provides, as follows:

This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this

Employee: Angela C. Neese

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state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

We have found that employee did not contract any identifiable occupational disease in Missouri, that her contract for employment was not made in Missouri, and that her work was not principally localized in Missouri within 13 calendar weeks of the injury or diagnosis of occupational disease. It follows that employee has failed to satisfy the requirements of § 287.110. Accordingly, we conclude that Chapter 287 does not apply to employee's injuries.

We additionally wish to make clear that, if it were shown that Chapter 287 did apply to this claim, we would deny the claim on the issue of medical causation, owing to employee's failure to provide persuasive expert medical opinion evidence.

**Conclusion**

Employee's claim is denied because Chapter 287 does not apply to her injury or occupational disease.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 13, 2014, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 11<sup>th</sup> day of March 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

# AWARD

Employee:	Angela C. Neese	Injury No.:	05-068917
Dependents:	N/A		
Employer:	Chrysler LLC, Inc.		Before the <b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Old Carco LLC		
Hearing Date:	February 6, 2014	Checked by:	JED

## 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: May 27, 2005 (alleged)
5. State location where accident occurred or occupational disease contracted: St. Louis County (alleged)
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 happened or occupational disease contracted:  
Employee alleged injury by repetitive trauma from Employer's assembly line.
12. Did accident or occupational disease cause death? N/A 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? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$675.90/\$354.05
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

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

TOTAL: -0-

- 23. Future requirements awarded: N/A

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

The compensation awarded to 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 Claimant: N/A

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

Employee:	Angela C. Neese	Injury No.:	05-068917
Dependents:	N/A		
Employer:	Chrysler LLC, Inc.		Before the <b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri
Insurer:	Old Carco LLC		Jefferson City, Missouri
Hearing Date:	February 6, 2014	Checked by:	JED

This case involves four separate Claims for Compensation: 05-068917(May 27, 2005), 05-068918 (June 6, 2005), 06-135663 (February 28, 2006) and 07-134224 (February 8, 2007). The testimony and exhibits in this record constitute the evidence in each Claim. Each Claim follows Claimant’s transfer to St. Louis after many years in an Alabama plant. Each Claim is disputed by Employer. Separate Awards issue on each Claim. These cases may be referred to herein as the first, second, third and fourth cases, chronologically.

Employer admits Claimant was employed on each of the reported dates of injury and that any liability was fully insured. Claimant admits she was not at work on any of the alleged injury dates. The Second Injury Fund (“SIF”) is a party to this claim. Claimant seeks PTD benefits against the SIF in the fourth Claim. Both parties are represented by counsel. Objections at expert depositions are ruled upon consistent with the findings herein.

Issues for Trial

*Third And Fourth Cases*

1. notice;
2. occupational disease (exposure and medical causation);
3. nature and extent of permanent disability;
4. liability of the SIF;

*Fourth Case Only*

5. Rate of Compensation

**FINDINGS OF FACT**

Claimant is a 54 year old native of Alabama. She has a high school diploma. Claimant began working at Chrysler’s electronics plant in Huntsville, Alabama in 1984. She worked continuously there until she transferred to the Missouri plant in early 2005. Transfer became an option when the Huntsville plant was purchased by Siemens. After some transition, employees were told they had the choice of remaining in Huntsville and becoming a Siemens employee or transferring to some other Chrysler plant. Claimant opted to transfer to Chrysler’s van plant Missouri, in order to retain her seniority. Her intention was to continue to work at Chrysler until she reached the 30 year milestone even though it would require her to live apart from her family.

When she transferred, she rented an apartment in the St. Louis area while her husband remained in the family home in Athens, Alabama, a town that is quite close to Huntsville.

The Huntsville plant produced electronic dashboard components such as radios and CD players that are inserted into dashboards that would be installed in a Chrysler vehicle at a plant elsewhere. The Huntsville job involved standing, reaching above shoulder level, lifting, carrying and the use of power tools. Separately, Claimant also worked as a part-time employee benefits representative. About a year before the transfer, Claimant became a full-time benefits representative. She continued to work on the line on weekends as needed. The benefits representative job allowed her to sit most of the time although she would go into the plant to speak to employees who had benefit issues.

Long before, in the late 80's or early 90's, Claimant began to notice neck and shoulder symptoms. She underwent a myelogram of her neck in 1989. Claimant required four surgical procedures on her right shoulder, including two scopes, an open procedure to repair a torn rotator cuff and another open procedure to remove the surgical staples. She also developed back problems that required her to undergo a lumbar MRI and epidural steroid injections. She had undergone a series of injections in Alabama as recently as November of 2004, five months before her transfer to Missouri. The shoulder and back problems were, at least in part, handled as workers' compensation injuries but no formal "claim" was filed in Alabama.

Claimant transferred to Missouri effective March 21, 2005. For the first 2-3 days she was in classroom training. She then went out on the assembly line and spent the next 1-2 weeks working with a local employee and another transferee as the two new employees learned to perform the various jobs that they would have to do as "floaters." At trial, Claimant agreed with the work hours reflected by Employer's pay records:

30 hours for the pay period ending March 27, 2005  
32 hours for the pay period ending April 3, 2005  
36.1 hours for the pay period ending April 24, 2005.

Claimant never successfully returned to (actual) work on the plant floor after April 24, 2005.<sup>1</sup> The paid hours in March and early April included her classroom training and the 1-2 weeks sharing a job with a regular worker and another transferee. Claimant was subsequently out ill with stress and later took a leave of absence. She admitted she was paid 28 days during stress classes. Claimant never worked again except for the one day attempted in February 2006. (T. 79-83.)

### *Clinic Notes & Reported Injuries*

#### **Right Shoulder (First Case)**

Claimant asserted that when she was transferred that she brought with her certain work restrictions in place, including no overhead work and no lifting more than five pounds with her right arm. These were permanent restrictions given to her in Alabama due to her long-standing shoulder and back conditions. Claimant alleges that the plant in Missouri would not accept those

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<sup>1</sup> All four alleged injury dates are subsequent to April 24, 2005.

restrictions and kept assigning her to jobs that violated the restrictions or that otherwise bothered her right shoulder and back. After working during the first two weekly pay periods in Missouri she left the job to attend an employer sponsored stress class where she was off-work but paid for four weeks. During this period she saw a psychiatrist in St. Louis and returned to Alabama and visited her PCP in order to obtain documentation to show the employer's plant physician of her long-standing restrictions.

Thereafter, Claimant returned to work in late April 2005 but worked less than one week when she again took leave effective April 22, 2005. Claimant was off-work for chest pain secondary to costochondritis injury in April 2005 (in Alabama). (See Exhibit 3.) Claimant did not return to work in 2005; Claimant never attempted a return to work on the line after April 2005 until her unsuccessful attempt to return to work in February 2006, nine months later.

Claimant testified that she complained to the Clinic that her back and shoulder were bothering her due to the more strenuous work that was being assigned and mentioned her long-standing work restrictions from Alabama. The lack of medical paper work confirming her restrictions is one of the reasons why she went back to Alabama while she was on leave.

According to the plant clinic records (Exhibit 3), Claimant first came into Medical, after her transfer, on April 18, 2005. On that date she reported having developed chest pain after rolling over in bed while in Alabama on vacation. A note from a Dr. Gross was presented to Employer's Clinic but was questioned since it appeared to the doctor to have been altered. She returned to Employer's Clinic on April 19, 2005 for her return to work assessment at which time she gave her prior history of bulging [low back] discs that had required injection therapy. On May 27, 2005 Claimant underwent a reinstatement exam after having been out for depression and stress with a last date worked of April 22, 2005. Although she was cleared for work with no restrictions on May 30, 2005, she never actually worked again.

Two notes of June 6, 2005, appear to be reports or complaints of longstanding symptoms in which no new injuries are identified.<sup>2</sup> These notes contain Claimant's report that she has not worked overhead since shoulder surgery; the plant in Alabama had no overhead work and she was in an "appointed position" and did not work the floor except during overtime and thus limited use of her right arm.

According to Exhibit 3, Claimant did not (attempt) return to work until February 13, 2006. On that date, and when the Plant again tried to place her on February 15, 2006, Claimant worked at most an hour or two on the line before she was sent home. She never returned to work again except to confirm her disability status.

The first treatment that Claimant received in Missouri (and outside the plant clinic) appears to have taken place on April 25, 2005 when she began seeing Dr. Leo Warren, a primary care physician. Her complaints to Dr. Warren involved headaches, insomnia and depression associated with her job transfer and separation from her family in Alabama (Exhibit T). She claimed that she felt overwhelmed and she hurt all over and admitted to a history of anxiety and depression for which she had been given Lexapro by her GYN physician in Alabama. She

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<sup>2</sup> This is contrary to the pleaded low back injury Claim (second case) of the same date.

returned to Dr. Warren on May 5, 2005 with those same complaints but added a complaint of chest pain.

Only on her next visit, on June 10, 2005, did she mention problems with her right shoulder, provided a history of her past shoulder problems and mentioned that the local company doctor won't accept her paperwork related to her restrictions so she intended to return to Alabama to have the restrictions renewed. [On July 10, 2005 she returned to Dr. Warren with new history of low back complaints adding that she had to visit an urgent care facility for these complaints. See Low Back case below.]

Claimant was seen by Dr. Tindell in Alabama in June 2005 complaining of right shoulder problems. The first *treatment* that she had for her shoulder after her transfer was while on a leave of absence. Dr. Tindell's history is that she had been doing more strenuous work since her transfer and that the plant physician was not accepting her work restrictions and she needed copies of her documentation. Although Dr. Tindell suspected a rotator cuff tear, and after an MRI, his final diagnosis was bursitis and tendinitis which is consistent with the known chronic condition comprising four surgeries. He prescribed medication and work restrictions but Claimant never returned to work. He proscribed any lifting over twenty pounds

#### Low Back (Second Case)

Between the June 10<sup>th</sup> and July 10<sup>th</sup> visits to Dr. Warren, she required urgent care treatment at a facility operated by St. Luke's Hospital. (Exhibit S). The history on July 4, 2005 was sudden onset of low back pain and right sciatica while turning to place some clothes in a basket in preparing to go to the pool. She was given pain medication and muscle relaxers and given lifting and other restrictions. This first report of back problems to Dr. Warren was followed by referral to Dr. Chapel, a chiropractor.<sup>3</sup>

Although the records are difficult to decipher, it appears that Claimant went to Dr. Chapel first on July 25, 2005 complaining of worsening low back pain, including radicular symptoms ("numbness in toes") which had its initial onset 3 years earlier with an aggravation "3+ weeks" earlier (elsewhere "'7/02/05"). Her pain was noted at seven on a 1-10 scale. An MRI at St. Luke's on July 25, 2005 revealed bulging discs with a central protrusion at L5-S1. (Exhibit R.) Dr. Chapel continued to see Claimant, periodically, beyond her low back surgery and, as late as April 11, 2006, she was still dating the onset of her back and leg problems to July 5, 2005. The questionnaire asking whether the condition is related to an "automobile accident or on-the-job injury[.]" Claimant responded, "No." (Exhibit Q.)

Dr. Warren then referred Claimant to Dr. John Moore (whose records are not in evidence) who apparently performed steroid injections, without lasting relief. Claimant next saw Dr. Backer on September 29, 2005. She filled out a form on which she indicated that the duration of her symptoms were from July, 2005 "this time about 3 months" and the "context" was "at home". (Exhibit H.) Dr. Backer also wrote a letter to Dr. Warren in which he states that Claimant has had chronic back pain on and off "but worse since July of 2005". Dr. Backer performed an inter-body fusion at L5-S1 for degenerative disc disease (a herniated disc was not

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<sup>3</sup> Dr. Chapel's records are presented in two separate Exhibits, Q and R.

found) on November 7, 2005. Claimant subsequently continued to complain of symptoms despite the surgery. Claimant followed up with Dr. Backer and Dr. Warren. Claimant's February 2006 attempted return to work was unsuccessful. She returned to Alabama soon after that and continues to seek pain treatment, initially from a Dr. Gaines, and now from a Dr. Hendrix.

#### Left Knee (Third Case)

Since Claimant left Chrysler and returned to Alabama she has required left knee surgery. She attributes this problem to her long history of standing and walking in the Alabama and Missouri plants and perhaps to favoring her leg due to her back problems. She admits that she never specifically complained about her left knee to Chrysler and the first mention of a knee problem is on October 28, 2006 when she was examined at SportsMED. Claimant stated that her left knee just locked up when she stood up. (Exhibit J.) An MRI showed some degenerative changes in the knee which led to left knee surgery by Dr. Moore for a medial meniscectomy in December 2006.

#### Cervical Spine (Fourth Case)

As to the cervical condition, Claimant has experienced neck and shoulder area pain since the late 1980's and admitted having a cervical myelogram as early as 1989. This then has been a chronic problem for which she had no medical treatment during the time that she resided in Missouri. However, on February 28, 2007, while seeing Dr. Parker in Alabama, she reported having had intermittent neck and bilateral shoulder pain in the past that became significantly worse approximately "four weeks ago" with radiation into her left arm. (Exhibit O.) Also, twenty days earlier, on February 8, 2007 she had filled out a SportsMED pain questionnaire indicating that her neck pain had begun suddenly, and checked a box indicating no apparent cause and another box indicating that the problem was not work related. (Exhibit J.) Claimant subsequently underwent cervical fusions in 2007 and 2009.

#### Current Complaints

Claimant currently complains of low back, neck and leg pain. Claimant has longstanding symptoms that disrupt her daily activities, prevent her from playing with her grandchildren, limit how far she can drive, how long she can sit or stand, make housework difficult and significantly limit her recreational activities. She must recline several times a day for relief and takes pain medications, medications to relax her muscles, allow her to sleep and to improve her mood. Her right shoulder is weak, she cannot use her arm above shoulder level and feels that she has lost 25% or more use in the arm. Claimant doesn't believe that she can work in any capacity and has turned down offers to work in a clerical capacity at a friend's pet grooming business since she doesn't believe that she would be a dependable employee. She has no specific left knee complaints at this time. Claimant is on Social Security Disability and receives a permanent total disability pension from Employer. Her husband continues to work at a bank. Her husband drove her to St. Louis for the trial but they had to make periodic stops due to her symptoms.

Opinion Evidence*Dr. Berkin*

Claimant offered the 2008 deposition of Dr. Shawn Berkin, as Exhibit F. Dr. Berkin examined Claimant and reviewed medical records. Dr. Berkin issued a report dated December 15, 2007. (Exhibit B). (It should be noted that Dr. Berkin offered opinions on the 2005 Claims only; the other two Claims were filed after his evaluation.) Later, he prepared a one-page report dated April 28, 2008. (Exhibit 4.)

Dr. Berkin was told that her complaints started in June 2005 after she was assigned to a job at Chrysler requiring her to lift 600 side panels for vans per shift. Although she admitted to having a history of low back pain dating from 2001, she stated that as she worked in St. Louis, her back pain worsened requiring her to seek medical treatment at the plant Clinic and later by Dr. Warren, Dr. Chapel and Dr. Moore and others for conservative care. Dr. Berkin said Claimant had a pre-existing low back condition for which he agreed, "she largely received conservative treatment" (p.16). He was apparently unaware of the steroid injections from 2004 in Alabama.

An MRI in July 2005 revealed disc bulging at several levels in the lumbar spine, more pronounced at L5-S1. When the conservative care did not achieve the hoped-for results, she was referred to Dr. Robert Backer who performed an inter-body fusion at L5-S1 in November 2005. However, Claimant continued to complain despite a post-surgery MRI showing solid fusion. Pain treatment was instituted in St. Louis but was transferred to Alabama when Claimant decided to return to her home there.

Claimant complained to Dr. Berkin of having pain, tightness, stiffness, spasm and loss of motion in her low back which affects her ability to carry out her usual activities. Dr. Berkin was aware of her then-recent history of cervical surgery, her history of low back treatment for degenerative disc disease and her history of multiple right shoulder surgeries. On physical examination, Dr. Berkin noted a loss of lumbar motion, positive SLR on the left, and pain on muscle stretching and squatting although many of her reflexes were normal. The examination of her upper extremities was consistent with her remarkable history of multiple right shoulder surgeries.

Dr. Berkin diagnosed low back strain, bulging at L5-S1 and L1-L2 and status post low back fusion. He opined that the strain with protruding discs was due to Claimant's "industrial accident that occurred in June of 2005 as the result of repetitive bending and lifting . . . at Chrysler." Dr. Berkin then assigned a 35% PPD due to the "injury" and added a 10% PPD preexisting due to her earlier low back symptoms and treatment and also provided a preexisting rating of 35% of the right shoulder.

On cross examination Dr. Berkin admitted that Dr. Parker had suspected an annular tear in 2003 (in Alabama) and confirmed that Claimant's symptoms had developed gradually over time. He also agreed that on exam he found no muscle spasm, SLR on the right was negative and normal sensation and nerve function were present. Dr. Berkin stated that it was his impression that Claimant worked in Missouri for about two months but he didn't know how much weight

she lifted and what other jobs she may have done as a floater. He also admitted a diagnosis of degenerative disc disease. He admitted that a herniated disc was not identified and he agreed that she developed the lumbar degenerative disc disease despite her lighter job in Alabama.<sup>4</sup>

It should be noted that Dr. Berkin prepared a subsequent report dated April 28, 2008 in which he reiterated that all of Claimant's disability in her right shoulder preexisted her transfer to Missouri. (See Exhibit 4.)

*Dr. Poetz*

Claimant offered the deposition of Dr. Robert Poetz as Exhibit A. His narrative report is marked Exhibit E. Dr. Poetz opined in all four cases herein. His examination of Claimant took place on March 18, 2009.

Dr. Poetz listed Claimant's complaints, recorded a history of her various jobs in Alabama and Missouri and reviewed medical records up to the date of the evaluation. Physical examination reflected a loss of motion in all planes of the right shoulder, poor grip strength bilaterally, left knee crepitus, some diminished range of motion in the left knee, a loss of motion in all directions in both the low back and neck, positive SLR bilaterally and surgical scars were present in the right shoulder area and on the neck and low back, as well as portal scars over the left knee.

Dr. Poetz diagnosed prior right shoulder decompression times two with right shoulder rotator cuff tendinitis and impingement syndrome due to the "injury" of May 27, 2005. He diagnosed preexisting lumbar degenerative disc disease with L5-S1 disc protrusion with intractable back pain and aggravation of the degenerative disc disease due to the "injury" on June 6, 2005 requiring fusion surgery. He diagnosed preexisting degenerative joint disease in the left knee with a medial meniscus tear and aggravation of the DJD secondary to the "injury" of February, 2006. Finally he diagnosed preexisting cervical DDD with a herniated C5-6 disc that required fusion surgery due to the "injury" of February, 2007.

Dr. Poetz rated Claimant's preexisting disability at 30% of the right shoulder, 5% of the low back, 5% of the left knee and 5% of the neck and rated the successive "injuries" at 15% of the right shoulder, 40% of the body related to the low back, 35% of the left knee and 40% of the body related to the neck and went on to state that he believed that Claimant is permanently and totally disabled due a combination of the preexisting disabilities and the disabilities that resulted from the four "injuries" giving rise to the four pending claims.

On cross examination Dr. Poetz admitted that he had not reviewed the earlier IME reports of Dr. Berkin so was not aware that Dr. Berkin had stated that all of the disability in Claimant's right shoulder disability pre-existed her transfer to Missouri. Moreover, he admitted he did not know how much overhead work Claimant performed in Missouri compared to how much, if any, she had done in Alabama. He was asked about how long Claimant worked in the Missouri plant:

Q: And do you know how many months, weeks, days, or hours that  
[Claimant] worked in Missouri after she transferred from Alabama?

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<sup>4</sup> Dr. Berkin did not enunciate a degenerative process in the diagnoses or impressions of his narrative report.

A: I do not.

(Exhibit A, p. 40.)

Regarding low back symptom onset, Dr. Poetz agreed that, first, the first back complaints reported to Dr. Warren and Dr. Chapel *post-dated* the event at home in July, 2005. Second, that Claimant history to Dr. Backer attributed her acute complaints to that July event at home. Third, that nowhere in the plant Clinical Notes is there any report of a back injury related to her job here in Missouri. Fourth, that she couldn't have been injured at work in February, 2006 (when she tried to go back to work post-surgery) when lifting a heavy box if she had in fact refused to lift the box due to the risk of a back injury. Also, Dr. Poetz admitted he found no history of low back injury in the Clinic Notes of Employer despite giving direct testimony of an "injury" on June 6, 2005. He also admitted that the February 2006 failed attempt to return to work was recorded in the Clinic Notes as pain with slight bending and refusal to lift a box contrary to her restrictions. (p. 48, 49.)

Dr. Poetz also acknowledged that the cervical herniated disc at C5-6 was a diagnosis that had been made in 2003 so was prior to her transfer to Missouri. As to the left knee, Dr. Poetz was not aware of how much standing and walking on concrete Claimant had done in Alabama or in Missouri, and that Claimant has attributed the knee condition to both walking and standing at work and also to, perhaps, favoring her leg due to her back condition. He was also aware that a lumbar MRI had been done in 2002 and again in 2005 but the latter was only sought after the event at home in July 2005. He could not tell if the disc bulges were present prior to that event.

*Mr. Lalk – Counselor*

Claimant offered the deposition of Mr. Timothy Lalk, vocational rehabilitation counselor, as Exhibit C and his narrative report as Exhibit D. Mr. Lalk conducted an interview and records review. Lalk's report contains a detailed medical history, a description of Claimant's work at Chrysler in Alabama and Missouri, a list of her complaints and capabilities, a family and social background, and an educational background and vocational history. Lalk also performed testing that showed that she reads at a high school level, her math skills were at a 7<sup>th</sup> grade level and that overall, she scored at an 11.4 grade level, making her a candidate for post-secondary training. However, when Lalk took into consideration Claimant's reported symptoms and limitations as well as the various limitations placed upon her by the various physicians whom she has seen, Lalk concluded that she was incapable of competing in the open labor market due to her high pain level and the need to recline periodically throughout the day, although Claimant does have the potential to be retrained for work that she might be able perform even with her current limitations.

On cross-examination, Mr. Lalk admitted that he had not seen the medical reports of either Dr. Berkin or Dr. Cantrell. He further admitted that it was his understanding that Claimant was able to continue to work at the Huntsville Plant because the jobs that she performed there did not require overhead work or heavy lifting, particularly the job as the benefits representative. He also did not know the requirements of the benefits representative job and agreed that, but for her claim that she had to recline periodically during the day, Claimant would be able to perform that

work currently. Lalk also agreed that it is difficult to motivate and place a worker whose options are limited to entry-level jobs in which they would earn less than they are currently receiving in disability benefits. The witness also agreed that he saw no medical records or reports that indicated that a physician had advised Claimant to recline to reduce or alleviate her symptoms and saw no reports in which she has been deemed to be permanently and totally disabled.

*Dr. Cantrell*

Employer offered the deposition of Dr. Russell Cantrell as Exhibit 1 and 2. He examined claimant and reviewed medical records. A second examination and second deposition occurred due to Claimant's successive Claim filings. Claimant gave a history of prior right shoulder injury and treatment in Alabama with the resulting permanent work restrictions and her prior history of low back symptoms which also resulted in work restrictions on lifting and overhead work. Her work in Alabama was such that these restrictions could be accommodated. However, she claimed that when she transferred to Missouri and started to use power tools suspended overhead and was required to bend and lift, and her right shoulder and low back pain increased despite the efforts that were made to find work that she could perform. Due to an episode of acute back pain and sciatica occurring on July 2, 2005 surgery proved necessary and thereafter Claimant was never able to return to work successfully.

Dr. Cantrell performed a clinical examination which was positive for a twenty-five percent loss of motion in the right shoulder, tenderness with deep palpation in the low back area, a moderate loss of motion in the low back and low back pain with SLR (although SLR was negative for radicular symptoms) She was found to have good muscle and nerve function in both her upper and lower extremities.

Dr. Cantrell stated that he did not believe Claimant's work in Missouri was a substantial factor in causing her need for low back surgery. His opinion was based upon, first, the lack of findings by the surgeon of an acute condition such as a herniated disc; second, the fact that the low back pain was due to long-standing DDD; and, third, the fact that the acute condition was triggered by the July 2, 2005 lifting incident at home as per the surgeon's notes.

Regarding the right shoulder, he did not believe that her work in Missouri caused additional injury to her right shoulder. Dr. Cantrell was given the hours worked by Claimant upon transfer to Missouri (detailed above). As a result of this lack of causation, Dr. Cantrell did not attribute any PPD in her low back or shoulder to her work in Missouri although he did believe that some work restrictions were appropriate due to these established pathologies.

On cross examination, Dr. Cantrell admitted that Claimant's work in Missouri was more strenuous than that which she performed in Alabama, that she did have to lift, carry and place metal parts and that surgery was not recommended until after her transfer, but he would not agree that Claimant's shoulder symptoms in June of 2005 might have masked her low back pain or that the pain that she experienced on July 2, 2005 was just a manifestation of an earlier injury, particularly since she attributed the acute symptoms to lifting at home. These acute symptoms at home follow longstanding degenerative disc disease that predates Claimant's transfer to Missouri.

\* \*

When Dr. Cantrell re-examined Claimant on April 22, 2013, he updated Claimant's medical history and complaints. He reviewed additional medical records, particularly those involving Claimant's left knee and neck. His physical examination continued to show loses of motion in the neck and low back, pain on movement but no muscle spasm. There was physical and documentary evidence of the two cervical operations and the left knee surgery.

Dr. Cantrell commented on the treatment records that revealed neck complaints going back to the late 1980's but which were not persistent through Claimant's work in St. Louis. Instead, these symptoms developed long after she left her employment at Chrysler per the statements that she made to several of her treating physicians in Alabama.

Based upon Claimant's medical history before her transfer, the limited amount of time that she worked in Missouri, and the information contained in the post-employment medical records from Alabama, Dr. Cantrell concluded that there is no medical causal connection between Claimant's work in Missouri and her need for neck and left knee surgery. As to Claimant's ability to work, Dr. Cantrell believes that she can do sedentary work or light duty at most. He also stated that his opinions regarding the low back and right shoulder have not changed since his first examination and deposition.

On cross examination, Dr. Cantrell stated that his opinion regarding the causation of Claimant's torn knee cartilage is consistent with her history of experiencing an onset of acute knee pain and locking upon standing and turning and would not agree with the supposition that the injury could have been due to a history of micro trauma to the knee over time at work.

#### *Claimant's Credibility*

Claimant's testimony was unreliable historically and unconvincing regarding her association of serious chronic symptomatology with the *de minimis* total work hours recorded in Missouri between March 21 and April 24, 2005. No new injuries are documented during either her three weeks of work or her few weeks of training. Only with the advent of a non-work related injury are treatable symptoms reported by Claimant, to her private physicians, as occurring at home. Her testimony was uncorroborated with the medical treatment record. Treatment with Dr. Warren began on April 25, 2005 for symptoms of insomnia and depression. Rather it correlates with pre-transfer medical events (in Alabama) or post-April 2005 events; as admitted, Claimant never returned to work after April 2005.

#### RULINGS OF LAW

All four Claims allege regular work duties on Employer's assembly line caused occupational disease. Repetitive trauma occupational disease claims necessarily fail without substantial exposure to a demonstrated repetitive trauma. Here, all alleged injuries (and exposures) are uncorroborated in Employer's Clinic Notes comprising Exhibit 3 (admitted without objection). The Clinic Notes are the only comprehensive medical record during the relevant times herein. A review of these notes reveals employee used the Clinic for both

personal and work-related medical conditions. Records of private providers do not reflect symptoms or work histories that might predicate either repetitive trauma or new injuries.

Claimant's four cases each plead onset dates that are not preceded by any sustained work period; the third and fourth cases plead onset dates subsequent to Claimant's retirement.

### Incidence of Occupational Disease

#### *Exposure and Medical Causation*

Injury alleged to have occurred by repetitive trauma is compensable under Chapter 287. Section 287.067.7 RSMo (2000). A claimant must prove all the essential elements of the case. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo.App. 1990). Dolen v. Bandera's Cafe, 800 S.W.2d 163, 164 (Mo.App. 1990). A claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo.App. 1988). A claimant must identify a hazard of occupational disease to which he was exposed on his job. Section 287.063.1 RSMo (2000). A two pronged test remains the law: (1) proof of an exposure greater than that which affects the public generally and (2) proof of a recognizable link between symptoms of the condition or disease and a distinctive feature of the job. Lytle v. T-Mac, 931 S.W.2d 496 (Mo.App. 1996). Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 48 (Mo.App. 1999).

Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). Silman, 891 S.W.2d at 175. As with all proofs in complex medical evidence, 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. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

The standard of proof that was in effect in May and June 2005 (i.e. first and second cases) is proof that the conditions of employment were "a substantial factor" in causing the harm for which medical treatment has been needed and which has resulted in the claimed disability. Sec. 287.020.2. RSMo. 2000. The "a substantial factor" standard does not require proof that the work was the predominate cause but the work must be more than merely a triggering or precipitating factor. It must be noted that the legislature excluded "progressive degeneration" from occupational disease. Section 287.067.2 RSMo (2000).

As with all proofs in complex medical evidence, 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. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Here, both of Claimant's experts were shown to have been either under-informed or misinformed about Claimant's work exposure in the Missouri plant. Claimant herself admitted she did not know what she was doing during her last week of work (T. p. 81). Dr. Berkin was

unaware of Claimant's pre-transfer low back condition requiring injection therapy in 2004. Missouri courts have held that it is reasonable to expect experts to be fully informed. Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

#### FIRST CASE

Here, Claimant is attempting to prove that her work in Missouri caused her to contract an occupational disease that re-injured her right shoulder. Before her transfer, she had undergone four surgeries on her shoulder and claims to have had permanent restrictions of no overhead work or lifting greater than five pounds with her right upper extremity. Her work in Alabama did not approach these restrictions and she was able to continue her job there. The question presents what effect, if any, did her very limited work in Missouri have on her right shoulder and was that claimed exposure sufficient to constitute a substantial factor in causing a compensable repetitive trauma injury. Apparently, a least one of Claimant's jobs here did involve her needing to pull a power tool down from overhead and she did have to do some lifting in at least one other job. However, when measured against the few hours worked in Missouri, Claimant exposure to each of these positions necessarily reduces exposure to the other the other.

Claimant offered testimony from two different experts. However, Claimant's opinion evidence is unsupported by treatment records or ergonomic facts that give probative force. Dr. Berkin, reviewed Dr. Tindell's shoulder treatment records, but nevertheless, attributed all of the right shoulder disability to the 1985 shoulder injury. He reiterated the point later in a supplemental report. Dr. Poetz contradicts his co-expert and baldly asserts a causal connection, diagnosing tendinitis and impingement syndrome (her "injury") and thirty percent PPD. However, no right shoulder problems or symptoms appear in the Medical Department records until June 6, 2005, just over six weeks after she has last worked on the line.

It was not until four days later, on June 10<sup>th</sup>, that she first mentions her right shoulder *history* to Dr. Warren (whom she began seeing since the day after her last day of employment in 2005, or April 25). The first *treatment* that she had for her shoulder after her transfer was that which she received from Dr. Tindell in Alabama beginning on June 21, 2005 while on a leave of absence. Dr. Tindell's final diagnosis was consistent with the known chronic condition (comprising the four surgeries in Alabama). Claimant last shoulder treatment was two weeks later but she claims she had some therapy for her shoulder while treating for her low back in the following months.

Employer's clinic notes contained no suggestion of new injury and only one reference to work restrictions. The only treatment records are the two weeks with Dr. Tidell in Alabama who diagnosed chronic conditions and provided medications. Dr. Poetz's reliance on Dr. Tindell's notes is misplaced inasmuch as the notes neither predicate new symptoms nor document sufficient ergonomic details of exposure. Regarding ergonomics, Dr. Poetz admitted on cross-examination that he did not know how much overhead work Claimant performed in Missouri. Dr. Poetz does not appear to have been properly informed about Claimant's mere three weeks (approximately thirty hours each) of actual floor work in Missouri acknowledged by Claimant at trial. As a result, Dr. Poetz was materially misinformed, or mistook, the description and duration

of Claimant's *de minimis* exposure. Admission of a contrary matter weakens the value of expert opinion. DeLisle v. Cape Mutual Insurance, 675 S.W.2d 97 (Mo.App. 1984).

Claimant's *condition* is not disputed. Nevertheless, Dr. Poetz's report and testimony provides no support for his disability rating since he doesn't even state that Claimant's pre-existing symptoms and findings have changed or increased as a result of Claimant's work in Missouri. Dr. Berkin rejected shoulder disability from work in Missouri flatly. Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). On the other hand, Dr. Cantrell testified that he found no evidence that Claimant's Missouri employment resulted in any additional injury to the right shoulder and, as such, assigned no disability beyond that which was present prior to her transfer.

This Claim then involves a situation where an employee with a significant chronic disabling injury transfers to a new job and experiences an increase in symptoms when asked to do work that arguably exceeds practical work restrictions but where there is no showing that the work (just three weeks, or more) caused any change in the underlying pathology or any increase in disability. Dr. Poetz described in detail some job procedures unsourced in his notes and not to be found elsewhere in the record, including Claimant's own direct testimony. The evidence demonstrates, at most, that Claimant's brief work exposure in Missouri resulted in temporary exacerbation of subjective shoulder complaints. This temporary triggering or precipitation of longstanding symptoms where the triggering or precipitation did not rise to the level of a "substantial factor" in causing a new "injury" that constitutes an independent occupational disease.

Dr. Cantrell's testimony is more persuasive for three reasons. He was better informed about the exposure, especially the duration of any alleged exposures. His conclusions are reconcilable with the balance of the record, particularly the pre-transfer medical record. Dr. Cantrell never was impeached or confronted with a mistaken fact of assumption. Claimant failed to establish by a preponderance of credible evidence that permanent disability, if any, was the result of the subject exposure and not that of a non-compensable, or prior, or subsequent event. See Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

## SECOND CASE

In this Second Case, alleging low back injury, Claimant's experts are found to lack sufficient bases to conclude a work injury occurred during Claimant's brief work in Missouri. Although Claimant underwent surgery in November 2005, Claimant had worked only a few weeks before taking a leave of absence. Approximately a month later, without having returned to work from her leave of absence, Claimant reported a lifting accident at home causing low back symptoms prompting her to seek treatment. The at-home accident history is traced in the records of her private providers. Prior to her transfer to Missouri, Claimant had developed substantial low back symptoms diagnosed as degenerative disc disease and claimed long-term work restrictions imposed in Alabama to protect her back from strain or injury. Claimant re-injured her back at home in July 2005 that led to her surgery four months later with Dr. Backer.

Other than Claimant's assertion of repetitive trauma, there are several likely causes of, or factors contributing to, the symptoms that led to Claimant's need for low back surgery. These are: 1) Claimant's pre-existing severe symptoms diagnosed as degenerative disc disease, including injection therapy (in 2004), 2) the acute injury that took place at home around July 2, 2005 and, 3) the progressive pathology with increasingly disabling symptoms from the degenerative disc disease (unaffected by Claimant's work or a superimposed trauma).

Claimant's chronic low back problems diagnosed as degenerative disc disease prior to her transfer to Missouri is beyond dispute. Treatment over several years including a full set of epidural steroid injections as recently as November 2004 created the need for permanent lifting restrictions. Equally clear is that on or about July 2, 2005 Claimant had a sudden onset of acute low back pain and sciatica while handling clothes at her apartment, which compelled her to seek urgent care two days later. Degenerative disc disease is a progressive condition that advances with age independent of trauma. Again, the legislature excluded "progressive degeneration" from occupational disease. Section 287.067.2 RSMo (2000).

Claimant only worked about three weeks in Missouri prior to her surgery. The 98.1 hours that she logged between March 21, 2005 and April 22 (see above) included two-three days sitting in a classroom and other time spent training on the line working with another transferee and a regular Missouri employee. This *de minimis* exposure to Employer's assembly line is, at once, unknown to Claimant's experts and improbable as an injuring exposure (necessarily unexplained in the record by Claimant's under-informed experts). On June 6, 2005, a visit to Employer's Clinic involved work restrictions that she had been given by her family doctor, however, she admitted that she had not worked under those restrictions since she had been out of the plant on vacation or sick leave since April 22.

Claimant's history and testimony is unreliable regarding the seriousness of her low back condition. She appears not to have mentioned her back problem to Chrysler's medical personnel until April 19, 2005 and then only mentioned her history of back symptoms when giving a medical history when she was undergoing a reinstatement exam after having been out due to chest pain. When next seen in Medical on May 27, 2005, she was again there to reinstate after an absence, this time due to depression and stress, no mention was made of her back and by then she was off work over one month (last day worked was April 22). Although she began seeing Dr. Warren (St. Louis area) on April 25, 2005 she only mentioned stress headaches and insomnia to him. On May 5, 2005 Claimant has the same complaints but added a new complaint, chest pain. On June 10, 2005 she added her shoulder, but not her back.

On July 4, 2005 Claimant went to St. Luke's Urgent Care reporting a sudden onset of low back pain and sciatica on July 2, 2005 at home while handling clothes. She did not go to Dr. Warren for her back until after the July 4<sup>th</sup> treatment and only then did he refer her to Dr. Chapel. When she went to Dr. Chapel, she again dated the onset of her back pain to July 4<sup>th</sup>. Claimant saw Dr. Backer (surgeon) on September 29, 2005 and, again, attributed her low back pain to the event at home. Claimant is neither working nor reporting symptoms on or about the alleged June 6, 2005 injury that she pled. Although Claimant denied some of these notes at trial, it must be observed that there is consistency and cogence in these private treatment records to credit those denials.

Dr. Berkin's qualifications warrant some scrutiny given the longstanding, complicated pathology in issue. To qualify an expert, a witness must have knowledge, skill, training, experience or education supporting the opinion which is intended to aid the trier of fact. Nixon v. Lichtenstein, 959 S.W.2d 854 (Mo.App. 1997). The extent of qualification usually pertains to the weight to be given evidence rather than admissibility. Donjon v. Black & Decker (U.S.), Inc., 825 S.W.2d 31 (Mo.App. 1992). Separately, the facts upon which he based his opinions are not supported by competent evidence. It is well established that there must be competent evidence to support the reasons and facts relied on by a medical expert to give the opinion sufficient probative force to be considered substantial evidence. Silman, supra.

Dr. Berkin's factual suppositions were often incorrect or incomplete: first, he thought that Claimant worked continuously for two months in St. Louis performing a job or jobs requiring bending and lifting whereas she worked less than three full weeks over a thirty day period (March 21 to April 22); second, he was not aware of the contents of the St. Luke's Urgent Care record for July 4, 2005; third, he failed to acknowledge the lack of back complaints (i.e. non-treatment) to Dr. Warren until after July 4, 2005; fourth, he failed to acknowledge that Dr. Chapel did not see Claimant until after the events of early July, 2005; fifth, he failed to mention, much less account for, the history given to Dr. Backer about the date of symptom onset; sixth, he failed to apprise himself of the weight of the side panels that she had to lift and move in the single job to which she has attributed most of her back problems; seventh, based upon the prior and subsequent medical records, there is no basis upon which he could convincingly explain that Claimant's work in Missouri caused a lumbosacral strain "with a protruding disc at L5-S1 and bulging discs at L5-S1 and L1-2.

Similarly, Dr. Poetz's qualifications must be considered given the complex pathology in issue. Nixon, supra. Don Jon, supra. Dr. Poetz is not a surgeon and such expertise is warranted in a surgery case where causation is disputed. This point is made imperative in context with the complicated facts of this case. Again, Claimant's expert's testimony was inexact and inaccurate as the result of unfounded assumptions. First, he stated that Claimant worked "long hours" on the side rail job which is odd since in discussing the alleged shoulder "injury" he wrote that she worked "several months" on her first job in St. Louis, with radiators. Second, when he was discussing the neck claim, he focused on her supposed need to perform a lot of overhead work, not a feature of either the side rail job or the radiator job. Dr. Poetz did not seem to realize that most of the time that Claimant worked on the floor involved training where she did not work on jobs alone but instead shared duties with another transferee and a regular Missouri employee. Third, Dr. Poetz contemplated Claimant beginning stress classes after onset of low back pain approximately June 2005. The record shows Claimant stopped working effective April 22 and had already taken stress classes. Dr. Poetz was not fully informed in this case to render opinions on causation.

Employer's expert, Dr. Cantrell, is a specialist in pain management and he treats patients with spine and joint injuries. He is associated with an office that specializes in orthopedics and sports medicine. His qualifications are somewhat better than Claimant's experts. More importantly, his understanding of the work place exposure and hours worked is reconciled clearly with the balance of the evidentiary record and his testimony, while challenged by Claimant, may not be said, in this case, to be impeached or even refuted.

Dr. Cantrell ultimately opined that L5-S1 surgery in November 2005 was the full manifestation of Claimant’s long-standing history of disabling degenerative disc disease that, if aggravated by any recent (post-transfer) events, it was the lifting incident at home of July 2, 2005. Absent clear evidence that Claimant was exposed to repetitive trauma at work, the July 2 incident becomes a plausible accident event that caused disabling symptoms. The medical record of Dr. Backer compels the conclusion that the non-work event was a substantial factor in leading to Claimant’s need for treatment or contributed to her current permanent disability. Claimant presented insufficient evidence through competent testimony to find a causal connection between Claimant’s work in Missouri and Claimant’s onset of low back symptoms giving rise to surgery. Dr. Cantrell was more persuasive than either Dr. Berkin or Dr. Poetz.

THIRD AND FOURTH CASES ONLY

The 2005 Reform Bill made changes to the laws that affect the third and fourth cases. The parties stipulated a February 28, 2006 injury date for the left knee claim. The standard of proof in effect on the date of this alleged injury is whether the conditions of employment were “the prevailing factor” in causing the harm for which medical treatment was needed and which resulted in the claimed disability. Sections 287.020.3(1), (2). and 287.067.2-3, RSMo. (2005).

THIRD CASE (Knee)

Notice

Section 287.420 RSMo (2005) requires an employee to give the employer written notice within thirty days of the diagnosis of the occupation disease causing the injury. The only exception is where the employer had actual notice and was not prejudiced by the lack of notice. However, the claimant has the burden of proof on both the notice and prejudice issues. In this case, Claimant admitted she did not report the left knee condition to Employer but mentioned to a supervisor that she was having generalized leg pain secondary to her low back condition. As discussed above, Claimant’s testimony is not reliable. Her assertion lacks detail and context that make it worthy of belief. Again, the Clinic Notes comprising Exhibit 3 lend no corroboration to her testimony about reporting knee injury complaints to Employer’s Clinic.

Here, the only event that could constitute actual notice to employer was the filing of the Claim.<sup>5</sup> Thus, Claimant’s claim fails for lack of notice to Employer as prescribed. Claimant failed to comply with the notice requirements contained in Section 287.420.

\* \* \*

Assuming, *arguendo*, that Employer received proper notice, Claimant, nevertheless, failed to present sufficient evidence of exposure and medical causation linking her actual exposure to line work at Employer’s Missouri plant to her knee and neck Claims. Repetitive

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<sup>5</sup> Reference to the minutes reveals a filing date September 11, 2008, about 22 months after her left knee surgery.

trauma injury is compensable “only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.067.3 RSMo (2005).

Moreover, it is necessary to prove, where there was a preexisting condition of the same kind or type, that there was more than a mere worsening of the same condition due to the most recent exposure, Miller v. U.S. Airways Group, Inc., 316 S. W. 3d 462 (Mo. App. 2010). Proof of an aggravation of a preexisting condition is not sufficient to establish a right to compensation unless the aggravations rise to the level of becoming the prevailing factor in causing both the need for treatment and disability. Payne v. Thompson Sales Co., 322 S. W. 3d 590 (Mo. App. 2011)

Dr. Berkin did not examine Claimant’s left knee and was not aware of any claim of work-related injury to that body part since it was not filed until after his examination. Dr. Poetz’s testimony is not credible for a number of reasons, to wit: Dr. Poetz is a family practitioner, not an orthopedic surgeon or physiatrist, and so lacks the qualifications to tender an opinion addressing the issue of whether Claimant’s work caused her to contract an occupational disease affecting her left knee, particularly in this complicated set of circumstances.

Claimant did not work in February 2006 except for her two brief attempts to work on February 13 and 15 which only precipitated a comment that the job that she had been assigned to on the morning of February 13 was jerking her right shoulder. Claimant had not worked since April 24, 2005. Claimant was unclear as to whether her claim of left knee injury was due to standing and waking on concrete at work or due to favoring her left knee due to her chronic low back and right leg symptoms (or both). There is not a single report of left knee pain or other symptoms in any of the medical records prior to the reference to the October 28, 2006 event.

Dr. Poetz lacked the necessary details concerning the claimant’s job duties in Missouri, and the number of hours that she worked in Missouri, to assess whether they created the hazard or risk of causing a torn medial meniscus or degenerative knee joint disease. Dr. Poetz was assuming that the claimant worked “long hours” standing and walking at work, whereas it is admitted that she only worked about two and one-half weeks in Missouri and that did not involve even a forty hour work week during any of the three weekly pay periods. Dr. Poetz contemplated a February 2006 retirement (p. 75), yet embraces the October 2006 onset date without reference to any earlier knee complaints. Accordingly, there is no explanation in evidence as to the medical basis of Dr. Poetz’s supposition that her work caused the pathology that Dr. Moore addressed at the time of his December 2006 surgery. Dr. Poetz did not have any basis to conclude that Claimant’s degenerative joint disease was aggravated by Claimant’s work, since he did not review any pre-allegation diagnostic studies.

Claimant’s knee locked in late October 2006 after not even attempting to work since February 2006 and after not working even a full shift since April 22, 2005. She was found to have an *acute* tear to her medial meniscus that required surgery. Then, in September 2008 she filed a Claim and reached back to her last job to allege a basis to claim workers’ compensation benefits. Claimant’s proffer of evidence is, again, insufficient to prove that the her brief period of work in Missouri was the prevailing factor is causing her need for left knee surgery and causing her to sustain permanent disability.

Dr. Cantrell, at the time of his second evaluation, wrote, and he later testified consistently with his written opinions, that Claimant's torn medial meniscus was due to an acute injury that took place when Claimant's left knee locked on or about October 28, 2006. He rejected any thought that the knee injury resulted from the "micro trauma" theorized by Claimant's attorney. (Exhibit 2, p. 37.) Dr. Cantrell's opinions were better founded and more persuasive than Dr. Poetz.

#### FOURTH CASE (Neck)

Of each of the four cases that Claimant is simultaneously pursuing, this Claim is the claim in which the required treatment was the most remote from her last date of active employment (i.e. April 2005). The stipulated onset date of February 8, 2007, is just a few days short of a year after her last attempt to work in Missouri and about 22 months after the last time that she had been able to work for (nearly) a full shift at Employer's Missouri plant. The first neck symptoms post-transfer were recorded in January 2007 even though Claimant had been under active medical treatment in 2005 and 2006 for her right shoulder, low back and left knee.

Once again, Dr. Poetz's qualification must be considered given the complex pathology in issue. Nixon, supra. Don Jon, supra. As a family practitioner, his emphasis is less focused than Dr. Cantrell's who, while not a surgeon, specializes in spine and joint injury in support of surgeons in his practice. Again, more importantly, his testimony is easily reconciled with the balance of the record. Whereas, Dr. Poetz's admissions regarding omissions in his knowledge of medical and work events undercut the probative value of his opinions. His testimony was inexact and inaccurate as the result of unfounded assumptions and the lack of a documented history of exposure to repetitive trauma or treatment record. Reliance on Claimant's representations to Dr. Poetz is misplaced due to her poor credibility on medical and work events elsewhere in the record. On the other hand, all of the documentary evidence supports Dr. Cantrell's conclusions.

Dr. Poetz attributed her need for neck surgery to her overhead work in Missouri, but if she indeed did any such work after her transfer, it was done in only one of the jobs which she performed in Missouri for a period of one or two weeks. On cross-examination, Claimant could not remember what she performed during her last week of work. Dr. Poetz's inaccuracies in evaluating the other cases bears on his testimony here. As part of the same evaluation, he also attributed an aggravation of her pre-existing right shoulder condition to overhead lifting but attributed her low back "injury" to the claimant's lifting, bending and carrying in a job that did not involve overhead work. He identified nothing ergonomic to predicate repetitive trauma to Claimant's knee. He was mistaken that Claimant worked "long hours" for "several months" in Missouri (see above).

More simply, Dr. Poetz does not explain how his causation opinion reconciles the lack of any neck complaints from the last date of Claimant's active employment in 2005 and her 2007 treatment in Alabama. He fails to reconcile the history that was given to the treating physicians in Alabama describing on onset of significantly increased symptoms sometime in January, 2007 (post-retirement) and Claimant's statement at that same time indicating that her condition was not due to her work. Unexplained in the record is his dismissal of the prior diagnosis of degenerative disc disease and a C5-6 herniation (from 2003) on the representations by Claimant

that she was asymptomatic from then until (presumably) she transferred to Missouri; at the same time, he ignored the absence of verified symptoms from the transfer date until early 2007.

The absence of neck complaints in the contemporaneous medical records is noteworthy. When seen by Dr. Warren on April 25, 2005, three days after her last work in 2005, her neck examination was normal. Even the Chiropractor, Dr. Chapel, listed symptoms no higher than her mid-back and the cervical area was not listed by Claimant or the doctor as a problem area. Neck complaints were also absent from the medical records of Dr. Warren and Dr. Backer that extend into 2006. There is simply no explanation for this lack of documentation other than to conclude that Claimant's need for surgery grew out of her acute onset of non-work related symptoms in January 2007.

The facts of this case are very similar to those in Payne, *supra*. There Claimant attempted to prove that his need for neck surgery was due his having injured his neck while shoveling snow at work. However, he had a history of a prior cervical HNP, failed to report an injury to his employer, failed to complain to his co-workers, failed to seek medical care promptly and when treatment was initially sought, six weeks after the shoveling event, he did not attribute his neck symptoms to an incident at work and stated that his symptoms had been present for 2 days, not 6 weeks. In that case, the ALJ, the Commission and ultimately the appellate court concluded that Payne failed to prove that the activity at work was the prevailing factor in causing his need for treatment and disability. Dr. Cantrell's opinions are better-reasoned and more persuasive than those of Dr. Poetz.

Dr. Cantrell testified that there is no causal connection between Claimant's brief work in Missouri, which ended no later than February 15, 2006, and perhaps as long ago as April 22, 2005, and her need for cervical surgery in February of 2007. He based his opinions on the fact that she had reported cervical complaints dating back to the late 1980's or early 1990's, she had been given the diagnosis of degenerative disc disease and a herniated disc at C5-6 in 2003 and when she finally sought more current treatment for her neck on February 8, 2007 that she reported having experienced a sudden onset of neck pain of unknown cause (but indicated at the time that it was not work related) and 20 days later, on February 28, 2007 she told Dr. Parker that her intermittent neck and shoulder pain had become significantly worse four weeks earlier and that she now also has radiation into her left arm.

#### Notice

Assuming, *arguendo*, a compensable repetitive trauma occupational disease, compensation would have nonetheless been denied due to a failure of notice. The claimant's testimony that she reported neck complaints to one or more of her supervisors in Missouri, and attributed those symptoms to her jobs to which she was assigned, is not credible. There is no record of her having complained to Employer's Clinic of any neck injury whether by accident or repetitive trauma. No mention of current neck symptoms can be found in the records of Dr. Warren, Dr. Chapel, Dr. Backer or of St. Luke's and, as such, cannot be corroborative of Claimant's suggestion that she reported her neck injury to supervisors.

In an occupational disease case, the thirty day period begins to run when the “condition” has been diagnosed. Section 287.420 RSMo (2005). Assuming, *arguendo*, Claimant was not diagnosed with degenerative disc disease and a C5-6 herniation in 2003, her surgery on February 12, 2007, was based upon medical diagnosis from Dr. Parker on February 8, 2007, which commenced the 30 day notice period. Yet, no Claim was filed for another 19 months. Claimant simply is not credible and this leads to the conclusion that she failed to provide the notice that the statute requires.

Conclusion

Accordingly, in the First Case, identified by Injury Number 05-068917, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain her burden of proof. Claim denied. The other issues are moot.

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

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

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award of Administrative Law Judge by Separate Opinion)

Injury No. 05-068918

Employee: Angela C. Neese  
Employer: Chrysler, LLC, Inc.  
Insurer: Old Carco LLC  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award of the administrative law judge by separate opinion.

**Preliminaries**

The parties asked the administrative law judge to resolve the following issues: (1) incidence of occupational disease, which includes exposure and medical causation; (2) permanent disability; and (3) liability of the Second Injury Fund.

The administrative law judge concluded that employee presented insufficient evidence through competent testimony to find a causal connection between employee's work in Missouri and employee's onset of low back symptoms giving rise to surgery.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in misinterpreting and/or ignoring the testimony from employee's experts; (2) in improperly determining that employee lacks credibility; (3) in improperly interpreting the last exposure rule; (4) in misinterpreting the facts and the law with regard to the issue of notice; and (5) in declining to award permanent total disability benefits from the Second Injury Fund.

The Commission affirms the award of the administrative law judge with this separate opinion.

**Findings of Fact**

On January 9, 1984, employee began working for employer in Huntsville, Alabama, as a Tech III. For over 20 years, her primary duties for employer involved working on an assembly line producing components for automobile manufacturing. Employee stood and walked continuously on concrete floors and performed repetitive overhead reaching and lifting tasks.

On March 21, 2005, employee transferred to employer's plant in St. Louis, Missouri. Employee worked 30 hours for employer during the week ending March 27, 2005, and

Employee: Angela C. Neese

- 2 -

32 hours during the week ending April 3, 2005. Of that time, employee spent about 2 days in a classroom, and about 2 weeks undergoing training, during which employee split her duties with another transferee. Employee performed no work for employer during the weeks ending April 10 and 17, 2005. Employee then worked 36.1 hours during the week ending April 24, 2005. After April 22, 2005, employee performed no actual work duties for employer in the St. Louis plant. Instead, she attended a stress class, then took a leave of absence. We find that employee performed less than 3 weeks of actual work in employer's St. Louis plant.

Employee claims that she suffered an occupational disease in Missouri affecting her low back as a result of this approximate 3 weeks of performing her work duties for employer. Employee provides expert medical testimony from Drs. Shawn Berkin and Robert Poetz. We have carefully reviewed the reports and deposition testimony from both doctors. After careful consideration, we find that both of these doctors were provided such limited information regarding employee's job duties in Missouri, the duration of her employment in Missouri, and the timing and onset of her complaints that their opinions lack any persuasive force with respect to the disputed issues in this matter.

For example, when asked whether he knew how long employee worked in Missouri, Dr. Berkin revealed his erroneous assumption that it was "probably" a couple of months, and that he "guess[ed]" employee developed symptoms at that time. *Transcript*, pages 298, 304. Dr. Poetz, meanwhile, seemed even less sure of the relevant facts involved in employee's claim: he admitted he didn't know the duration of employee's work in Missouri, and did not even know the significance of her claimed date of injury. Both doctors rendered purely conclusory opinions in their reports, and failed to persuasively explain any causative interaction between employee's job duties in Missouri and the purported occupational disease sustained in Missouri. Both doctors also failed to persuasively distinguish the purported occupational disease sustained in Missouri from employee's preexisting conditions affecting the low back.

It may have been (indeed it appears to be the case) that employee's years of work for employer in Alabama contributed to or caused some of the injuries she claims herein, but we find that employee has failed to provide persuasive medical evidence that she contracted any identifiable occupational disease in this state.

Employer hired employee in Alabama; it follows (and we so find) that her contract for employment was not made in Missouri. Because employee only performed her actual job duties for employer for about 3 weeks in Missouri before participating in the stress class and taking a leave of absence, we find that her employment was not principally localized in Missouri within 13 calendar weeks of her suffering any identifiable injury or occupational disease.

Employee: Angela C. Neese

**Conclusions of Law**

Application of Chapter 287

Section 287.110.2 RSMo provides, as follows:

2. This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

We have found that employee did not contract any identifiable occupational disease in Missouri, that her contract for employment was not made in Missouri, and that her work was not principally localized in Missouri within 13 calendar weeks of the injury or diagnosis of occupational disease. It follows that employee has failed to satisfy the requirements of § 287.110. Accordingly, we conclude that Chapter 287 does not apply to employee's injuries.

We additionally wish to make clear that, if it were shown that Chapter 287 did apply to this claim, we would deny it on the issue of medical causation, owing to employee's failure to provide persuasive expert medical opinion evidence.

**Conclusion**

Employee's claim is denied because Chapter 287 does not apply to her injuries.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 13, 2014, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 11<sup>th</sup> day of March 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

\_\_\_\_\_  
James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

# AWARD

Employee: Angela C. Neese Injury No.: 05-068918  
Dependents: N/A  
Employer: Chrysler LLC, Inc. Before the  
Division of Workers'  
Compensation  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri  
Additional Party: Second Injury Fund  
Insurer: Old Carco LLC  
Hearing Date: February 6, 2014 Checked by: JED

## 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: June 6, 2005 (alleged)
5. State location where accident occurred or occupational disease contracted: St. Louis County (alleged)
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 happened or occupational disease contracted:  
Employee alleged injury by repetitive trauma from Employer's assembly line.
12. Did accident or occupational disease cause death? N/A 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? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$675.90/\$354.05
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

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

TOTAL: -0-

- 23. Future requirements awarded: N/A

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

The compensation awarded to 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 Claimant:

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

Employee:	Angela C. Neese	Injury No.:	05-068917
Dependents:	N/A		
Employer:	Chrysler LLC, Inc.		
Additional Party:	Second Injury Fund		
Insurer:	Old Carco LLC		
Hearing Date:	February 6, 2014	Checked by:	JED

Before the  
**Division of Workers’  
 Compensation**  
 Department of Labor and Industrial  
 Relations of Missouri  
 Jefferson City, Missouri

This case involves four separate Claims for Compensation: 05-068917(May 27, 2005), 05-068918 (June 6, 2005), 06-135663 (February 28, 2006) and 07-134224 (February 8, 2007). The testimony and exhibits in this record constitute the evidence in each Claim. Each Claim follows Claimant’s transfer to St. Louis after many years in an Alabama plant. Each Claim is disputed by Employer. Separate Awards issue on each Claim. These cases may be referred to herein as the first, second, third and fourth cases, chronologically.

Employer admits Claimant was employed on each of the reported dates of injury and that any liability was fully insured. Claimant admits she was not at work on any of the alleged injury dates. The Second Injury Fund (“SIF”) is a party to this claim. Claimant seeks PTD benefits against the SIF in the fourth Claim. Both parties are represented by counsel. Objections at expert depositions are ruled upon consistent with the findings herein.

Issues for Trial

*Third And Fourth Cases*

1. notice;
2. occupational disease (exposure and medical causation);
3. nature and extent of permanent disability;
4. liability of the SIF;

*Fourth Case Only*

5. Rate of Compensation

**FINDINGS OF FACT**

Claimant is a 54 year old native of Alabama. She has a high school diploma. Claimant began working at Chrysler’s electronics plant in Huntsville, Alabama in 1984. She worked continuously there until she transferred to the Missouri plant in early 2005. Transfer became an option when the Huntsville plant was purchased by Siemens. After some transition, employees were told they had the choice of remaining in Huntsville and becoming a Siemens employee or transferring to some other Chrysler plant. Claimant opted to transfer to Chrysler’s van plant Missouri, in order to retain her seniority. Her intention was to continue to work at Chrysler until she reached the 30 year milestone even though it would require her to live apart from her family.

When she transferred, she rented an apartment in the St. Louis area while her husband remained in the family home in Athens, Alabama, a town that is quite close to Huntsville.

The Huntsville plant produced electronic dashboard components such as radios and CD players that are inserted into dashboards that would be installed in a Chrysler vehicle at a plant elsewhere. The Huntsville job involved standing, reaching above shoulder level, lifting, carrying and the use of power tools. Separately, Claimant also worked as a part-time employee benefits representative. About a year before the transfer, Claimant became a full-time benefits representative. She continued to work on the line on weekends as needed. The benefits representative job allowed her to sit most of the time although she would go into the plant to speak to employees who had benefit issues.

Long before, in the late 80's or early 90's, Claimant began to notice neck and shoulder symptoms. She underwent a myelogram of her neck in 1989. Claimant required four surgical procedures on her right shoulder, including two scopes, an open procedure to repair a torn rotator cuff and another open procedure to remove the surgical staples. She also developed back problems that required her to undergo a lumbar MRI and epidural steroid injections. She had undergone a series of injections in Alabama as recently as November of 2004, five months before her transfer to Missouri. The shoulder and back problems were, at least in part, handled as workers' compensation injuries but no formal "claim" was filed in Alabama.

Claimant transferred to Missouri effective March 21, 2005. For the first 2-3 days she was in classroom training. She then went out on the assembly line and spent the next 1-2 weeks working with a local employee and another transferee as the two new employees learned to perform the various jobs that they would have to do as "floaters." At trial, Claimant agreed with the work hours reflected by Employer's pay records:

30 hours for the pay period ending March 27, 2005  
32 hours for the pay period ending April 3, 2005  
36.1 hours for the pay period ending April 24, 2005.

Claimant never successfully returned to (actual) work on the plant floor after April 24, 2005.<sup>1</sup> The paid hours in March and early April included her classroom training and the 1-2 weeks sharing a job with a regular worker and another transferee. Claimant was subsequently out ill with stress and later took a leave of absence. She admitted she was paid 28 days during stress classes. Claimant never worked again except for the one day attempted in February 2006. (T. 79-83.)

### *Clinic Notes & Reported Injuries*

#### **Right Shoulder (First Case)**

Claimant asserted that when she was transferred that she brought with her certain work restrictions in place, including no overhead work and no lifting more than five pounds with her right arm. These were permanent restrictions given to her in Alabama due to her long-standing shoulder and back conditions. Claimant alleges that the plant in Missouri would not accept those

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<sup>1</sup> All four alleged injury dates are subsequent to April 24, 2005.

restrictions and kept assigning her to jobs that violated the restrictions or that otherwise bothered her right shoulder and back. After working during the first two weekly pay periods in Missouri she left the job to attend an employer sponsored stress class where she was off-work but paid for four weeks. During this period she saw a psychiatrist in St. Louis and returned to Alabama and visited her PCP in order to obtain documentation to show the employer's plant physician of her long-standing restrictions.

Thereafter, Claimant returned to work in late April 2005 but worked less than one week when she again took leave effective April 22, 2005. Claimant was off-work for chest pain secondary to costochondritis injury in April 2005 (in Alabama). (See Exhibit 3.) Claimant did not return to work in 2005; Claimant never attempted a return to work on the line after April 2005 until her unsuccessful attempt to return to work in February 2006, nine months later.

Claimant testified that she complained to the Clinic that her back and shoulder were bothering her due to the more strenuous work that was being assigned and mentioned her long-standing work restrictions from Alabama. The lack of medical paper work confirming her restrictions is one of the reasons why she went back to Alabama while she was on leave.

According to the plant clinic records (Exhibit 3), Claimant first came into Medical, after her transfer, on April 18, 2005. On that date she reported having developed chest pain after rolling over in bed while in Alabama on vacation. A note from a Dr. Gross was presented to Employer's Clinic but was questioned since it appeared to the doctor to have been altered. She returned to Employer's Clinic on April 19, 2005 for her return to work assessment at which time she gave her prior history of bulging [low back] discs that had required injection therapy. On May 27, 2005 Claimant underwent a reinstatement exam after having been out for depression and stress with a last date worked of April 22, 2005. Although she was cleared for work with no restrictions on May 30, 2005, she never actually worked again.

Two notes of June 6, 2005, appear to be reports or complaints of longstanding symptoms in which no new injuries are identified.<sup>2</sup> These notes contain Claimant's report that she has not worked overhead since shoulder surgery; the plant in Alabama had no overhead work and she was in an "appointed position" and did not work the floor except during overtime and thus limited use of her right arm.

According to Exhibit 3, Claimant did not (attempt) return to work until February 13, 2006. On that date, and when the Plant again tried to place her on February 15, 2006, Claimant worked at most an hour or two on the line before she was sent home. She never returned to work again except to confirm her disability status.

The first treatment that Claimant received in Missouri (and outside the plant clinic) appears to have taken place on April 25, 2005 when she began seeing Dr. Leo Warren, a primary care physician. Her complaints to Dr. Warren involved headaches, insomnia and depression associated with her job transfer and separation from her family in Alabama (Exhibit T). She claimed that she felt overwhelmed and she hurt all over and admitted to a history of anxiety and depression for which she had been given Lexapro by her GYN physician in Alabama. She

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<sup>2</sup> This is contrary to the pleaded low back injury Claim (second case) of the same date.

returned to Dr. Warren on May 5, 2005 with those same complaints but added a complaint of chest pain.

Only on her next visit, on June 10, 2005, did she mention problems with her right shoulder, provided a history of her past shoulder problems and mentioned that the local company doctor won't accept her paperwork related to her restrictions so she intended to return to Alabama to have the restrictions renewed. [On July 10, 2005 she returned to Dr. Warren with new history of low back complaints adding that she had to visit an urgent care facility for these complaints. See Low Back case below.]

Claimant was seen by Dr. Tindell in Alabama in June 2005 complaining of right shoulder problems. The first *treatment* that she had for her shoulder after her transfer was while on a leave of absence. Dr. Tindell's history is that she had been doing more strenuous work since her transfer and that the plant physician was not accepting her work restrictions and she needed copies of her documentation. Although Dr. Tindell suspected a rotator cuff tear, and after an MRI, his final diagnosis was bursitis and tendinitis which is consistent with the known chronic condition comprising four surgeries. He prescribed medication and work restrictions but Claimant never returned to work. He proscribed any lifting over twenty pounds

#### Low Back (Second Case)

Between the June 10<sup>th</sup> and July 10<sup>th</sup> visits to Dr. Warren, she required urgent care treatment at a facility operated by St. Luke's Hospital. (Exhibit S). The history on July 4, 2005 was sudden onset of low back pain and right sciatica while turning to place some clothes in a basket in preparing to go to the pool. She was given pain medication and muscle relaxers and given lifting and other restrictions. This first report of back problems to Dr. Warren was followed by referral to Dr. Chapel, a chiropractor.<sup>3</sup>

Although the records are difficult to decipher, it appears that Claimant went to Dr. Chapel first on July 25, 2005 complaining of worsening low back pain, including radicular symptoms ("numbness in toes") which had its initial onset 3 years earlier with an aggravation "3+ weeks" earlier (elsewhere "'7/02/05"). Her pain was noted at seven on a 1-10 scale. An MRI at St. Luke's on July 25, 2005 revealed bulging discs with a central protrusion at L5-S1. (Exhibit R.) Dr. Chapel continued to see Claimant, periodically, beyond her low back surgery and, as late as April 11, 2006, she was still dating the onset of her back and leg problems to July 5, 2005. The questionnaire asking whether the condition is related to an "automobile accident or on-the-job injury[.]" Claimant responded, "No." (Exhibit Q.)

Dr. Warren then referred Claimant to Dr. John Moore (whose records are not in evidence) who apparently performed steroid injections, without lasting relief. Claimant next saw Dr. Backer on September 29, 2005. She filled out a form on which she indicated that the duration of her symptoms were from July, 2005 "this time about 3 months" and the "context" was "at home". (Exhibit H.) Dr. Backer also wrote a letter to Dr. Warren in which he states that Claimant has had chronic back pain on and off "but worse since July of 2005". Dr. Backer performed an inter-body fusion at L5-S1 for degenerative disc disease (a herniated disc was not

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<sup>3</sup> Dr. Chapel's records are presented in two separate Exhibits, Q and R.

found) on November 7, 2005. Claimant subsequently continued to complain of symptoms despite the surgery. Claimant followed up with Dr. Backer and Dr. Warren. Claimant's February 2006 attempted return to work was unsuccessful. She returned to Alabama soon after that and continues to seek pain treatment, initially from a Dr. Gaines, and now from a Dr. Hendrix.

#### Left Knee (Third Case)

Since Claimant left Chrysler and returned to Alabama she has required left knee surgery. She attributes this problem to her long history of standing and walking in the Alabama and Missouri plants and perhaps to favoring her leg due to her back problems. She admits that she never specifically complained about her left knee to Chrysler and the first mention of a knee problem is on October 28, 2006 when she was examined at SportsMED. Claimant stated that her left knee just locked up when she stood up. (Exhibit J.) An MRI showed some degenerative changes in the knee which led to left knee surgery by Dr. Moore for a medial meniscectomy in December 2006.

#### Cervical Spine (Fourth Case)

As to the cervical condition, Claimant has experienced neck and shoulder area pain since the late 1980's and admitted having a cervical myelogram as early as 1989. This then has been a chronic problem for which she had no medical treatment during the time that she resided in Missouri. However, on February 28, 2007, while seeing Dr. Parker in Alabama, she reported having had intermittent neck and bilateral shoulder pain in the past that became significantly worse approximately "four weeks ago" with radiation into her left arm. (Exhibit O.) Also, twenty days earlier, on February 8, 2007 she had filled out a SportsMED pain questionnaire indicating that her neck pain had begun suddenly, and checked a box indicating no apparent cause and another box indicating that the problem was not work related. (Exhibit J.) Claimant subsequently underwent cervical fusions in 2007 and 2009.

#### Current Complaints

Claimant currently complains of low back, neck and leg pain. Claimant has longstanding symptoms that disrupt her daily activities, prevent her from playing with her grandchildren, limit how far she can drive, how long she can sit or stand, make housework difficult and significantly limit her recreational activities. She must recline several times a day for relief and takes pain medications, medications to relax her muscles, allow her to sleep and to improve her mood. Her right shoulder is weak, she cannot use her arm above shoulder level and feels that she has lost 25% or more use in the arm. Claimant doesn't believe that she can work in any capacity and has turned down offers to work in a clerical capacity at a friend's pet grooming business since she doesn't believe that she would be a dependable employee. She has no specific left knee complaints at this time. Claimant is on Social Security Disability and receives a permanent total disability pension from Employer. Her husband continues to work at a bank. Her husband drove her to St. Louis for the trial but they had to make periodic stops due to her symptoms.

Opinion Evidence*Dr. Berkin*

Claimant offered the 2008 deposition of Dr. Shawn Berkin, as Exhibit F. Dr. Berkin examined Claimant and reviewed medical records. Dr. Berkin issued a report dated December 15, 2007. (Exhibit B). (It should be noted that Dr. Berkin offered opinions on the 2005 Claims only; the other two Claims were filed after his evaluation.) Later, he prepared a one-page report dated April 28, 2008. (Exhibit 4.)

Dr. Berkin was told that her complaints started in June 2005 after she was assigned to a job at Chrysler requiring her to lift 600 side panels for vans per shift. Although she admitted to having a history of low back pain dating from 2001, she stated that as she worked in St. Louis, her back pain worsened requiring her to seek medical treatment at the plant Clinic and later by Dr. Warren, Dr. Chapel and Dr. Moore and others for conservative care. Dr. Berkin said Claimant had a pre-existing low back condition for which he agreed, "she largely received conservative treatment" (p.16). He was apparently unaware of the steroid injections from 2004 in Alabama.

An MRI in July 2005 revealed disc bulging at several levels in the lumbar spine, more pronounced at L5-S1. When the conservative care did not achieve the hoped-for results, she was referred to Dr. Robert Backer who performed an inter-body fusion at L5-S1 in November 2005. However, Claimant continued to complain despite a post-surgery MRI showing solid fusion. Pain treatment was instituted in St. Louis but was transferred to Alabama when Claimant decided to return to her home there.

Claimant complained to Dr. Berkin of having pain, tightness, stiffness, spasm and loss of motion in her low back which affects her ability to carry out her usual activities. Dr. Berkin was aware of her then-recent history of cervical surgery, her history of low back treatment for degenerative disc disease and her history of multiple right shoulder surgeries. On physical examination, Dr. Berkin noted a loss of lumbar motion, positive SLR on the left, and pain on muscle stretching and squatting although many of her reflexes were normal. The examination of her upper extremities was consistent with her remarkable history of multiple right shoulder surgeries.

Dr. Berkin diagnosed low back strain, bulging at L5-S1 and L1-L2 and status post low back fusion. He opined that the strain with protruding discs was due to Claimant's "industrial accident that occurred in June of 2005 as the result of repetitive bending and lifting . . . at Chrysler." Dr. Berkin then assigned a 35% PPD due to the "injury" and added a 10% PPD preexisting due to her earlier low back symptoms and treatment and also provided a preexisting rating of 35% of the right shoulder.

On cross examination Dr. Berkin admitted that Dr. Parker had suspected an annular tear in 2003 (in Alabama) and confirmed that Claimant's symptoms had developed gradually over time. He also agreed that on exam he found no muscle spasm, SLR on the right was negative and normal sensation and nerve function were present. Dr. Berkin stated that it was his impression that Claimant worked in Missouri for about two months but he didn't know how much weight

she lifted and what other jobs she may have done as a floater. He also admitted a diagnosis of degenerative disc disease. He admitted that a herniated disc was not identified and he agreed that she developed the lumbar degenerative disc disease despite her lighter job in Alabama.<sup>4</sup>

It should be noted that Dr. Berkin prepared a subsequent report dated April 28, 2008 in which he reiterated that all of Claimant's disability in her right shoulder preexisted her transfer to Missouri. (See Exhibit 4.)

*Dr. Poetz*

Claimant offered the deposition of Dr. Robert Poetz as Exhibit A. His narrative report is marked Exhibit E. Dr. Poetz opined in all four cases herein. His examination of Claimant took place on March 18, 2009.

Dr. Poetz listed Claimant's complaints, recorded a history of her various jobs in Alabama and Missouri and reviewed medical records up to the date of the evaluation. Physical examination reflected a loss of motion in all planes of the right shoulder, poor grip strength bilaterally, left knee crepitus, some diminished range of motion in the left knee, a loss of motion in all directions in both the low back and neck, positive SLR bilaterally and surgical scars were present in the right shoulder area and on the neck and low back, as well as portal scars over the left knee.

Dr. Poetz diagnosed prior right shoulder decompression times two with right shoulder rotator cuff tendinitis and impingement syndrome due to the "injury" of May 27, 2005. He diagnosed preexisting lumbar degenerative disc disease with L5-S1 disc protrusion with intractable back pain and aggravation of the degenerative disc disease due to the "injury" on June 6, 2005 requiring fusion surgery. He diagnosed preexisting degenerative joint disease in the left knee with a medial meniscus tear and aggravation of the DJD secondary to the "injury" of February, 2006. Finally he diagnosed preexisting cervical DDD with a herniated C5-6 disc that required fusion surgery due to the "injury" of February, 2007.

Dr. Poetz rated Claimant's preexisting disability at 30% of the right shoulder, 5% of the low back, 5% of the left knee and 5% of the neck and rated the successive "injuries" at 15% of the right shoulder, 40% of the body related to the low back, 35% of the left knee and 40% of the body related to the neck and went on to state that he believed that Claimant is permanently and totally disabled due a combination of the preexisting disabilities and the disabilities that resulted from the four "injuries" giving rise to the four pending claims.

On cross examination Dr. Poetz admitted that he had not reviewed the earlier IME reports of Dr. Berkin so was not aware that Dr. Berkin had stated that all of the disability in Claimant's right shoulder disability pre-existed her transfer to Missouri. Moreover, he admitted he did not know how much overhead work Claimant performed in Missouri compared to how much, if any, she had done in Alabama. He was asked about how long Claimant worked in the Missouri plant:

Q: And do you know how many months, weeks, days, or hours that  
[Claimant] worked in Missouri after she transferred from Alabama?

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<sup>4</sup> Dr. Berkin did not enunciate a degenerative process in the diagnoses or impressions of his narrative report.

A: I do not.

(Exhibit A, p. 40.)

Regarding low back symptom onset, Dr. Poetz agreed that, first, the first back complaints reported to Dr. Warren and Dr. Chapel *post-dated* the event at home in July, 2005. Second, that Claimant history to Dr. Backer attributed her acute complaints to that July event at home. Third, that nowhere in the plant Clinical Notes is there any report of a back injury related to her job here in Missouri. Fourth, that she couldn't have been injured at work in February, 2006 (when she tried to go back to work post-surgery) when lifting a heavy box if she had in fact refused to lift the box due to the risk of a back injury. Also, Dr. Poetz admitted he found no history of low back injury in the Clinic Notes of Employer despite giving direct testimony of an "injury" on June 6, 2005. He also admitted that the February 2006 failed attempt to return to work was recorded in the Clinic Notes as pain with slight bending and refusal to lift a box contrary to her restrictions. (p. 48, 49.)

Dr. Poetz also acknowledged that the cervical herniated disc at C5-6 was a diagnosis that had been made in 2003 so was prior to her transfer to Missouri. As to the left knee, Dr. Poetz was not aware of how much standing and walking on concrete Claimant had done in Alabama or in Missouri, and that Claimant has attributed the knee condition to both walking and standing at work and also to, perhaps, favoring her leg due to her back condition. He was also aware that a lumbar MRI had been done in 2002 and again in 2005 but the latter was only sought after the event at home in July 2005. He could not tell if the disc bulges were present prior to that event.

*Mr. Lalk – Counselor*

Claimant offered the deposition of Mr. Timothy Lalk, vocational rehabilitation counselor, as Exhibit C and his narrative report as Exhibit D. Mr. Lalk conducted an interview and records review. Lalk's report contains a detailed medical history, a description of Claimant's work at Chrysler in Alabama and Missouri, a list of her complaints and capabilities, a family and social background, and an educational background and vocational history. Lalk also performed testing that showed that she reads at a high school level, her math skills were at a 7<sup>th</sup> grade level and that overall, she scored at an 11.4 grade level, making her a candidate for post-secondary training. However, when Lalk took into consideration Claimant's reported symptoms and limitations as well as the various limitations placed upon her by the various physicians whom she has seen, Lalk concluded that she was incapable of competing in the open labor market due to her high pain level and the need to recline periodically throughout the day, although Claimant does have the potential to be retrained for work that she might be able perform even with her current limitations.

On cross-examination, Mr. Lalk admitted that he had not seen the medical reports of either Dr. Berkin or Dr. Cantrell. He further admitted that it was his understanding that Claimant was able to continue to work at the Huntsville Plant because the jobs that she performed there did not require overhead work or heavy lifting, particularly the job as the benefits representative. He also did not know the requirements of the benefits representative job and agreed that, but for her claim that she had to recline periodically during the day, Claimant would be able to perform that

work currently. Lalk also agreed that it is difficult to motivate and place a worker whose options are limited to entry-level jobs in which they would earn less than they are currently receiving in disability benefits. The witness also agreed that he saw no medical records or reports that indicated that a physician had advised Claimant to recline to reduce or alleviate her symptoms and saw no reports in which she has been deemed to be permanently and totally disabled.

*Dr. Cantrell*

Employer offered the deposition of Dr. Russell Cantrell as Exhibit 1 and 2. He examined claimant and reviewed medical records. A second examination and second deposition occurred due to Claimant's successive Claim filings. Claimant gave a history of prior right shoulder injury and treatment in Alabama with the resulting permanent work restrictions and her prior history of low back symptoms which also resulted in work restrictions on lifting and overhead work. Her work in Alabama was such that these restrictions could be accommodated. However, she claimed that when she transferred to Missouri and started to use power tools suspended overhead and was required to bend and lift, and her right shoulder and low back pain increased despite the efforts that were made to find work that she could perform. Due to an episode of acute back pain and sciatica occurring on July 2, 2005 surgery proved necessary and thereafter Claimant was never able to return to work successfully.

Dr. Cantrell performed a clinical examination which was positive for a twenty-five percent loss of motion in the right shoulder, tenderness with deep palpation in the low back area, a moderate loss of motion in the low back and low back pain with SLR (although SLR was negative for radicular symptoms) She was found to have good muscle and nerve function in both her upper and lower extremities.

Dr. Cantrell stated that he did not believe Claimant's work in Missouri was a substantial factor in causing her need for low back surgery. His opinion was based upon, first, the lack of findings by the surgeon of an acute condition such as a herniated disc; second, the fact that the low back pain was due to long-standing DDD; and, third, the fact that the acute condition was triggered by the July 2, 2005 lifting incident at home as per the surgeon's notes.

Regarding the right shoulder, he did not believe that her work in Missouri caused additional injury to her right shoulder. Dr. Cantrell was given the hours worked by Claimant upon transfer to Missouri (detailed above). As a result of this lack of causation, Dr. Cantrell did not attribute any PPD in her low back or shoulder to her work in Missouri although he did believe that some work restrictions were appropriate due to these established pathologies.

On cross examination, Dr. Cantrell admitted that Claimant's work in Missouri was more strenuous than that which she performed in Alabama, that she did have to lift, carry and place metal parts and that surgery was not recommended until after her transfer, but he would not agree that Claimant's shoulder symptoms in June of 2005 might have masked her low back pain or that the pain that she experienced on July 2, 2005 was just a manifestation of an earlier injury, particularly since she attributed the acute symptoms to lifting at home. These acute symptoms at home follow longstanding degenerative disc disease that predates Claimant's transfer to Missouri.

\* \*

When Dr. Cantrell re-examined Claimant on April 22, 2013, he updated Claimant's medical history and complaints. He reviewed additional medical records, particularly those involving Claimant's left knee and neck. His physical examination continued to show loses of motion in the neck and low back, pain on movement but no muscle spasm. There was physical and documentary evidence of the two cervical operations and the left knee surgery.

Dr. Cantrell commented on the treatment records that revealed neck complaints going back to the late 1980's but which were not persistent through Claimant's work in St. Louis. Instead, these symptoms developed long after she left her employment at Chrysler per the statements that she made to several of her treating physicians in Alabama.

Based upon Claimant's medical history before her transfer, the limited amount of time that she worked in Missouri, and the information contained in the post-employment medical records from Alabama, Dr. Cantrell concluded that there is no medical causal connection between Claimant's work in Missouri and her need for neck and left knee surgery. As to Claimant's ability to work, Dr. Cantrell believes that she can do sedentary work or light duty at most. He also stated that his opinions regarding the low back and right shoulder have not changed since his first examination and deposition.

On cross examination, Dr. Cantrell stated that his opinion regarding the causation of Claimant's torn knee cartilage is consistent with her history of experiencing an onset of acute knee pain and locking upon standing and turning and would not agree with the supposition that the injury could have been due to a history of micro trauma to the knee over time at work.

#### *Claimant's Credibility*

Claimant's testimony was unreliable historically and unconvincing regarding her association of serious chronic symptomatology with the *de minimis* total work hours recorded in Missouri between March 21 and April 24, 2005. No new injuries are documented during either her three weeks of work or her few weeks of training. Only with the advent of a non-work related injury are treatable symptoms reported by Claimant, to her private physicians, as occurring at home. Her testimony was uncorroborated with the medical treatment record. Treatment with Dr. Warren began on April 25, 2005 for symptoms of insomnia and depression. Rather it correlates with pre-transfer medical events (in Alabama) or post-April 2005 events; as admitted, Claimant never returned to work after April 2005.

#### RULINGS OF LAW

All four Claims allege regular work duties on Employer's assembly line caused occupational disease. Repetitive trauma occupational disease claims necessarily fail without substantial exposure to a demonstrated repetitive trauma. Here, all alleged injuries (and exposures) are uncorroborated in Employer's Clinic Notes comprising Exhibit 3 (admitted without objection). The Clinic Notes are the only comprehensive medical record during the relevant times herein. A review of these notes reveals employee used the Clinic for both

personal and work-related medical conditions. Records of private providers do not reflect symptoms or work histories that might predicate either repetitive trauma or new injuries.

Claimant's four cases each plead onset dates that are not preceded by any sustained work period; the third and fourth cases plead onset dates subsequent to Claimant's retirement.

### Incidence of Occupational Disease

#### *Exposure and Medical Causation*

Injury alleged to have occurred by repetitive trauma is compensable under Chapter 287. Section 287.067.7 RSMo (2000). A claimant must prove all the essential elements of the case. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo.App. 1990). Dolen v. Bandera's Cafe, 800 S.W.2d 163, 164 (Mo.App. 1990). A claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo.App. 1988). A claimant must identify a hazard of occupational disease to which he was exposed on his job. Section 287.063.1 RSMo (2000). A two pronged test remains the law: (1) proof of an exposure greater than that which affects the public generally and (2) proof of a recognizable link between symptoms of the condition or disease and a distinctive feature of the job. Lytle v. T-Mac, 931 S.W.2d 496 (Mo.App. 1996). Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 48 (Mo.App. 1999).

Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). Silman, 891 S.W.2d at 175. As with all proofs in complex medical evidence, 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. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

The standard of proof that was in effect in May and June 2005 (i.e. first and second cases) is proof that the conditions of employment were "a substantial factor" in causing the harm for which medical treatment has been needed and which has resulted in the claimed disability. Sec. 287.020.2. RSMo. 2000. The "a substantial factor" standard does not require proof that the work was the predominate cause but the work must be more than merely a triggering or precipitating factor. It must be noted that the legislature excluded "progressive degeneration" from occupational disease. Section 287.067.2 RSMo (2000).

As with all proofs in complex medical evidence, 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. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Here, both of Claimant's experts were shown to have been either under-informed or misinformed about Claimant's work exposure in the Missouri plant. Claimant herself admitted she did not know what she was doing during her last week of work (T. p. 81). Dr. Berkin was

unaware of Claimant's pre-transfer low back condition requiring injection therapy in 2004. Missouri courts have held that it is reasonable to expect experts to be fully informed. Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

#### FIRST CASE

Here, Claimant is attempting to prove that her work in Missouri caused her to contract an occupational disease that re-injured her right shoulder. Before her transfer, she had undergone four surgeries on her shoulder and claims to have had permanent restrictions of no overhead work or lifting greater than five pounds with her right upper extremity. Her work in Alabama did not approach these restrictions and she was able to continue her job there. The question presents what effect, if any, did her very limited work in Missouri have on her right shoulder and was that claimed exposure sufficient to constitute a substantial factor in causing a compensable repetitive trauma injury. Apparently, a least one of Claimant's jobs here did involve her needing to pull a power tool down from overhead and she did have to do some lifting in at least one other job. However, when measured against the few hours worked in Missouri, Claimant exposure to each of these positions necessarily reduces exposure to the other the other.

Claimant offered testimony from two different experts. However, Claimant's opinion evidence is unsupported by treatment records or ergonomic facts that give probative force. Dr. Berkin, reviewed Dr. Tindell's shoulder treatment records, but nevertheless, attributed all of the right shoulder disability to the 1985 shoulder injury. He reiterated the point later in a supplemental report. Dr. Poetz contradicts his co-expert and baldly asserts a causal connection, diagnosing tendinitis and impingement syndrome (her "injury") and thirty percent PPD. However, no right shoulder problems or symptoms appear in the Medical Department records until June 6, 2005, just over six weeks after she has last worked on the line.

It was not until four days later, on June 10<sup>th</sup>, that she first mentions her right shoulder *history* to Dr. Warren (whom she began seeing since the day after her last day of employment in 2005, or April 25). The first *treatment* that she had for her shoulder after her transfer was that which she received from Dr. Tindell in Alabama beginning on June 21, 2005 while on a leave of absence. Dr. Tindell's final diagnosis was consistent with the known chronic condition (comprising the four surgeries in Alabama). Claimant last shoulder treatment was two weeks later but she claims she had some therapy for her shoulder while treating for her low back in the following months.

Employer's clinic notes contained no suggestion of new injury and only one reference to work restrictions. The only treatment records are the two weeks with Dr. Tidell in Alabama who diagnosed chronic conditions and provided medications. Dr. Poetz's reliance on Dr. Tindell's notes is misplaced inasmuch as the notes neither predicate new symptoms nor document sufficient ergonomic details of exposure. Regarding ergonomics, Dr. Poetz admitted on cross-examination that he did not know how much overhead work Claimant performed in Missouri. Dr. Poetz does not appear to have been properly informed about Claimant's mere three weeks (approximately thirty hours each) of actual floor work in Missouri acknowledged by Claimant at trial. As a result, Dr. Poetz was materially misinformed, or mistook, the description and duration

of Claimant's *de minimis* exposure. Admission of a contrary matter weakens the value of expert opinion. DeLisle v. Cape Mutual Insurance, 675 S.W.2d 97 (Mo.App. 1984).

Claimant's *condition* is not disputed. Nevertheless, Dr. Poetz's report and testimony provides no support for his disability rating since he doesn't even state that Claimant's pre-existing symptoms and findings have changed or increased as a result of Claimant's work in Missouri. Dr. Berkin rejected shoulder disability from work in Missouri flatly. Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). On the other hand, Dr. Cantrell testified that he found no evidence that Claimant's Missouri employment resulted in any additional injury to the right shoulder and, as such, assigned no disability beyond that which was present prior to her transfer.

This Claim then involves a situation where an employee with a significant chronic disabling injury transfers to a new job and experiences an increase in symptoms when asked to do work that arguably exceeds practical work restrictions but where there is no showing that the work (just three weeks, or more) caused any change in the underlying pathology or any increase in disability. Dr. Poetz described in detail some job procedures unsourced in his notes and not to be found elsewhere in the record, including Claimant's own direct testimony. The evidence demonstrates, at most, that Claimant's brief work exposure in Missouri resulted in temporary exacerbation of subjective shoulder complaints. This temporary triggering or precipitation of longstanding symptoms where the triggering or precipitation did not rise to the level of a "substantial factor" in causing a new "injury" that constitutes an independent occupational disease.

Dr. Cantrell's testimony is more persuasive for three reasons. He was better informed about the exposure, especially the duration of any alleged exposures. His conclusions are reconcilable with the balance of the record, particularly the pre-transfer medical record. Dr. Cantrell never was impeached or confronted with a mistaken fact of assumption. Claimant failed to establish by a preponderance of credible evidence that permanent disability, if any, was the result of the subject exposure and not that of a non-compensable, or prior, or subsequent event. See Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

## SECOND CASE

In this Second Case, alleging low back injury, Claimant's experts are found to lack sufficient bases to conclude a work injury occurred during Claimant's brief work in Missouri. Although Claimant underwent surgery in November 2005, Claimant had worked only a few weeks before taking a leave of absence. Approximately a month later, without having returned to work from her leave of absence, Claimant reported a lifting accident at home causing low back symptoms prompting her to seek treatment. The at-home accident history is traced in the records of her private providers. Prior to her transfer to Missouri, Claimant had developed substantial low back symptoms diagnosed as degenerative disc disease and claimed long-term work restrictions imposed in Alabama to protect her back from strain or injury. Claimant re-injured her back at home in July 2005 that led to her surgery four months later with Dr. Backer.

Other than Claimant's assertion of repetitive trauma, there are several likely causes of, or factors contributing to, the symptoms that led to Claimant's need for low back surgery. These are: 1) Claimant's pre-existing severe symptoms diagnosed as degenerative disc disease, including injection therapy (in 2004), 2) the acute injury that took place at home around July 2, 2005 and, 3) the progressive pathology with increasingly disabling symptoms from the degenerative disc disease (unaffected by Claimant's work or a superimposed trauma).

Claimant's chronic low back problems diagnosed as degenerative disc disease prior to her transfer to Missouri is beyond dispute. Treatment over several years including a full set of epidural steroid injections as recently as November 2004 created the need for permanent lifting restrictions. Equally clear is that on or about July 2, 2005 Claimant had a sudden onset of acute low back pain and sciatica while handling clothes at her apartment, which compelled her to seek urgent care two days later. Degenerative disc disease is a progressive condition that advances with age independent of trauma. Again, the legislature excluded "progressive degeneration" from occupational disease. Section 287.067.2 RSMo (2000).

Claimant only worked about three weeks in Missouri prior to her surgery. The 98.1 hours that she logged between March 21, 2005 and April 22 (see above) included two-three days sitting in a classroom and other time spent training on the line working with another transferee and a regular Missouri employee. This *de minimis* exposure to Employer's assembly line is, at once, unknown to Claimant's experts and improbable as an injuring exposure (necessarily unexplained in the record by Claimant's under-informed experts). On June 6, 2005, a visit to Employer's Clinic involved work restrictions that she had been given by her family doctor, however, she admitted that she had not worked under those restrictions since she had been out of the plant on vacation or sick leave since April 22.

Claimant's history and testimony is unreliable regarding the seriousness of her low back condition. She appears not to have mentioned her back problem to Chrysler's medical personnel until April 19, 2005 and then only mentioned her history of back symptoms when giving a medical history when she was undergoing a reinstatement exam after having been out due to chest pain. When next seen in Medical on May 27, 2005, she was again there to reinstate after an absence, this time due to depression and stress, no mention was made of her back and by then she was off work over one month (last day worked was April 22). Although she began seeing Dr. Warren (St. Louis area) on April 25, 2005 she only mentioned stress headaches and insomnia to him. On May 5, 2005 Claimant has the same complaints but added a new complaint, chest pain. On June 10, 2005 she added her shoulder, but not her back.

On July 4, 2005 Claimant went to St. Luke's Urgent Care reporting a sudden onset of low back pain and sciatica on July 2, 2005 at home while handling clothes. She did not go to Dr. Warren for her back until after the July 4<sup>th</sup> treatment and only then did he refer her to Dr. Chapel. When she went to Dr. Chapel, she again dated the onset of her back pain to July 4<sup>th</sup>. Claimant saw Dr. Backer (surgeon) on September 29, 2005 and, again, attributed her low back pain to the event at home. Claimant is neither working nor reporting symptoms on or about the alleged June 6, 2005 injury that she pled. Although Claimant denied some of these notes at trial, it must be observed that there is consistency and cogence in these private treatment records to credit those denials.

Dr. Berkin's qualifications warrant some scrutiny given the longstanding, complicated pathology in issue. To qualify an expert, a witness must have knowledge, skill, training, experience or education supporting the opinion which is intended to aid the trier of fact. Nixon v. Lichtenstein, 959 S.W.2d 854 (Mo.App. 1997). The extent of qualification usually pertains to the weight to be given evidence rather than admissibility. Donjon v. Black & Decker (U.S.), Inc., 825 S.W.2d 31 (Mo.App. 1992). Separately, the facts upon which he based his opinions are not supported by competent evidence. It is well established that there must be competent evidence to support the reasons and facts relied on by a medical expert to give the opinion sufficient probative force to be considered substantial evidence. Silman, supra.

Dr. Berkin's factual suppositions were often incorrect or incomplete: first, he thought that Claimant worked continuously for two months in St. Louis performing a job or jobs requiring bending and lifting whereas she worked less than three full weeks over a thirty day period (March 21 to April 22); second, he was not aware of the contents of the St. Luke's Urgent Care record for July 4, 2005; third, he failed to acknowledge the lack of back complaints (i.e. non-treatment) to Dr. Warren until after July 4, 2005; fourth, he failed to acknowledge that Dr. Chapel did not see Claimant until after the events of early July, 2005; fifth, he failed to mention, much less account for, the history given to Dr. Backer about the date of symptom onset; sixth, he failed to apprise himself of the weight of the side panels that she had to lift and move in the single job to which she has attributed most of her back problems; seventh, based upon the prior and subsequent medical records, there is no basis upon which he could convincingly explain that Claimant's work in Missouri caused a lumbosacral strain "with a protruding disc at L5-S1 and bulging discs at L5-S1 and L1-2.

Similarly, Dr. Poetz's qualifications must be considered given the complex pathology in issue. Nixon, supra. Don Jon, supra. Dr. Poetz is not a surgeon and such expertise is warranted in a surgery case where causation is disputed. This point is made imperative in context with the complicated facts of this case. Again, Claimant's expert's testimony was inexact and inaccurate as the result of unfounded assumptions. First, he stated that Claimant worked "long hours" on the side rail job which is odd since in discussing the alleged shoulder "injury" he wrote that she worked "several months" on her first job in St. Louis, with radiators. Second, when he was discussing the neck claim, he focused on her supposed need to perform a lot of overhead work, not a feature of either the side rail job or the radiator job. Dr. Poetz did not seem to realize that most of the time that Claimant worked on the floor involved training where she did not work on jobs alone but instead shared duties with another transferee and a regular Missouri employee. Third, Dr. Poetz contemplated Claimant beginning stress classes after onset of low back pain approximately June 2005. The record shows Claimant stopped working effective April 22 and had already taken stress classes. Dr. Poetz was not fully informed in this case to render opinions on causation.

Employer's expert, Dr. Cantrell, is a specialist in pain management and he treats patients with spine and joint injuries. He is associated with an office that specializes in orthopedics and sports medicine. His qualifications are somewhat better than Claimant's experts. More importantly, his understanding of the work place exposure and hours worked is reconciled clearly with the balance of the evidentiary record and his testimony, while challenged by Claimant, may not be said, in this case, to be impeached or even refuted.

Dr. Cantrell ultimately opined that L5-S1 surgery in November 2005 was the full manifestation of Claimant's long-standing history of disabling degenerative disc disease that, if aggravated by any recent (post-transfer) events, it was the lifting incident at home of July 2, 2005. Absent clear evidence that Claimant was exposed to repetitive trauma at work, the July 2 incident becomes a plausible accident event that caused disabling symptoms. The medical record of Dr. Backer compels the conclusion that the non-work event was a substantial factor in leading to Claimant's need for treatment or contributed to her current permanent disability. Claimant presented insufficient evidence through competent testimony to find a causal connection between Claimant's work in Missouri and Claimant's onset of low back symptoms giving rise to surgery. Dr. Cantrell was more persuasive than either Dr. Berkin or Dr. Poetz.

### THIRD AND FOURTH CASES ONLY

The 2005 Reform Bill made changes to the laws that affect the third and fourth cases. The parties stipulated a February 28, 2006 injury date for the left knee claim. The standard of proof in effect on the date of this alleged injury is whether the conditions of employment were "the prevailing factor" in causing the harm for which medical treatment was needed and which resulted in the claimed disability. Sections 287.020.3(1), (2). and 287.067.2-3, RSMo. (2005).

### THIRD CASE (Knee)

#### Notice

Section 287.420 RSMo (2005) requires an employee to give the employer written notice within thirty days of the diagnosis of the occupation disease causing the injury. The only exception is where the employer had actual notice and was not prejudiced by the lack of notice. However, the claimant has the burden of proof on both the notice and prejudice issues. In this case, Claimant admitted she did not report the left knee condition to Employer but mentioned to a supervisor that she was having generalized leg pain secondary to her low back condition. As discussed above, Claimant's testimony is not reliable. Her assertion lacks detail and context that make it worthy of belief. Again, the Clinic Notes comprising Exhibit 3 lend no corroboration to her testimony about reporting knee injury complaints to Employer's Clinic.

Here, the only event that could constitute actual notice to employer was the filing of the Claim.<sup>5</sup> Thus, Claimant's claim fails for lack of notice to Employer as prescribed. Claimant failed to comply with the notice requirements contained in Section 287.420.

\* \* \*

Assuming, *arguendo*, that Employer received proper notice, Claimant, nevertheless, failed to present sufficient evidence of exposure and medical causation linking her actual exposure to line work at Employer's Missouri plant to her knee and neck Claims. Repetitive

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<sup>5</sup> Reference to the minutes reveals a filing date September 11, 2008, about 22 months after her left knee surgery.

trauma injury is compensable “only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.067.3 RSMo (2005).

Moreover, it is necessary to prove, where there was a preexisting condition of the same kind or type, that there was more than a mere worsening of the same condition due to the most recent exposure, Miller v. U.S. Airways Group, Inc., 316 S. W. 3d 462 (Mo. App. 2010). Proof of an aggravation of a preexisting condition is not sufficient to establish a right to compensation unless the aggravations rise to the level of becoming the prevailing factor in causing both the need for treatment and disability. Payne v. Thompson Sales Co., 322 S. W. 3d 590 (Mo. App. 2011)

Dr. Berkin did not examine Claimant’s left knee and was not aware of any claim of work-related injury to that body part since it was not filed until after his examination. Dr. Poetz’s testimony is not credible for a number of reasons, to wit: Dr. Poetz is a family practitioner, not an orthopedic surgeon or physiatrist, and so lacks the qualifications to tender an opinion addressing the issue of whether Claimant’s work caused her to contract an occupational disease affecting her left knee, particularly in this complicated set of circumstances.

Claimant did not work in February 2006 except for her two brief attempts to work on February 13 and 15 which only precipitated a comment that the job that she had been assigned to on the morning of February 13 was jerking her right shoulder. Claimant had not worked since April 24, 2005. Claimant was unclear as to whether her claim of left knee injury was due to standing and waking on concrete at work or due to favoring her left knee due to her chronic low back and right leg symptoms (or both). There is not a single report of left knee pain or other symptoms in any of the medical records prior to the reference to the October 28, 2006 event.

Dr. Poetz lacked the necessary details concerning the claimant’s job duties in Missouri, and the number of hours that she worked in Missouri, to assess whether they created the hazard or risk of causing a torn medial meniscus or degenerative knee joint disease. Dr. Poetz was assuming that the claimant worked “long hours” standing and walking at work, whereas it is admitted that she only worked about two and one-half weeks in Missouri and that did not involve even a forty hour work week during any of the three weekly pay periods. Dr. Poetz contemplated a February 2006 retirement (p. 75), yet embraces the October 2006 onset date without reference to any earlier knee complaints. Accordingly, there is no explanation in evidence as to the medical basis of Dr. Poetz’s supposition that her work caused the pathology that Dr. Moore addressed at the time of his December 2006 surgery. Dr. Poetz did not have any basis to conclude that Claimant’s degenerative joint disease was aggravated by Claimant’s work, since he did not review any pre-allegation diagnostic studies.

Claimant’s knee locked in late October 2006 after not even attempting to work since February 2006 and after not working even a full shift since April 22, 2005. She was found to have an *acute* tear to her medial meniscus that required surgery. Then, in September 2008 she filed a Claim and reached back to her last job to allege a basis to claim workers’ compensation benefits. Claimant’s proffer of evidence is, again, insufficient to prove that the her brief period of work in Missouri was the prevailing factor in causing her need for left knee surgery and causing her to sustain permanent disability.

Dr. Cantrell, at the time of his second evaluation, wrote, and he later testified consistently with his written opinions, that Claimant's torn medial meniscus was due to an acute injury that took place when Claimant's left knee locked on or about October 28, 2006. He rejected any thought that the knee injury resulted from the "micro trauma" theorized by Claimant's attorney. (Exhibit 2, p. 37.) Dr. Cantrell's opinions were better founded and more persuasive than Dr. Poetz.

#### FOURTH CASE (Neck)

Of each of the four cases that Claimant is simultaneously pursuing, this Claim is the claim in which the required treatment was the most remote from her last date of active employment (i.e. April 2005). The stipulated onset date of February 8, 2007, is just a few days short of a year after her last attempt to work in Missouri and about 22 months after the last time that she had been able to work for (nearly) a full shift at Employer's Missouri plant. The first neck symptoms post-transfer were recorded in January 2007 even though Claimant had been under active medical treatment in 2005 and 2006 for her right shoulder, low back and left knee.

Once again, Dr. Poetz's qualification must be considered given the complex pathology in issue. Nixon, supra. Don Jon, supra. As a family practitioner, his emphasis is less focused than Dr. Cantrell's who, while not a surgeon, specializes in spine and joint injury in support of surgeons in his practice. Again, more importantly, his testimony is easily reconciled with the balance of the record. Whereas, Dr. Poetz's admissions regarding omissions in his knowledge of medical and work events undercut the probative value of his opinions. His testimony was inexact and inaccurate as the result of unfounded assumptions and the lack of a documented history of exposure to repetitive trauma or treatment record. Reliance on Claimant's representations to Dr. Poetz is misplaced due to her poor credibility on medical and work events elsewhere in the record. On the other hand, all of the documentary evidence supports Dr. Cantrell's conclusions.

Dr. Poetz attributed her need for neck surgery to her overhead work in Missouri, but if she indeed did any such work after her transfer, it was done in only one of the jobs which she performed in Missouri for a period of one or two weeks. On cross-examination, Claimant could not remember what she performed during her last week of work. Dr. Poetz's inaccuracies in evaluating the other cases bears on his testimony here. As part of the same evaluation, he also attributed an aggravation of her pre-existing right shoulder condition to overhead lifting but attributed her low back "injury" to the claimant's lifting, bending and carrying in a job that did not involve overhead work. He identified nothing ergonomic to predicate repetitive trauma to Claimant's knee. He was mistaken that Claimant worked "long hours" for "several months" in Missouri (see above).

More simply, Dr. Poetz does not explain how his causation opinion reconciles the lack of any neck complaints from the last date of Claimant's active employment in 2005 and her 2007 treatment in Alabama. He fails to reconcile the history that was given to the treating physicians in Alabama describing on onset of significantly increased symptoms sometime in January, 2007 (post-retirement) and Claimant's statement at that same time indicating that her condition was not due to her work. Unexplained in the record is his dismissal of the prior diagnosis of degenerative disc disease and a C5-6 herniation (from 2003) on the representations by Claimant

that she was asymptomatic from then until (presumably) she transferred to Missouri; at the same time, he ignored the absence of verified symptoms from the transfer date until early 2007.

The absence of neck complaints in the contemporaneous medical records is noteworthy. When seen by Dr. Warren on April 25, 2005, three days after her last work in 2005, her neck examination was normal. Even the Chiropractor, Dr. Chapel, listed symptoms no higher than her mid-back and the cervical area was not listed by Claimant or the doctor as a problem area. Neck complaints were also absent from the medical records of Dr. Warren and Dr. Backer that extend into 2006. There is simply no explanation for this lack of documentation other than to conclude that Claimant's need for surgery grew out of her acute onset of non-work related symptoms in January 2007.

The facts of this case are very similar to those in Payne, *supra*. There Claimant attempted to prove that his need for neck surgery was due his having injured his neck while shoveling snow at work. However, he had a history of a prior cervical HNP, failed to report an injury to his employer, failed to complain to his co-workers, failed to seek medical care promptly and when treatment was initially sought, six weeks after the shoveling event, he did not attribute his neck symptoms to an incident at work and stated that his symptoms had been present for 2 days, not 6 weeks. In that case, the ALJ, the Commission and ultimately the appellate court concluded that Payne failed to prove that the activity at work was the prevailing factor in causing his need for treatment and disability. Dr. Cantrell's opinions are better-reasoned and more persuasive than those of Dr. Poetz.

Dr. Cantrell testified that there is no causal connection between Claimant's brief work in Missouri, which ended no later than February 15, 2006, and perhaps as long ago as April 22, 2005, and her need for cervical surgery in February of 2007. He based his opinions on the fact that she had reported cervical complaints dating back to the late 1980's or early 1990's, she had been given the diagnosis of degenerative disc disease and a herniated disc at C5-6 in 2003 and when she finally sought more current treatment for her neck on February 8, 2007 that she reported having experienced a sudden onset of neck pain of unknown cause (but indicated at the time that it was not work related) and 20 days later, on February 28, 2007 she told Dr. Parker that her intermittent neck and shoulder pain had become significantly worse four weeks earlier and that she now also has radiation into her left arm.

#### Notice

Assuming, *arguendo*, a compensable repetitive trauma occupational disease, compensation would have nonetheless been denied due to a failure of notice. The claimant's testimony that she reported neck complaints to one or more of her supervisors in Missouri, and attributed those symptoms to her jobs to which she was assigned, is not credible. There is no record of her having complained to Employer's Clinic of any neck injury whether by accident or repetitive trauma. No mention of current neck symptoms can be found in the records of Dr. Warren, Dr. Chapel, Dr. Backer or of St. Luke's and, as such, cannot be corroborative of Claimant's suggestion that she reported her neck injury to supervisors.

In an occupational disease case, the thirty day period begins to run when the “condition” has been diagnosed. Section 287.420 RSMo (2005). Assuming, *arguendo*, Claimant was not diagnosed with degenerative disc disease and a C5-6 herniation in 2003, her surgery on February 12, 2007, was based upon medical diagnosis from Dr. Parker on February 8, 2007, which commenced the 30 day notice period. Yet, no Claim was filed for another 19 months. Claimant simply is not credible and this leads to the conclusion that she failed to provide the notice that the statute requires.

Conclusion

Accordingly, in the Second Case, identified by Injury Number 05-068918, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain her burden of proof. Claim denied. The other issues are moot.

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

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

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award of Administrative Law Judge by Separate Opinion)

Injury No. 06-135663

Employee: Angela C. Neese  
Employer: Chrysler LLC, Inc.  
Insurer: Old Carco LLC  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award of the administrative law judge by separate opinion.

**Preliminaries**

The parties asked the administrative law judge to resolve the following issues: (1) incidence of occupational disease, which includes exposure and medical causation; (2) permanent disability; (3) notice; and (4) liability of the Second Injury Fund.

The administrative law judge concluded that employee failed to comply with the notice requirements of § 287.420 RSMo, and also failed to present sufficient evidence of exposure and medical causation linking her actual exposure to line work at employer's Missouri plant to her knee claim.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in misinterpreting and/or ignoring the testimony from employee's experts; (2) in improperly determining that employee lacks credibility; (3) in improperly interpreting the last exposure rule; (4) in misinterpreting the facts and the law with regard to the issue of notice; and (5) in declining to award permanent total disability benefits from the Second Injury Fund.

The Commission affirms the award of the administrative law judge with this separate opinion.

**Findings of Fact**

On January 9, 1984, employee began working for employer in Huntsville, Alabama, as a Tech III. For over 20 years, her primary duties for employer involved working on an assembly line producing components for automobile manufacturing. Employee stood and walked continuously on concrete floors and performed repetitive overhead reaching and lifting tasks.

Employee: Angela C. Neese

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On March 21, 2005, employee transferred to employer's plant in St. Louis, Missouri. Employee worked 30 hours for employer during the week ending March 27, 2005, and 32 hours during the week ending April 3, 2005. Of that time, employee spent about 2 days in a classroom, and about 2 weeks undergoing training, during which employee split her duties with another transferee. Employee performed no work for employer during the weeks ending April 10 and 17, 2005. Employee then worked 36.1 hours during the week ending April 24, 2005. After April 22, 2005, employee performed no actual work duties for employer in the St. Louis plant. Instead, she attended a stress class, then took a leave of absence. We find that employee performed less than 3 weeks of actual work in employer's St. Louis plant.

Employee claims that she suffered an occupational disease in Missouri affecting her left knee as a result of this approximate 3 weeks of performing her work duties for employer. Employee provides expert medical testimony from Drs. Shawn Berkin and Robert Poetz. We have carefully reviewed the reports and deposition testimony from both doctors. After careful consideration, we find that both of these doctors were provided such limited information regarding employee's job duties in Missouri, the duration of her employment in Missouri, and the timing and onset of her complaints that their opinions lack any persuasive force with respect to the disputed issues in this matter.

For example, when asked whether he knew how long employee worked in Missouri, Dr. Berkin revealed his erroneous assumption that it was "probably" a couple of months, and that he "guess[ed]" employee developed symptoms at that time. *Transcript*, pages 298, 304. Dr. Poetz, meanwhile, seemed even less sure of the relevant facts involved in employee's claim: he admitted he didn't know the duration of employee's work in Missouri, and did not even know the significance of her claimed date of injury. Both doctors rendered purely conclusory opinions in their reports, and failed to persuasively explain any causative interaction between employee's job duties in Missouri and the purported occupational disease sustained in Missouri.

It may have been (indeed it appears to be the case) that employee's years of work for employer in Alabama contributed to or caused some of the injuries she claims herein, but we find that employee has failed to provide persuasive medical evidence that she contracted any identifiable occupational disease in this state.

Employer hired employee in Alabama; it follows (and we so find) that her contract for employment was not made in Missouri. Because employee only performed her actual job duties for employer for about 3 weeks in Missouri before participating in the stress class and taking a leave of absence, we find that her employment was not principally localized in Missouri within 13 calendar weeks of her suffering any identifiable injury or occupational disease.

Employee: Angela C. Neese

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**Conclusions of Law**

Application of Chapter 287

Section 287.110.2 RSMo provides, as follows:

2. This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

We have found that employee did not contract any identifiable occupational disease in Missouri, that her contract for employment was not made in Missouri, and that her work was not principally localized in Missouri within 13 calendar weeks of the injury or diagnosis of occupational disease. It follows that employee has failed to satisfy the requirements of § 287.110. Accordingly, we conclude that Chapter 287 does not apply to employee's injuries.

We additionally wish to make clear that, if it were shown that Chapter 287 did apply to this claim, we would deny it on the issue of medical causation, owing to employee's failure to provide persuasive expert medical opinion evidence.

**Conclusion**

Employee's claim is denied because Chapter 287 does not apply to her injuries.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 13, 2014, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 11<sup>th</sup> day of March 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

\_\_\_\_\_  
James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

# AWARD

Employee: Angela C. Neese

Injury No.: 06-135663

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Chrysler LLC, Inc.

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Old Carco LLC

Hearing Date: February 6, 2014

Checked by: JED

## 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: February 28, 2006 (alleged)
5. State location where accident occurred or occupational disease contracted: St. Louis County (alleged)
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 happened or occupational disease contracted:  
Employee alleged injury by repetitive trauma from Employer's assembly line.
12. Did accident or occupational disease cause death? N/A 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? N/A

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: N/A
- 19. Weekly compensation rate: \$697.67/\$365.08
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

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

TOTAL: -0-

- 23. Future requirements awarded: N/A

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

The compensation awarded to 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 Claimant:

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

Employee:	Angela C. Neese	Injury No.:	06-135663
Dependents:	N/A	Before the	
Employer:	Chrysler LLC, Inc.	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund	<b>Compensation</b>	
Insurer:	Old Carco LLC	Department of Labor and Industrial	
Hearing Date:	February 6, 2014	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED

This case involves four separate Claims for Compensation: 05-068917(May 27, 2005), 05-068918 (June 6, 2005), 06-135663 (February 28, 2006) and 07-134224 (February 8, 2007). The testimony and exhibits in this record constitute the evidence in each Claim. Each Claim follows Claimant’s transfer to St. Louis after many years in an Alabama plant. Each Claim is disputed by Employer. Separate Awards issue on each Claim. These cases may be referred to herein as the first, second, third and fourth cases, chronologically.

Employer admits Claimant was employed on each of the reported dates of injury and that any liability was fully insured. Claimant admits she was not at work on any of the alleged injury dates. The Second Injury Fund (“SIF”) is a party to this claim. Claimant seeks PTD benefits against the SIF in the fourth Claim. Both parties are represented by counsel. Objections at expert depositions are ruled upon consistent with the findings herein.

Issues for Trial

*Third And Fourth Cases*

1. notice;
2. occupational disease (exposure and medical causation);
3. nature and extent of permanent disability;
4. liability of the SIF;

*Fourth Case Only*

5. Rate of Compensation

**FINDINGS OF FACT**

Claimant is a 54 year old native of Alabama. She has a high school diploma. Claimant began working at Chrysler’s electronics plant in Huntsville, Alabama in 1984. She worked continuously there until she transferred to the Missouri plant in early 2005. Transfer became an option when the Huntsville plant was purchased by Siemens. After some transition, employees were told they had the choice of remaining in Huntsville and becoming a Siemens employee or transferring to some other Chrysler plant. Claimant opted to transfer to Chrysler’s van plant Missouri, in order to retain her seniority. Her intention was to continue to work at Chrysler until she reached the 30 year milestone even though it would require her to live apart from her family.

When she transferred, she rented an apartment in the St. Louis area while her husband remained in the family home in Athens, Alabama, a town that is quite close to Huntsville.

The Huntsville plant produced electronic dashboard components such as radios and CD players that are inserted into dashboards that would be installed in a Chrysler vehicle at a plant elsewhere. The Huntsville job involved standing, reaching above shoulder level, lifting, carrying and the use of power tools. Separately, Claimant also worked as a part-time employee benefits representative. About a year before the transfer, Claimant became a full-time benefits representative. She continued to work on the line on weekends as needed. The benefits representative job allowed her to sit most of the time although she would go into the plant to speak to employees who had benefit issues.

Long before, in the late 80's or early 90's, Claimant began to notice neck and shoulder symptoms. She underwent a myelogram of her neck in 1989. Claimant required four surgical procedures on her right shoulder, including two scopes, an open procedure to repair a torn rotator cuff and another open procedure to remove the surgical staples. She also developed back problems that required her to undergo a lumbar MRI and epidural steroid injections. She had undergone a series of injections in Alabama as recently as November of 2004, five months before her transfer to Missouri. The shoulder and back problems were, at least in part, handled as workers' compensation injuries but no formal "claim" was filed in Alabama.

Claimant transferred to Missouri effective March 21, 2005. For the first 2-3 days she was in classroom training. She then went out on the assembly line and spent the next 1-2 weeks working with a local employee and another transferee as the two new employees learned to perform the various jobs that they would have to do as "floaters." At trial, Claimant agreed with the work hours reflected by Employer's pay records:

30 hours for the pay period ending March 27, 2005  
32 hours for the pay period ending April 3, 2005  
36.1 hours for the pay period ending April 24, 2005.

Claimant never successfully returned to (actual) work on the plant floor after April 24, 2005.<sup>1</sup> The paid hours in March and early April included her classroom training and the 1-2 weeks sharing a job with a regular worker and another transferee. Claimant was subsequently out ill with stress and later took a leave of absence. She admitted she was paid 28 days during stress classes. Claimant never worked again except for the one day attempted in February 2006. (T. 79-83.)

### *Clinic Notes & Reported Injuries*

#### **Right Shoulder (First Case)**

Claimant asserted that when she was transferred that she brought with her certain work restrictions in place, including no overhead work and no lifting more than five pounds with her right arm. These were permanent restrictions given to her in Alabama due to her long-standing shoulder and back conditions. Claimant alleges that the plant in Missouri would not accept those

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<sup>1</sup> All four alleged injury dates are subsequent to April 24, 2005.

restrictions and kept assigning her to jobs that violated the restrictions or that otherwise bothered her right shoulder and back. After working during the first two weekly pay periods in Missouri she left the job to attend an employer sponsored stress class where she was off-work but paid for four weeks. During this period she saw a psychiatrist in St. Louis and returned to Alabama and visited her PCP in order to obtain documentation to show the employer's plant physician of her long-standing restrictions.

Thereafter, Claimant returned to work in late April 2005 but worked less than one week when she again took leave effective April 22, 2005. Claimant was off-work for chest pain secondary to costochondritis injury in April 2005 (in Alabama). (See Exhibit 3.) Claimant did not return to work in 2005; Claimant never attempted a return to work on the line after April 2005 until her unsuccessful attempt to return to work in February 2006, nine months later.

Claimant testified that she complained to the Clinic that her back and shoulder were bothering her due to the more strenuous work that was being assigned and mentioned her long-standing work restrictions from Alabama. The lack of medical paper work confirming her restrictions is one of the reasons why she went back to Alabama while she was on leave.

According to the plant clinic records (Exhibit 3), Claimant first came into Medical, after her transfer, on April 18, 2005. On that date she reported having developed chest pain after rolling over in bed while in Alabama on vacation. A note from a Dr. Gross was presented to Employer's Clinic but was questioned since it appeared to the doctor to have been altered. She returned to Employer's Clinic on April 19, 2005 for her return to work assessment at which time she gave her prior history of bulging [low back] discs that had required injection therapy. On May 27, 2005 Claimant underwent a reinstatement exam after having been out for depression and stress with a last date worked of April 22, 2005. Although she was cleared for work with no restrictions on May 30, 2005, she never actually worked again.

Two notes of June 6, 2005, appear to be reports or complaints of longstanding symptoms in which no new injuries are identified.<sup>2</sup> These notes contain Claimant's report that she has not worked overhead since shoulder surgery; the plant in Alabama had no overhead work and she was in an "appointed position" and did not work the floor except during overtime and thus limited use of her right arm.

According to Exhibit 3, Claimant did not (attempt) return to work until February 13, 2006. On that date, and when the Plant again tried to place her on February 15, 2006, Claimant worked at most an hour or two on the line before she was sent home. She never returned to work again except to confirm her disability status.

The first treatment that Claimant received in Missouri (and outside the plant clinic) appears to have taken place on April 25, 2005 when she began seeing Dr. Leo Warren, a primary care physician. Her complaints to Dr. Warren involved headaches, insomnia and depression associated with her job transfer and separation from her family in Alabama (Exhibit T). She claimed that she felt overwhelmed and she hurt all over and admitted to a history of anxiety and depression for which she had been given Lexapro by her GYN physician in Alabama. She

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<sup>2</sup> This is contrary to the pleaded low back injury Claim (second case) of the same date.

returned to Dr. Warren on May 5, 2005 with those same complaints but added a complaint of chest pain.

Only on her next visit, on June 10, 2005, did she mention problems with her right shoulder, provided a history of her past shoulder problems and mentioned that the local company doctor won't accept her paperwork related to her restrictions so she intended to return to Alabama to have the restrictions renewed. [On July 10, 2005 she returned to Dr. Warren with new history of low back complaints adding that she had to visit an urgent care facility for these complaints. See Low Back case below.]

Claimant was seen by Dr. Tindell in Alabama in June 2005 complaining of right shoulder problems. The first *treatment* that she had for her shoulder after her transfer was while on a leave of absence. Dr. Tindell's history is that she had been doing more strenuous work since her transfer and that the plant physician was not accepting her work restrictions and she needed copies of her documentation. Although Dr. Tindell suspected a rotator cuff tear, and after an MRI, his final diagnosis was bursitis and tendinitis which is consistent with the known chronic condition comprising four surgeries. He prescribed medication and work restrictions but Claimant never returned to work. He proscribed any lifting over twenty pounds

#### Low Back (Second Case)

Between the June 10<sup>th</sup> and July 10<sup>th</sup> visits to Dr. Warren, she required urgent care treatment at a facility operated by St. Luke's Hospital. (Exhibit S). The history on July 4, 2005 was sudden onset of low back pain and right sciatica while turning to place some clothes in a basket in preparing to go to the pool. She was given pain medication and muscle relaxers and given lifting and other restrictions. This first report of back problems to Dr. Warren was followed by referral to Dr. Chapel, a chiropractor.<sup>3</sup>

Although the records are difficult to decipher, it appears that Claimant went to Dr. Chapel first on July 25, 2005 complaining of worsening low back pain, including radicular symptoms ("numbness in toes") which had its initial onset 3 years earlier with an aggravation "3+ weeks" earlier (elsewhere "'7/02/05"). Her pain was noted at seven on a 1-10 scale. An MRI at St. Luke's on July 25, 2005 revealed bulging discs with a central protrusion at L5-S1. (Exhibit R.) Dr. Chapel continued to see Claimant, periodically, beyond her low back surgery and, as late as April 11, 2006, she was still dating the onset of her back and leg problems to July 5, 2005. The questionnaire asking whether the condition is related to an "automobile accident or on-the-job injury[.]" Claimant responded, "No." (Exhibit Q.)

Dr. Warren then referred Claimant to Dr. John Moore (whose records are not in evidence) who apparently performed steroid injections, without lasting relief. Claimant next saw Dr. Backer on September 29, 2005. She filled out a form on which she indicated that the duration of her symptoms were from July, 2005 "this time about 3 months" and the "context" was "at home". (Exhibit H.) Dr. Backer also wrote a letter to Dr. Warren in which he states that Claimant has had chronic back pain on and off "but worse since July of 2005". Dr. Backer performed an inter-body fusion at L5-S1 for degenerative disc disease (a herniated disc was not

<sup>3</sup> Dr. Chapel's records are presented in two separate Exhibits, Q and R.

found) on November 7, 2005. Claimant subsequently continued to complain of symptoms despite the surgery. Claimant followed up with Dr. Backer and Dr. Warren. Claimant's February 2006 attempted return to work was unsuccessful. She returned to Alabama soon after that and continues to seek pain treatment, initially from a Dr. Gaines, and now from a Dr. Hendrix.

#### Left Knee (Third Case)

Since Claimant left Chrysler and returned to Alabama she has required left knee surgery. She attributes this problem to her long history of standing and walking in the Alabama and Missouri plants and perhaps to favoring her leg due to her back problems. She admits that she never specifically complained about her left knee to Chrysler and the first mention of a knee problem is on October 28, 2006 when she was examined at SportsMED. Claimant stated that her left knee just locked up when she stood up. (Exhibit J.) An MRI showed some degenerative changes in the knee which led to left knee surgery by Dr. Moore for a medial meniscectomy in December 2006.

#### Cervical Spine (Fourth Case)

As to the cervical condition, Claimant has experienced neck and shoulder area pain since the late 1980's and admitted having a cervical myelogram as early as 1989. This then has been a chronic problem for which she had no medical treatment during the time that she resided in Missouri. However, on February 28, 2007, while seeing Dr. Parker in Alabama, she reported having had intermittent neck and bilateral shoulder pain in the past that became significantly worse approximately "four weeks ago" with radiation into her left arm. (Exhibit O.) Also, twenty days earlier, on February 8, 2007 she had filled out a SportsMED pain questionnaire indicating that her neck pain had begun suddenly, and checked a box indicating no apparent cause and another box indicating that the problem was not work related. (Exhibit J.) Claimant subsequently underwent cervical fusions in 2007 and 2009.

#### Current Complaints

Claimant currently complains of low back, neck and leg pain. Claimant has longstanding symptoms that disrupt her daily activities, prevent her from playing with her grandchildren, limit how far she can drive, how long she can sit or stand, make housework difficult and significantly limit her recreational activities. She must recline several times a day for relief and takes pain medications, medications to relax her muscles, allow her to sleep and to improve her mood. Her right shoulder is weak, she cannot use her arm above shoulder level and feels that she has lost 25% or more use in the arm. Claimant doesn't believe that she can work in any capacity and has turned down offers to work in a clerical capacity at a friend's pet grooming business since she doesn't believe that she would be a dependable employee. She has no specific left knee complaints at this time. Claimant is on Social Security Disability and receives a permanent total disability pension from Employer. Her husband continues to work at a bank. Her husband drove her to St. Louis for the trial but they had to make periodic stops due to her symptoms.

Opinion Evidence*Dr. Berkin*

Claimant offered the 2008 deposition of Dr. Shawn Berkin, as Exhibit F. Dr. Berkin examined Claimant and reviewed medical records. Dr. Berkin issued a report dated December 15, 2007. (Exhibit B). (It should be noted that Dr. Berkin offered opinions on the 2005 Claims only; the other two Claims were filed after his evaluation.) Later, he prepared a one-page report dated April 28, 2008. (Exhibit 4.)

Dr. Berkin was told that her complaints started in June 2005 after she was assigned to a job at Chrysler requiring her to lift 600 side panels for vans per shift. Although she admitted to having a history of low back pain dating from 2001, she stated that as she worked in St. Louis, her back pain worsened requiring her to seek medical treatment at the plant Clinic and later by Dr. Warren, Dr. Chapel and Dr. Moore and others for conservative care. Dr. Berkin said Claimant had a pre-existing low back condition for which he agreed, "she largely received conservative treatment" (p.16). He was apparently unaware of the steroid injections from 2004 in Alabama.

An MRI in July 2005 revealed disc bulging at several levels in the lumbar spine, more pronounced at L5-S1. When the conservative care did not achieve the hoped-for results, she was referred to Dr. Robert Backer who performed an inter-body fusion at L5-S1 in November 2005. However, Claimant continued to complain despite a post-surgery MRI showing solid fusion. Pain treatment was instituted in St. Louis but was transferred to Alabama when Claimant decided to return to her home there.

Claimant complained to Dr. Berkin of having pain, tightness, stiffness, spasm and loss of motion in her low back which affects her ability to carry out her usual activities. Dr. Berkin was aware of her then-recent history of cervical surgery, her history of low back treatment for degenerative disc disease and her history of multiple right shoulder surgeries. On physical examination, Dr. Berkin noted a loss of lumbar motion, positive SLR on the left, and pain on muscle stretching and squatting although many of her reflexes were normal. The examination of her upper extremities was consistent with her remarkable history of multiple right shoulder surgeries.

Dr. Berkin diagnosed low back strain, bulging at L5-S1 and L1-L2 and status post low back fusion. He opined that the strain with protruding discs was due to Claimant's "industrial accident that occurred in June of 2005 as the result of repetitive bending and lifting . . . at Chrysler." Dr. Berkin then assigned a 35% PPD due to the "injury" and added a 10% PPD preexisting due to her earlier low back symptoms and treatment and also provided a preexisting rating of 35% of the right shoulder.

On cross examination Dr. Berkin admitted that Dr. Parker had suspected an annular tear in 2003 (in Alabama) and confirmed that Claimant's symptoms had developed gradually over time. He also agreed that on exam he found no muscle spasm, SLR on the right was negative and normal sensation and nerve function were present. Dr. Berkin stated that it was his impression that Claimant worked in Missouri for about two months but he didn't know how much weight

she lifted and what other jobs she may have done as a floater. He also admitted a diagnosis of degenerative disc disease. He admitted that a herniated disc was not identified and he agreed that she developed the lumbar degenerative disc disease despite her lighter job in Alabama.<sup>4</sup>

It should be noted that Dr. Berkin prepared a subsequent report dated April 28, 2008 in which he reiterated that all of Claimant's disability in her right shoulder preexisted her transfer to Missouri. (See Exhibit 4.)

*Dr. Poetz*

Claimant offered the deposition of Dr. Robert Poetz as Exhibit A. His narrative report is marked Exhibit E. Dr. Poetz opined in all four cases herein. His examination of Claimant took place on March 18, 2009.

Dr. Poetz listed Claimant's complaints, recorded a history of her various jobs in Alabama and Missouri and reviewed medical records up to the date of the evaluation. Physical examination reflected a loss of motion in all planes of the right shoulder, poor grip strength bilaterally, left knee crepitus, some diminished range of motion in the left knee, a loss of motion in all directions in both the low back and neck, positive SLR bilaterally and surgical scars were present in the right shoulder area and on the neck and low back, as well as portal scars over the left knee.

Dr. Poetz diagnosed prior right shoulder decompression times two with right shoulder rotator cuff tendinitis and impingement syndrome due to the "injury" of May 27, 2005. He diagnosed preexisting lumbar degenerative disc disease with L5-S1 disc protrusion with intractable back pain and aggravation of the degenerative disc disease due to the "injury" on June 6, 2005 requiring fusion surgery. He diagnosed preexisting degenerative joint disease in the left knee with a medial meniscus tear and aggravation of the DJD secondary to the "injury" of February, 2006. Finally he diagnosed preexisting cervical DDD with a herniated C5-6 disc that required fusion surgery due to the "injury" of February, 2007.

Dr. Poetz rated Claimant's preexisting disability at 30% of the right shoulder, 5% of the low back, 5% of the left knee and 5% of the neck and rated the successive "injuries" at 15% of the right shoulder, 40% of the body related to the low back, 35% of the left knee and 40% of the body related to the neck and went on to state that he believed that Claimant is permanently and totally disabled due a combination of the preexisting disabilities and the disabilities that resulted from the four "injuries" giving rise to the four pending claims.

On cross examination Dr. Poetz admitted that he had not reviewed the earlier IME reports of Dr. Berkin so was not aware that Dr. Berkin had stated that all of the disability in Claimant's right shoulder disability pre-existed her transfer to Missouri. Moreover, he admitted he did not know how much overhead work Claimant performed in Missouri compared to how much, if any, she had done in Alabama. He was asked about how long Claimant worked in the Missouri plant:

Q: And do you know how many months, weeks, days, or hours that  
[Claimant] worked in Missouri after she transferred from Alabama?

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<sup>4</sup> Dr. Berkin did not enunciate a degenerative process in the diagnoses or impressions of his narrative report.

A: I do not.

(Exhibit A, p. 40.)

Regarding low back symptom onset, Dr. Poetz agreed that, first, the first back complaints reported to Dr. Warren and Dr. Chapel *post-dated* the event at home in July, 2005. Second, that Claimant history to Dr. Backer attributed her acute complaints to that July event at home. Third, that nowhere in the plant Clinical Notes is there any report of a back injury related to her job here in Missouri. Fourth, that she couldn't have been injured at work in February, 2006 (when she tried to go back to work post-surgery) when lifting a heavy box if she had in fact refused to lift the box due to the risk of a back injury. Also, Dr. Poetz admitted he found no history of low back injury in the Clinic Notes of Employer despite giving direct testimony of an "injury" on June 6, 2005. He also admitted that the February 2006 failed attempt to return to work was recorded in the Clinic Notes as pain with slight bending and refusal to lift a box contrary to her restrictions. (p. 48, 49.)

Dr. Poetz also acknowledged that the cervical herniated disc at C5-6 was a diagnosis that had been made in 2003 so was prior to her transfer to Missouri. As to the left knee, Dr. Poetz was not aware of how much standing and walking on concrete Claimant had done in Alabama or in Missouri, and that Claimant has attributed the knee condition to both walking and standing at work and also to, perhaps, favoring her leg due to her back condition. He was also aware that a lumbar MRI had been done in 2002 and again in 2005 but the latter was only sought after the event at home in July 2005. He could not tell if the disc bulges were present prior to that event.

*Mr. Lalk – Counselor*

Claimant offered the deposition of Mr. Timothy Lalk, vocational rehabilitation counselor, as Exhibit C and his narrative report as Exhibit D. Mr. Lalk conducted an interview and records review. Lalk's report contains a detailed medical history, a description of Claimant's work at Chrysler in Alabama and Missouri, a list of her complaints and capabilities, a family and social background, and an educational background and vocational history. Lalk also performed testing that showed that she reads at a high school level, her math skills were at a 7<sup>th</sup> grade level and that overall, she scored at an 11.4 grade level, making her a candidate for post-secondary training. However, when Lalk took into consideration Claimant's reported symptoms and limitations as well as the various limitations placed upon her by the various physicians whom she has seen, Lalk concluded that she was incapable of competing in the open labor market due to her high pain level and the need to recline periodically throughout the day, although Claimant does have the potential to be retrained for work that she might be able perform even with her current limitations.

On cross-examination, Mr. Lalk admitted that he had not seen the medical reports of either Dr. Berkin or Dr. Cantrell. He further admitted that it was his understanding that Claimant was able to continue to work at the Huntsville Plant because the jobs that she performed there did not require overhead work or heavy lifting, particularly the job as the benefits representative. He also did not know the requirements of the benefits representative job and agreed that, but for her claim that she had to recline periodically during the day, Claimant would be able to perform that

work currently. Lalk also agreed that it is difficult to motivate and place a worker whose options are limited to entry-level jobs in which they would earn less than they are currently receiving in disability benefits. The witness also agreed that he saw no medical records or reports that indicated that a physician had advised Claimant to recline to reduce or alleviate her symptoms and saw no reports in which she has been deemed to be permanently and totally disabled.

*Dr. Cantrell*

Employer offered the deposition of Dr. Russell Cantrell as Exhibit 1 and 2. He examined claimant and reviewed medical records. A second examination and second deposition occurred due to Claimant's successive Claim filings. Claimant gave a history of prior right shoulder injury and treatment in Alabama with the resulting permanent work restrictions and her prior history of low back symptoms which also resulted in work restrictions on lifting and overhead work. Her work in Alabama was such that these restrictions could be accommodated. However, she claimed that when she transferred to Missouri and started to use power tools suspended overhead and was required to bend and lift, and her right shoulder and low back pain increased despite the efforts that were made to find work that she could perform. Due to an episode of acute back pain and sciatica occurring on July 2, 2005 surgery proved necessary and thereafter Claimant was never able to return to work successfully.

Dr. Cantrell performed a clinical examination which was positive for a twenty-five percent loss of motion in the right shoulder, tenderness with deep palpation in the low back area, a moderate loss of motion in the low back and low back pain with SLR (although SLR was negative for radicular symptoms) She was found to have good muscle and nerve function in both her upper and lower extremities.

Dr. Cantrell stated that he did not believe Claimant's work in Missouri was a substantial factor in causing her need for low back surgery. His opinion was based upon, first, the lack of findings by the surgeon of an acute condition such as a herniated disc; second, the fact that the low back pain was due to long-standing DDD; and, third, the fact that the acute condition was triggered by the July 2, 2005 lifting incident at home as per the surgeon's notes.

Regarding the right shoulder, he did not believe that her work in Missouri caused additional injury to her right shoulder. Dr. Cantrell was given the hours worked by Claimant upon transfer to Missouri (detailed above). As a result of this lack of causation, Dr. Cantrell did not attribute any PPD in her low back or shoulder to her work in Missouri although he did believe that some work restrictions were appropriate due to these established pathologies.

On cross examination, Dr. Cantrell admitted that Claimant's work in Missouri was more strenuous than that which she performed in Alabama, that she did have to lift, carry and place metal parts and that surgery was not recommended until after her transfer, but he would not agree that Claimant's shoulder symptoms in June of 2005 might have masked her low back pain or that the pain that she experienced on July 2, 2005 was just a manifestation of an earlier injury, particularly since she attributed the acute symptoms to lifting at home. These acute symptoms at home follow longstanding degenerative disc disease that predates Claimant's transfer to Missouri.

\* \*

When Dr. Cantrell re-examined Claimant on April 22, 2013, he updated Claimant's medical history and complaints. He reviewed additional medical records, particularly those involving Claimant's left knee and neck. His physical examination continued to show loses of motion in the neck and low back, pain on movement but no muscle spasm. There was physical and documentary evidence of the two cervical operations and the left knee surgery.

Dr. Cantrell commented on the treatment records that revealed neck complaints going back to the late 1980's but which were not persistent through Claimant's work in St. Louis. Instead, these symptoms developed long after she left her employment at Chrysler per the statements that she made to several of her treating physicians in Alabama.

Based upon Claimant's medical history before her transfer, the limited amount of time that she worked in Missouri, and the information contained in the post-employment medical records from Alabama, Dr. Cantrell concluded that there is no medical causal connection between Claimant's work in Missouri and her need for neck and left knee surgery. As to Claimant's ability to work, Dr. Cantrell believes that she can do sedentary work or light duty at most. He also stated that his opinions regarding the low back and right shoulder have not changed since his first examination and deposition.

On cross examination, Dr. Cantrell stated that his opinion regarding the causation of Claimant's torn knee cartilage is consistent with her history of experiencing an onset of acute knee pain and locking upon standing and turning and would not agree with the supposition that the injury could have been due to a history of micro trauma to the knee over time at work.

#### *Claimant's Credibility*

Claimant's testimony was unreliable historically and unconvincing regarding her association of serious chronic symptomatology with the *de minimis* total work hours recorded in Missouri between March 21 and April 24, 2005. No new injuries are documented during either her three weeks of work or her few weeks of training. Only with the advent of a non-work related injury are treatable symptoms reported by Claimant, to her private physicians, as occurring at home. Her testimony was uncorroborated with the medical treatment record. Treatment with Dr. Warren began on April 25, 2005 for symptoms of insomnia and depression. Rather it correlates with pre-transfer medical events (in Alabama) or post-April 2005 events; as admitted, Claimant never returned to work after April 2005.

#### RULINGS OF LAW

All four Claims allege regular work duties on Employer's assembly line caused occupational disease. Repetitive trauma occupational disease claims necessarily fail without substantial exposure to a demonstrated repetitive trauma. Here, all alleged injuries (and exposures) are uncorroborated in Employer's Clinic Notes comprising Exhibit 3 (admitted without objection). The Clinic Notes are the only comprehensive medical record during the relevant times herein. A review of these notes reveals employee used the Clinic for both

personal and work-related medical conditions. Records of private providers do not reflect symptoms or work histories that might predicate either repetitive trauma or new injuries.

Claimant's four cases each plead onset dates that are not preceded by any sustained work period; the third and fourth cases plead onset dates subsequent to Claimant's retirement.

### Incidence of Occupational Disease

#### *Exposure and Medical Causation*

Injury alleged to have occurred by repetitive trauma is compensable under Chapter 287. Section 287.067.7 RSMo (2000). A claimant must prove all the essential elements of the case. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo.App. 1990). Dolen v. Bandera's Cafe, 800 S.W.2d 163, 164 (Mo.App. 1990). A claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo.App. 1988). A claimant must identify a hazard of occupational disease to which he was exposed on his job. Section 287.063.1 RSMo (2000). A two pronged test remains the law: (1) proof of an exposure greater than that which affects the public generally and (2) proof of a recognizable link between symptoms of the condition or disease and a distinctive feature of the job. Lytle v. T-Mac, 931 S.W.2d 496 (Mo.App. 1996). Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 48 (Mo.App. 1999).

Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). Silman, 891 S.W.2d at 175. As with all proofs in complex medical evidence, 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. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

The standard of proof that was in effect in May and June 2005 (i.e. first and second cases) is proof that the conditions of employment were "a substantial factor" in causing the harm for which medical treatment has been needed and which has resulted in the claimed disability. Sec. 287.020.2. RSMo. 2000. The "a substantial factor" standard does not require proof that the work was the predominate cause but the work must be more than merely a triggering or precipitating factor. It must be noted that the legislature excluded "progressive degeneration" from occupational disease. Section 287.067.2 RSMo (2000).

As with all proofs in complex medical evidence, 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. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Here, both of Claimant's experts were shown to have been either under-informed or misinformed about Claimant's work exposure in the Missouri plant. Claimant herself admitted she did not know what she was doing during her last week of work (T. p. 81). Dr. Berkin was

unaware of Claimant's pre-transfer low back condition requiring injection therapy in 2004. Missouri courts have held that it is reasonable to expect experts to be fully informed. Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

### FIRST CASE

Here, Claimant is attempting to prove that her work in Missouri caused her to contract an occupational disease that re-injured her right shoulder. Before her transfer, she had undergone four surgeries on her shoulder and claims to have had permanent restrictions of no overhead work or lifting greater than five pounds with her right upper extremity. Her work in Alabama did not approach these restrictions and she was able to continue her job there. The question presents what effect, if any, did her very limited work in Missouri have on her right shoulder and was that claimed exposure sufficient to constitute a substantial factor in causing a compensable repetitive trauma injury. Apparently, a least one of Claimant's jobs here did involve her needing to pull a power tool down from overhead and she did have to do some lifting in at least one other job. However, when measured against the few hours worked in Missouri, Claimant exposure to each of these positions necessarily reduces exposure to the other the other.

Claimant offered testimony from two different experts. However, Claimant's opinion evidence is unsupported by treatment records or ergonomic facts that give probative force. Dr. Berkin, reviewed Dr. Tindell's shoulder treatment records, but nevertheless, attributed all of the right shoulder disability to the 1985 shoulder injury. He reiterated the point later in a supplemental report. Dr. Poetz contradicts his co-expert and baldly asserts a causal connection, diagnosing tendinitis and impingement syndrome (her "injury") and thirty percent PPD. However, no right shoulder problems or symptoms appear in the Medical Department records until June 6, 2005, just over six weeks after she has last worked on the line.

It was not until four days later, on June 10<sup>th</sup>, that she first mentions her right shoulder *history* to Dr. Warren (whom she began seeing since the day after her last day of employment in 2005, or April 25). The first *treatment* that she had for her shoulder after her transfer was that which she received from Dr. Tindell in Alabama beginning on June 21, 2005 while on a leave of absence. Dr. Tindell's final diagnosis was consistent with the known chronic condition (comprising the four surgeries in Alabama). Claimant last shoulder treatment was two weeks later but she claims she had some therapy for her shoulder while treating for her low back in the following months.

Employer's clinic notes contained no suggestion of new injury and only one reference to work restrictions. The only treatment records are the two weeks with Dr. Tidell in Alabama who diagnosed chronic conditions and provided medications. Dr. Poetz's reliance on Dr. Tindell's notes is misplaced inasmuch as the notes neither predicate new symptoms nor document sufficient ergonomic details of exposure. Regarding ergonomics, Dr. Poetz admitted on cross-examination that he did not know how much overhead work Claimant performed in Missouri. Dr. Poetz does not appear to have been properly informed about Claimant's mere three weeks (approximately thirty hours each) of actual floor work in Missouri acknowledged by Claimant at trial. As a result, Dr. Poetz was materially misinformed, or mistook, the description and duration

of Claimant's *de minimis* exposure. Admission of a contrary matter weakens the value of expert opinion. DeLisle v. Cape Mutual Insurance, 675 S.W.2d 97 (Mo.App. 1984).

Claimant's *condition* is not disputed. Nevertheless, Dr. Poetz's report and testimony provides no support for his disability rating since he doesn't even state that Claimant's pre-existing symptoms and findings have changed or increased as a result of Claimant's work in Missouri. Dr. Berkin rejected shoulder disability from work in Missouri flatly. Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). On the other hand, Dr. Cantrell testified that he found no evidence that Claimant's Missouri employment resulted in any additional injury to the right shoulder and, as such, assigned no disability beyond that which was present prior to her transfer.

This Claim then involves a situation where an employee with a significant chronic disabling injury transfers to a new job and experiences an increase in symptoms when asked to do work that arguably exceeds practical work restrictions but where there is no showing that the work (just three weeks, or more) caused any change in the underlying pathology or any increase in disability. Dr. Poetz described in detail some job procedures unsourced in his notes and not to be found elsewhere in the record, including Claimant's own direct testimony. The evidence demonstrates, at most, that Claimant's brief work exposure in Missouri resulted in temporary exacerbation of subjective shoulder complaints. This temporary triggering or precipitation of longstanding symptoms where the triggering or precipitation did not rise to the level of a "substantial factor" in causing a new "injury" that constitutes an independent occupational disease.

Dr. Cantrell's testimony is more persuasive for three reasons. He was better informed about the exposure, especially the duration of any alleged exposures. His conclusions are reconcilable with the balance of the record, particularly the pre-transfer medical record. Dr. Cantrell never was impeached or confronted with a mistaken fact of assumption. Claimant failed to establish by a preponderance of credible evidence that permanent disability, if any, was the result of the subject exposure and not that of a non-compensable, or prior, or subsequent event. See Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

## SECOND CASE

In this Second Case, alleging low back injury, Claimant's experts are found to lack sufficient bases to conclude a work injury occurred during Claimant's brief work in Missouri. Although Claimant underwent surgery in November 2005, Claimant had worked only a few weeks before taking a leave of absence. Approximately a month later, without having returned to work from her leave of absence, Claimant reported a lifting accident at home causing low back symptoms prompting her to seek treatment. The at-home accident history is traced in the records of her private providers. Prior to her transfer to Missouri, Claimant had developed substantial low back symptoms diagnosed as degenerative disc disease and claimed long-term work restrictions imposed in Alabama to protect her back from strain or injury. Claimant re-injured her back at home in July 2005 that led to her surgery four months later with Dr. Backer.

Other than Claimant's assertion of repetitive trauma, there are several likely causes of, or factors contributing to, the symptoms that led to Claimant's need for low back surgery. These are: 1) Claimant's pre-existing severe symptoms diagnosed as degenerative disc disease, including injection therapy (in 2004), 2) the acute injury that took place at home around July 2, 2005 and, 3) the progressive pathology with increasingly disabling symptoms from the degenerative disc disease (unaffected by Claimant's work or a superimposed trauma).

Claimant's chronic low back problems diagnosed as degenerative disc disease prior to her transfer to Missouri is beyond dispute. Treatment over several years including a full set of epidural steroid injections as recently as November 2004 created the need for permanent lifting restrictions. Equally clear is that on or about July 2, 2005 Claimant had a sudden onset of acute low back pain and sciatica while handling clothes at her apartment, which compelled her to seek urgent care two days later. Degenerative disc disease is a progressive condition that advances with age independent of trauma. Again, the legislature excluded "progressive degeneration" from occupational disease. Section 287.067.2 RSMo (2000).

Claimant only worked about three weeks in Missouri prior to her surgery. The 98.1 hours that she logged between March 21, 2005 and April 22 (see above) included two-three days sitting in a classroom and other time spent training on the line working with another transferee and a regular Missouri employee. This *de minimis* exposure to Employer's assembly line is, at once, unknown to Claimant's experts and improbable as an injuring exposure (necessarily unexplained in the record by Claimant's under-informed experts). On June 6, 2005, a visit to Employer's Clinic involved work restrictions that she had been given by her family doctor, however, she admitted that she had not worked under those restrictions since she had been out of the plant on vacation or sick leave since April 22.

Claimant's history and testimony is unreliable regarding the seriousness of her low back condition. She appears not to have mentioned her back problem to Chrysler's medical personnel until April 19, 2005 and then only mentioned her history of back symptoms when giving a medical history when she was undergoing a reinstatement exam after having been out due to chest pain. When next seen in Medical on May 27, 2005, she was again there to reinstate after an absence, this time due to depression and stress, no mention was made of her back and by then she was off work over one month (last day worked was April 22). Although she began seeing Dr. Warren (St. Louis area) on April 25, 2005 she only mentioned stress headaches and insomnia to him. On May 5, 2005 Claimant has the same complaints but added a new complaint, chest pain. On June 10, 2005 she added her shoulder, but not her back.

On July 4, 2005 Claimant went to St. Luke's Urgent Care reporting a sudden onset of low back pain and sciatica on July 2, 2005 at home while handling clothes. She did not go to Dr. Warren for her back until after the July 4<sup>th</sup> treatment and only then did he refer her to Dr. Chapel. When she went to Dr. Chapel, she again dated the onset of her back pain to July 4<sup>th</sup>. Claimant saw Dr. Backer (surgeon) on September 29, 2005 and, again, attributed her low back pain to the event at home. Claimant is neither working nor reporting symptoms on or about the alleged June 6, 2005 injury that she pled. Although Claimant denied some of these notes at trial, it must be observed that there is consistency and cogence in these private treatment records to credit those denials.

Dr. Berkin's qualifications warrant some scrutiny given the longstanding, complicated pathology in issue. To qualify an expert, a witness must have knowledge, skill, training, experience or education supporting the opinion which is intended to aid the trier of fact. Nixon v. Lichtenstein, 959 S.W.2d 854 (Mo.App. 1997). The extent of qualification usually pertains to the weight to be given evidence rather than admissibility. Donjon v. Black & Decker (U.S.), Inc., 825 S.W.2d 31 (Mo.App. 1992). Separately, the facts upon which he based his opinions are not supported by competent evidence. It is well established that there must be competent evidence to support the reasons and facts relied on by a medical expert to give the opinion sufficient probative force to be considered substantial evidence. Silman, supra.

Dr. Berkin's factual suppositions were often incorrect or incomplete: first, he thought that Claimant worked continuously for two months in St. Louis performing a job or jobs requiring bending and lifting whereas she worked less than three full weeks over a thirty day period (March 21 to April 22); second, he was not aware of the contents of the St. Luke's Urgent Care record for July 4, 2005; third, he failed to acknowledge the lack of back complaints (i.e. non-treatment) to Dr. Warren until after July 4, 2005; fourth, he failed to acknowledge that Dr. Chapel did not see Claimant until after the events of early July, 2005; fifth, he failed to mention, much less account for, the history given to Dr. Backer about the date of symptom onset; sixth, he failed to apprise himself of the weight of the side panels that she had to lift and move in the single job to which she has attributed most of her back problems; seventh, based upon the prior and subsequent medical records, there is no basis upon which he could convincingly explain that Claimant's work in Missouri caused a lumbosacral strain "with a protruding disc at L5-S1 and bulging discs at L5-S1 and L1-2.

Similarly, Dr. Poetz's qualifications must be considered given the complex pathology in issue. Nixon, supra. Don Jon, supra. Dr. Poetz is not a surgeon and such expertise is warranted in a surgery case where causation is disputed. This point is made imperative in context with the complicated facts of this case. Again, Claimant's expert's testimony was inexact and inaccurate as the result of unfounded assumptions. First, he stated that Claimant worked "long hours" on the side rail job which is odd since in discussing the alleged shoulder "injury" he wrote that she worked "several months" on her first job in St. Louis, with radiators. Second, when he was discussing the neck claim, he focused on her supposed need to perform a lot of overhead work, not a feature of either the side rail job or the radiator job. Dr. Poetz did not seem to realize that most of the time that Claimant worked on the floor involved training where she did not work on jobs alone but instead shared duties with another transferee and a regular Missouri employee. Third, Dr. Poetz contemplated Claimant beginning stress classes after onset of low back pain approximately June 2005. The record shows Claimant stopped working effective April 22 and had already taken stress classes. Dr. Poetz was not fully informed in this case to render opinions on causation.

Employer's expert, Dr. Cantrell, is a specialist in pain management and he treats patients with spine and joint injuries. He is associated with an office that specializes in orthopedics and sports medicine. His qualifications are somewhat better than Claimant's experts. More importantly, his understanding of the work place exposure and hours worked is reconciled clearly with the balance of the evidentiary record and his testimony, while challenged by Claimant, may not be said, in this case, to be impeached or even refuted.

Dr. Cantrell ultimately opined that L5-S1 surgery in November 2005 was the full manifestation of Claimant’s long-standing history of disabling degenerative disc disease that, if aggravated by any recent (post-transfer) events, it was the lifting incident at home of July 2, 2005. Absent clear evidence that Claimant was exposed to repetitive trauma at work, the July 2 incident becomes a plausible accident event that caused disabling symptoms. The medical record of Dr. Backer compels the conclusion that the non-work event was a substantial factor in leading to Claimant’s need for treatment or contributed to her current permanent disability. Claimant presented insufficient evidence through competent testimony to find a causal connection between Claimant’s work in Missouri and Claimant’s onset of low back symptoms giving rise to surgery. Dr. Cantrell was more persuasive than either Dr. Berkin or Dr. Poetz.

THIRD AND FOURTH CASES ONLY

The 2005 Reform Bill made changes to the laws that affect the third and fourth cases. The parties stipulated a February 28, 2006 injury date for the left knee claim. The standard of proof in effect on the date of this alleged injury is whether the conditions of employment were “the prevailing factor” in causing the harm for which medical treatment was needed and which resulted in the claimed disability. Sections 287.020.3(1), (2). and 287.067.2-3, RSMo. (2005).

THIRD CASE (Knee)

Notice

Section 287.420 RSMo (2005) requires an employee to give the employer written notice within thirty days of the diagnosis of the occupation disease causing the injury. The only exception is where the employer had actual notice and was not prejudiced by the lack of notice. However, the claimant has the burden of proof on both the notice and prejudice issues. In this case, Claimant admitted she did not report the left knee condition to Employer but mentioned to a supervisor that she was having generalized leg pain secondary to her low back condition. As discussed above, Claimant’s testimony is not reliable. Her assertion lacks detail and context that make it worthy of belief. Again, the Clinic Notes comprising Exhibit 3 lend no corroboration to her testimony about reporting knee injury complaints to Employer’s Clinic.

Here, the only event that could constitute actual notice to employer was the filing of the Claim.<sup>5</sup> Thus, Claimant’s claim fails for lack of notice to Employer as prescribed. Claimant failed to comply with the notice requirements contained in Section 287.420.

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Assuming, *arguendo*, that Employer received proper notice, Claimant, nevertheless, failed to present sufficient evidence of exposure and medical causation linking her actual exposure to line work at Employer’s Missouri plant to her knee and neck Claims. Repetitive

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<sup>5</sup> Reference to the minutes reveals a filing date September 11, 2008, about 22 months after her left knee surgery.

trauma injury is compensable “only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.067.3 RSMo (2005).

Moreover, it is necessary to prove, where there was a preexisting condition of the same kind or type, that there was more than a mere worsening of the same condition due to the most recent exposure, Miller v. U.S. Airways Group, Inc., 316 S. W. 3d 462 (Mo. App. 2010). Proof of an aggravation of a preexisting condition is not sufficient to establish a right to compensation unless the aggravations rise to the level of becoming the prevailing factor in causing both the need for treatment and disability. Payne v. Thompson Sales Co., 322 S. W. 3d 590 (Mo. App. 2011)

Dr. Berkin did not examine Claimant’s left knee and was not aware of any claim of work-related injury to that body part since it was not filed until after his examination. Dr. Poetz’s testimony is not credible for a number of reasons, to wit: Dr. Poetz is a family practitioner, not an orthopedic surgeon or physiatrist, and so lacks the qualifications to tender an opinion addressing the issue of whether Claimant’s work caused her to contract an occupational disease affecting her left knee, particularly in this complicated set of circumstances.

Claimant did not work in February 2006 except for her two brief attempts to work on February 13 and 15 which only precipitated a comment that the job that she had been assigned to on the morning of February 13 was jerking her right shoulder. Claimant had not worked since April 24, 2005. Claimant was unclear as to whether her claim of left knee injury was due to standing and waking on concrete at work or due to favoring her left knee due to her chronic low back and right leg symptoms (or both). There is not a single report of left knee pain or other symptoms in any of the medical records prior to the reference to the October 28, 2006 event.

Dr. Poetz lacked the necessary details concerning the claimant’s job duties in Missouri, and the number of hours that she worked in Missouri, to assess whether they created the hazard or risk of causing a torn medial meniscus or degenerative knee joint disease. Dr. Poetz was assuming that the claimant worked “long hours” standing and walking at work, whereas it is admitted that she only worked about two and one-half weeks in Missouri and that did not involve even a forty hour work week during any of the three weekly pay periods. Dr. Poetz contemplated a February 2006 retirement (p. 75), yet embraces the October 2006 onset date without reference to any earlier knee complaints. Accordingly, there is no explanation in evidence as to the medical basis of Dr. Poetz’s supposition that her work caused the pathology that Dr. Moore addressed at the time of his December 2006 surgery. Dr. Poetz did not have any basis to conclude that Claimant’s degenerative joint disease was aggravated by Claimant’s work, since he did not review any pre-allegation diagnostic studies.

Claimant’s knee locked in late October 2006 after not even attempting to work since February 2006 and after not working even a full shift since April 22, 2005. She was found to have an *acute* tear to her medial meniscus that required surgery. Then, in September 2008 she filed a Claim and reached back to her last job to allege a basis to claim workers’ compensation benefits. Claimant’s proffer of evidence is, again, insufficient to prove that the her brief period of work in Missouri was the prevailing factor in causing her need for left knee surgery and causing her to sustain permanent disability.

Dr. Cantrell, at the time of his second evaluation, wrote, and he later testified consistently with his written opinions, that Claimant's torn medial meniscus was due to an acute injury that took place when Claimant's left knee locked on or about October 28, 2006. He rejected any thought that the knee injury resulted from the "micro trauma" theorized by Claimant's attorney. (Exhibit 2, p. 37.) Dr. Cantrell's opinions were better founded and more persuasive than Dr. Poetz.

#### FOURTH CASE (Neck)

Of each of the four cases that Claimant is simultaneously pursuing, this Claim is the claim in which the required treatment was the most remote from her last date of active employment (i.e. April 2005). The stipulated onset date of February 8, 2007, is just a few days short of a year after her last attempt to work in Missouri and about 22 months after the last time that she had been able to work for (nearly) a full shift at Employer's Missouri plant. The first neck symptoms post-transfer were recorded in January 2007 even though Claimant had been under active medical treatment in 2005 and 2006 for her right shoulder, low back and left knee.

Once again, Dr. Poetz's qualification must be considered given the complex pathology in issue. Nixon, supra. Don Jon, supra. As a family practitioner, his emphasis is less focused than Dr. Cantrell's who, while not a surgeon, specializes in spine and joint injury in support of surgeons in his practice. Again, more importantly, his testimony is easily reconciled with the balance of the record. Whereas, Dr. Poetz's admissions regarding omissions in his knowledge of medical and work events undercut the probative value of his opinions. His testimony was inexact and inaccurate as the result of unfounded assumptions and the lack of a documented history of exposure to repetitive trauma or treatment record. Reliance on Claimant's representations to Dr. Poetz is misplaced due to her poor credibility on medical and work events elsewhere in the record. On the other hand, all of the documentary evidence supports Dr. Cantrell's conclusions.

Dr. Poetz attributed her need for neck surgery to her overhead work in Missouri, but if she indeed did any such work after her transfer, it was done in only one of the jobs which she performed in Missouri for a period of one or two weeks. On cross-examination, Claimant could not remember what she performed during her last week of work. Dr. Poetz's inaccuracies in evaluating the other cases bears on his testimony here. As part of the same evaluation, he also attributed an aggravation of her pre-existing right shoulder condition to overhead lifting but attributed her low back "injury" to the claimant's lifting, bending and carrying in a job that did not involve overhead work. He identified nothing ergonomic to predicate repetitive trauma to Claimant's knee. He was mistaken that Claimant worked "long hours" for "several months" in Missouri (see above).

More simply, Dr. Poetz does not explain how his causation opinion reconciles the lack of any neck complaints from the last date of Claimant's active employment in 2005 and her 2007 treatment in Alabama. He fails to reconcile the history that was given to the treating physicians in Alabama describing on onset of significantly increased symptoms sometime in January, 2007 (post-retirement) and Claimant's statement at that same time indicating that her condition was not due to her work. Unexplained in the record is his dismissal of the prior diagnosis of degenerative disc disease and a C5-6 herniation (from 2003) on the representations by Claimant

that she was asymptomatic from then until (presumably) she transferred to Missouri; at the same time, he ignored the absence of verified symptoms from the transfer date until early 2007.

The absence of neck complaints in the contemporaneous medical records is noteworthy. When seen by Dr. Warren on April 25, 2005, three days after her last work in 2005, her neck examination was normal. Even the Chiropractor, Dr. Chapel, listed symptoms no higher than her mid-back and the cervical area was not listed by Claimant or the doctor as a problem area. Neck complaints were also absent from the medical records of Dr. Warren and Dr. Backer that extend into 2006. There is simply no explanation for this lack of documentation other than to conclude that Claimant's need for surgery grew out of her acute onset of non-work related symptoms in January 2007.

The facts of this case are very similar to those in Payne, *supra*. There Claimant attempted to prove that his need for neck surgery was due his having injured his neck while shoveling snow at work. However, he had a history of a prior cervical HNP, failed to report an injury to his employer, failed to complain to his co-workers, failed to seek medical care promptly and when treatment was initially sought, six weeks after the shoveling event, he did not attribute his neck symptoms to an incident at work and stated that his symptoms had been present for 2 days, not 6 weeks. In that case, the ALJ, the Commission and ultimately the appellate court concluded that Payne failed to prove that the activity at work was the prevailing factor in causing his need for treatment and disability. Dr. Cantrell's opinions are better-reasoned and more persuasive than those of Dr. Poetz.

Dr. Cantrell testified that there is no causal connection between Claimant's brief work in Missouri, which ended no later than February 15, 2006, and perhaps as long ago as April 22, 2005, and her need for cervical surgery in February of 2007. He based his opinions on the fact that she had reported cervical complaints dating back to the late 1980's or early 1990's, she had been given the diagnosis of degenerative disc disease and a herniated disc at C5-6 in 2003 and when she finally sought more current treatment for her neck on February 8, 2007 that she reported having experienced a sudden onset of neck pain of unknown cause (but indicated at the time that it was not work related) and 20 days later, on February 28, 2007 she told Dr. Parker that her intermittent neck and shoulder pain had become significantly worse four weeks earlier and that she now also has radiation into her left arm.

#### Notice

Assuming, *arguendo*, a compensable repetitive trauma occupational disease, compensation would have nonetheless been denied due to a failure of notice. The claimant's testimony that she reported neck complaints to one or more of her supervisors in Missouri, and attributed those symptoms to her jobs to which she was assigned, is not credible. There is no record of her having complained to Employer's Clinic of any neck injury whether by accident or repetitive trauma. No mention of current neck symptoms can be found in the records of Dr. Warren, Dr. Chapel, Dr. Backer or of St. Luke's and, as such, cannot be corroborative of Claimant's suggestion that she reported her neck injury to supervisors.

In an occupational disease case, the thirty day period begins to run when the “condition” has been diagnosed. Section 287.420 RSMo (2005). Assuming, *arguendo*, Claimant was not diagnosed with degenerative disc disease and a C5-6 herniation in 2003, her surgery on February 12, 2007, was based upon medical diagnosis from Dr. Parker on February 8, 2007, which commenced the 30 day notice period. Yet, no Claim was filed for another 19 months. Claimant simply is not credible and this leads to the conclusion that she failed to provide the notice that the statute requires.

Conclusion

Accordingly, in the Third Case, identified by Injury Number 06-135663, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain her burden of proof. Claim denied. The other issues are moot.

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

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

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

**FINAL AWARD DENYING COMPENSATION**  
(Affirming Award of Administrative Law Judge by Separate Opinion)

Injury No. 07-134224

Employee: Angela C. Neese

Employer: Chrysler LLC, Inc.

Insurer: Old Carco LLC

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award of the administrative law judge by separate opinion.

**Preliminaries**

The parties asked the administrative law judge to resolve the following issues: (1) incidence of occupational disease, which includes exposure and medical causation; (2) permanent disability; (3) notice; (4) liability of the Second Injury Fund; and (5) rates of compensation.

The administrative law judge concluded that employee failed to meet her burden of proof with respect to the issue of occupational disease, and also that employee failed to provide notice as required under § 287.420 RSMo.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in misinterpreting and/or ignoring the testimony from employee's experts; (2) in improperly determining that employee lacks credibility; (3) in improperly interpreting the last exposure rule; (4) in misinterpreting the facts and the law with regard to the issue of notice; and (5) in declining to award permanent total disability benefits from the Second Injury Fund.

The Commission affirms the award of the administrative law judge with this separate opinion.

**Findings of Fact**

On January 9, 1984, employee began working for employer in Huntsville, Alabama, as a Tech III. For over 20 years, her primary duties for employer involved working on an assembly line producing components for automobile manufacturing. Employee stood and walked continuously on concrete floors and performed repetitive overhead reaching and lifting tasks.

On March 21, 2005, employee transferred to employer's plant in St. Louis, Missouri. Employee worked 30 hours for employer during the week ending March 27, 2005, and

Employee: Angela C. Neese

- 2 -

32 hours during the week ending April 3, 2005. Of that time, employee spent about 2 days in a classroom, and about 2 weeks undergoing training, during which employee split her duties with another transferee. Employee performed no work for employer during the weeks ending April 10 and 17, 2005. Employee then worked 36.1 hours during the week ending April 24, 2005. After April 22, 2005, employee performed no actual work duties for employer in the St. Louis plant. Instead, she attended a stress class, then took a leave of absence. We find that employee performed less than 3 weeks of actual work in employer's St. Louis plant.

Employee claims that she suffered an occupational disease in Missouri affecting her cervical spine as a result of this approximate 3 weeks of performing her work duties for employer. Employee provides expert medical testimony from Drs. Shawn Berkin and Robert Poetz. We have carefully reviewed the reports and deposition testimony from both doctors. After careful consideration, we find that both of these doctors were provided such limited information regarding employee's job duties in Missouri, the duration of her employment in Missouri, and the timing and onset of her complaints that their opinions lack any persuasive force with respect to the disputed issues in this matter.

For example, when asked whether he knew how long employee worked in Missouri, Dr. Berkin revealed his erroneous assumption that it was "probably" a couple of months, and that he "guess[ed]" employee developed symptoms at that time. *Transcript*, pages 298, 304. Dr. Poetz, meanwhile, seemed even less sure of the relevant facts involved in employee's claim: he admitted he didn't know the duration of employee's work in Missouri, and did not even know the significance of her claimed date of injury. Both doctors rendered purely conclusory opinions in their reports, and failed to persuasively explain any causative interaction between employee's job duties in Missouri and the purported occupational disease sustained in Missouri. Both doctors also failed to persuasively distinguish the purported occupational disease sustained in Missouri from employee's preexisting conditions affecting the cervical spine.

It may have been (indeed it appears to be the case) that employee's years of work for employer in Alabama contributed to or caused some of the injuries she claims herein, but we find that employee has failed to provide persuasive medical evidence that she contracted any identifiable occupational disease in this state.

Employer hired employee in Alabama; it follows (and we so find) that her contract for employment was not made in Missouri. Because employee only performed her actual job duties for employer for about 3 weeks in Missouri before participating in the stress class and taking a leave of absence, we find that her employment was not principally localized in Missouri within 13 calendar weeks of her suffering any identifiable injury or occupational disease.

Employee: Angela C. Neese

**Conclusions of Law**

Application of Chapter 287

Section 287.110.2 RSMo provides, as follows:

2. This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

We have found that employee did not contract any identifiable occupational disease in Missouri, that her contract for employment was not made in Missouri, and that her work was not principally localized in Missouri within 13 calendar weeks of the injury or diagnosis of occupational disease. It follows that employee has failed to satisfy the requirements of § 287.110. Accordingly, we conclude that Chapter 287 does not apply to employee's injuries.

We additionally wish to make clear that, if it were shown that Chapter 287 did apply to this claim, we would deny it on the issue of medical causation, owing to employee's failure to provide persuasive expert medical opinion evidence.

**Conclusion**

Employee's claim is denied because Chapter 287 does not apply to her injuries.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued May 13, 2014, is attached solely for reference and is not incorporated by this decision.

Given at Jefferson City, State of Missouri, this 11<sup>th</sup> day of March 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

\_\_\_\_\_  
James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

# AWARD

Employee:	Angela C. Neese	Injury No.:	07-134224
Dependents:	N/A	Before the	
Employer:	Chrysler LLC, Inc.	<b>Division of Workers'</b>	
Additional Party:	Second Injury Fund	<b>Compensation</b>	
Insurer:	Old Carco LLC	Department of Labor and Industrial	
Hearing Date:	February 6, 2014	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED

## 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: February 8, 2007 (alleged)
5. State location where accident occurred or occupational disease contracted: St. Louis County (alleged)
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 happened or occupational disease contracted:  
Employee alleged injury by repetitive trauma from Employer's assembly line.
12. Did accident or occupational disease cause death? N/A 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? N/A

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

COMPENSATION PAYABLE

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

TOTAL: -0-

- 23. Future requirements awarded: N/A

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

The compensation awarded to 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 Claimant:

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

Employee:	Angela C. Neese	Injury No.:	07-134224
Dependents:	N/A		
Employer:	Chrysler LLC, Inc.		Before the <b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund		Department of Labor and Industrial Relations of Missouri
Insurer:	Old Carco LLC		Jefferson City, Missouri
Hearing Date:	February 6, 2014	Checked by:	JED

This case involves four separate Claims for Compensation: 05-068917(May 27, 2005), 05-068918 (June 6, 2005), 06-135663 (February 28, 2006) and 07-134224 (February 8, 2007). The testimony and exhibits in this record constitute the evidence in each Claim. Each Claim follows Claimant’s transfer to St. Louis after many years in an Alabama plant. Each Claim is disputed by Employer. Separate Awards issue on each Claim. These cases may be referred to herein as the first, second, third and fourth cases, chronologically.

Employer admits Claimant was employed on each of the reported dates of injury and that any liability was fully insured. Claimant admits she was not at work on any of the alleged injury dates. The Second Injury Fund (“SIF”) is a party to this claim. Claimant seeks PTD benefits against the SIF in the fourth Claim. Both parties are represented by counsel. Objections at expert depositions are ruled upon consistent with the findings herein.

Issues for Trial

*Third And Fourth Cases*

1. notice;  
*All four Cases*
2. occupational disease (exposure and medical causation);
3. nature and extent of permanent disability;
4. liability of the SIF;  
*Fourth Case Only*
5. Rate of Compensation

**FINDINGS OF FACT**

Claimant is a 54 year old native of Alabama. She has a high school diploma. Claimant began working at Chrysler’s electronics plant in Huntsville, Alabama in 1984. She worked continuously there until she transferred to the Missouri plant in early 2005. Transfer became an option when the Huntsville plant was purchased by Siemens. After some transition, employees were told they had the choice of remaining in Huntsville and becoming a Siemens employee or transferring to some other Chrysler plant. Claimant opted to transfer to Chrysler’s van plant Missouri, in order to retain her seniority. Her intention was to continue to work at Chrysler until

she reached the 30 year milestone even though it would require her to live apart from her family. When she transferred, she rented an apartment in the St. Louis area while her husband remained in the family home in Athens, Alabama, a town that is quite close to Huntsville.

The Huntsville plant produced electronic dashboard components such as radios and CD players that are inserted into dashboards that would be installed in a Chrysler vehicle at a plant elsewhere. The Huntsville job involved standing, reaching above shoulder level, lifting, carrying and the use of power tools. Separately, Claimant also worked as a part-time employee benefits representative. About a year before the transfer, Claimant became a full-time benefits representative. She continued to work on the line on weekends as needed. The benefits representative job allowed her to sit most of the time although she would go into the plant to speak to employees who had benefit issues.

Long before, in the late 80's or early 90's, Claimant began to notice neck and shoulder symptoms. She underwent a myelogram of her neck in 1989. Claimant required four surgical procedures on her right shoulder, including two scopes, an open procedure to repair a torn rotator cuff and another open procedure to remove the surgical staples. She also developed back problems that required her to undergo a lumbar MRI and epidural steroid injections. She had undergone a series of injections in Alabama as recently as November of 2004, five months before her transfer to Missouri. The shoulder and back problems were, at least in part, handled as workers' compensation injuries but no formal "claim" was filed in Alabama.

Claimant transferred to Missouri effective March 21, 2005. For the first 2-3 days she was in classroom training. She then went out on the assembly line and spent the next 1-2 weeks working with a local employee and another transferee as the two new employees learned to perform the various jobs that they would have to do as "floaters." At trial, Claimant agreed with the work hours reflected by Employer's pay records:

30 hours for the pay period ending March 27, 2005  
32 hours for the pay period ending April 3, 2005  
36.1 hours for the pay period ending April 24, 2005.

Claimant never successfully returned to (actual) work on the plant floor after April 24, 2005.<sup>1</sup> The paid hours in March and early April included her classroom training and the 1-2 weeks sharing a job with a regular worker and another transferee. Claimant was subsequently out ill with stress and later took a leave of absence. She admitted she was paid 28 days during stress classes. Claimant never worked again except for the one day attempted in February 2006. (T. 79-83.)

#### *Clinic Notes & Reported Injuries*

##### Right Shoulder (First Case)

Claimant asserted that when she was transferred that she brought with her certain work restrictions in place, including no overhead work and no lifting more than five pounds with her right arm. These were permanent restrictions given to her in Alabama due to her long-standing

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<sup>1</sup> All four alleged injury dates are subsequent to April 24, 2005.

shoulder and back conditions. Claimant alleges that the plant in Missouri would not accept those restrictions and kept assigning her to jobs that violated the restrictions or that otherwise bothered her right shoulder and back. After working during the first two weekly pay periods in Missouri she left the job to attend an employer sponsored stress class where she was off-work but paid for four weeks. During this period she saw a psychiatrist in St. Louis and returned to Alabama and visited her PCP in order to obtain documentation to show the employer's plant physician of her long-standing restrictions.

Thereafter, Claimant returned to work in late April 2005 but worked less than one week when she again took leave effective April 22, 2005. Claimant was off-work for chest pain secondary to costochondritis injury in April 2005 (in Alabama). (See Exhibit 3.) Claimant did not return to work in 2005; Claimant never attempted a return to work on the line after April 2005 until her unsuccessful attempt to return to work in February 2006, nine months later.

Claimant testified that she complained to the Clinic that her back and shoulder were bothering her due to the more strenuous work that was being assigned and mentioned her long-standing work restrictions from Alabama. The lack of medical paper work confirming her restrictions is one of the reasons why she went back to Alabama while she was on leave.

According to the plant clinic records (Exhibit 3), Claimant first came into Medical, after her transfer, on April 18, 2005. On that date she reported having developed chest pain after rolling over in bed while in Alabama on vacation. A note from a Dr. Gross was presented to Employer's Clinic but was questioned since it appeared to the doctor to have been altered. She returned to Employer's Clinic on April 19, 2005 for her return to work assessment at which time she gave her prior history of bulging [low back] discs that had required injection therapy. On May 27, 2005 Claimant underwent a reinstatement exam after having been out for depression and stress with a last date worked of April 22, 2005. Although she was cleared for work with no restrictions on May 30, 2005, she never actually worked again.

Two notes of June 6, 2005, appear to be reports or complaints of longstanding symptoms in which no new injuries are identified.<sup>2</sup> These notes contain Claimant's report that she has not worked overhead since shoulder surgery; the plant in Alabama had no overhead work and she was in an "appointed position" and did not work the floor except during overtime and thus limited use of her right arm.

According to Exhibit 3, Claimant did not (attempt) return to work until February 13, 2006. On that date, and when the Plant again tried to place her on February 15, 2006, Claimant worked at most an hour or two on the line before she was sent home. She never returned to work again except to confirm her disability status.

The first treatment that Claimant received in Missouri (and outside the plant clinic) appears to have taken place on April 25, 2005 when she began seeing Dr. Leo Warren, a primary care physician. Her complaints to Dr. Warren involved headaches, insomnia and depression associated with her job transfer and separation from her family in Alabama (Exhibit T). She claimed that she felt overwhelmed and she hurt all over and admitted to a history of anxiety and depression for which she had been given Lexapro by her GYN physician in Alabama. She

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<sup>2</sup> This is contrary to the pleaded low back injury Claim (second case) of the same date.

returned to Dr. Warren on May 5, 2005 with those same complaints but added a complaint of chest pain.

Only on her next visit, on June 10, 2005, did she mention problems with her right shoulder, provided a history of her past shoulder problems and mentioned that the local company doctor won't accept her paperwork related to her restrictions so she intended to return to Alabama to have the restrictions renewed. [On July 10, 2005 she returned to Dr. Warren with new history of low back complaints adding that she had to visit an urgent care facility for these complaints. See Low Back case below.]

Claimant was seen by Dr. Tindell in Alabama in June 2005 complaining of right shoulder problems. The first *treatment* that she had for her shoulder after her transfer was while on a leave of absence. Dr. Tindell's history is that she had been doing more strenuous work since her transfer and that the plant physician was not accepting her work restrictions and she needed copies of her documentation. Although Dr. Tindell suspected a rotator cuff tear, and after an MRI, his final diagnosis was bursitis and tendinitis which is consistent with the known chronic condition comprising four surgeries. He prescribed medication and work restrictions but Claimant never returned to work. He proscribed any lifting over twenty pounds

#### Low Back (Second Case)

Between the June 10<sup>th</sup> and July 10<sup>th</sup> visits to Dr. Warren, she required urgent care treatment at a facility operated by St. Luke's Hospital. (Exhibit S). The history on July 4, 2005 was sudden onset of low back pain and right sciatica while turning to place some clothes in a basket in preparing to go to the pool. She was given pain medication and muscle relaxers and given lifting and other restrictions. This first report of back problems to Dr. Warren was followed by referral to Dr. Chapel, a chiropractor.<sup>3</sup>

Although the records are difficult to decipher, it appears that Claimant went to Dr. Chapel first on July 25, 2005 complaining of worsening low back pain, including radicular symptoms ("numbness in toes") which had its initial onset 3 years earlier with an aggravation "3+ weeks" earlier (elsewhere "'7/02/05"). Her pain was noted at seven on a 1-10 scale. An MRI at St. Luke's on July 25, 2005 revealed bulging discs with a central protrusion at L5-S1. (Exhibit R.) Dr. Chapel continued to see Claimant, periodically, beyond her low back surgery and, as late as April 11, 2006, she was still dating the onset of her back and leg problems to July 5, 2005. The questionnaire asking whether the condition is related to an "automobile accident or on-the-job injury[.]" Claimant responded, "No." (Exhibit Q.)

Dr. Warren then referred Claimant to Dr. John Moore (whose records are not in evidence) who apparently performed steroid injections, without lasting relief. Claimant next saw Dr. Backer on September 29, 2005. She filled out a form on which she indicated that the duration of her symptoms were from July, 2005 "this time about 3 months" and the "context" was "at home". (Exhibit H.) Dr. Backer also wrote a letter to Dr. Warren in which he states that Claimant has had chronic back pain on and off "but worse since July of 2005". Dr. Backer performed an inter-body fusion at L5-S1 for degenerative disc disease (a herniated disc was not

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<sup>3</sup> Dr. Chapel's records are presented in two separate Exhibits, Q and R.

found) on November 7, 2005. Claimant subsequently continued to complain of symptoms despite the surgery. Claimant followed up with Dr. Backer and Dr. Warren. Claimant's February 2006 attempted return to work was unsuccessful. She returned to Alabama soon after that and continues to seek pain treatment, initially from a Dr. Gaines, and now from a Dr. Hendrix.

#### Left Knee (Third Case)

Since Claimant left Chrysler and returned to Alabama she has required left knee surgery. She attributes this problem to her long history of standing and walking in the Alabama and Missouri plants and perhaps to favoring her leg due to her back problems. She admits that she never specifically complained about her left knee to Chrysler and the first mention of a knee problem is on October 28, 2006 when she was examined at SportsMED. Claimant stated that her left knee just locked up when she stood up. (Exhibit J.) An MRI showed some degenerative changes in the knee which led to left knee surgery by Dr. Moore for a medial meniscectomy in December 2006.

#### Cervical Spine (Fourth Case)

As to the cervical condition, Claimant has experienced neck and shoulder area pain since the late 1980's and admitted having a cervical myelogram as early as 1989. This then has been a chronic problem for which she had no medical treatment during the time that she resided in Missouri. However, on February 28, 2007, while seeing Dr. Parker in Alabama, she reported having had intermittent neck and bilateral shoulder pain in the past that became significantly worse approximately "four weeks ago" with radiation into her left arm. (Exhibit O.) Also, twenty days earlier, on February 8, 2007 she had filled out a SportsMED pain questionnaire indicating that her neck pain had begun suddenly, and checked a box indicating no apparent cause and another box indicating that the problem was not work related. (Exhibit J.) Claimant subsequently underwent cervical fusions in 2007 and 2009.

#### Current Complaints

Claimant currently complains of low back, neck and leg pain. Claimant has longstanding symptoms that disrupt her daily activities, prevent her from playing with her grandchildren, limit how far she can drive, how long she can sit or stand, make housework difficult and significantly limit her recreational activities. She must recline several times a day for relief and takes pain medications, medications to relax her muscles, allow her to sleep and to improve her mood. Her right shoulder is weak, she cannot use her arm above shoulder level and feels that she has lost 25% or more use in the arm. Claimant doesn't believe that she can work in any capacity and has turned down offers to work in a clerical capacity at a friend's pet grooming business since she doesn't believe that she would be a dependable employee. She has no specific left knee complaints at this time. Claimant is on Social Security Disability and receives a permanent total disability pension from Employer. Her husband continues to work at a bank. Her husband drove her to St. Louis for the trial but they had to make periodic stops due to her symptoms.

Opinion Evidence*Dr. Berkin*

Claimant offered the 2008 deposition of Dr. Shawn Berkin, as Exhibit F. Dr. Berkin examined Claimant and reviewed medical records. Dr. Berkin issued a report dated December 15, 2007. (Exhibit B). (It should be noted that Dr. Berkin offered opinions on the 2005 Claims only; the other two Claims were filed after his evaluation.) Later, he prepared a one-page report dated April 28, 2008. (Exhibit 4.)

Dr. Berkin was told that her complaints started in June 2005 after she was assigned to a job at Chrysler requiring her to lift 600 side panels for vans per shift. Although she admitted to having a history of low back pain dating from 2001, she stated that as she worked in St. Louis, her back pain worsened requiring her to seek medical treatment at the plant Clinic and later by Dr. Warren, Dr. Chapel and Dr. Moore and others for conservative care. Dr. Berkin said Claimant had a pre-existing low back condition for which he agreed, "she largely received conservative treatment" (p.16). He was apparently unaware of the steroid injections from 2004 in Alabama.

An MRI in July 2005 revealed disc bulging at several levels in the lumbar spine, more pronounced at L5-S1. When the conservative care did not achieve the hoped-for results, she was referred to Dr. Robert Backer who performed an inter-body fusion at L5-S1 in November 2005. However, Claimant continued to complain despite a post-surgery MRI showing solid fusion. Pain treatment was instituted in St. Louis but was transferred to Alabama when Claimant decided to return to her home there.

Claimant complained to Dr. Berkin of having pain, tightness, stiffness, spasm and loss of motion in her low back which affects her ability to carry out her usual activities. Dr. Berkin was aware of her then-recent history of cervical surgery, her history of low back treatment for degenerative disc disease and her history of multiple right shoulder surgeries. On physical examination, Dr. Berkin noted a loss of lumbar motion, positive SLR on the left, and pain on muscle stretching and squatting although many of her reflexes were normal. The examination of her upper extremities was consistent with her remarkable history of multiple right shoulder surgeries.

Dr. Berkin diagnosed low back strain, bulging at L5-S1 and L1-L2 and status post low back fusion. He opined that the strain with protruding discs was due to Claimant's "industrial accident that occurred in June of 2005 as the result of repetitive bending and lifting . . . at Chrysler." Dr. Berkin then assigned a 35% PPD due to the "injury" and added a 10% PPD preexisting due to her earlier low back symptoms and treatment and also provided a preexisting rating of 35% of the right shoulder.

On cross examination Dr. Berkin admitted that Dr. Parker had suspected an annular tear in 2003 (in Alabama) and confirmed that Claimant's symptoms had developed gradually over time. He also agreed that on exam he found no muscle spasm, SLR on the right was negative and normal sensation and nerve function were present. Dr. Berkin stated that it was his impression that Claimant worked in Missouri for about two months but he didn't know how much weight

she lifted and what other jobs she may have done as a floater. He also admitted a diagnosis of degenerative disc disease. He admitted that a herniated disc was not identified and he agreed that she developed the lumbar degenerative disc disease despite her lighter job in Alabama.<sup>4</sup>

It should be noted that Dr. Berkin prepared a subsequent report dated April 28, 2008 in which he reiterated that all of Claimant's disability in her right shoulder preexisted her transfer to Missouri. (See Exhibit 4.)

*Dr. Poetz*

Claimant offered the deposition of Dr. Robert Poetz as Exhibit A. His narrative report is marked Exhibit E. Dr. Poetz opined in all four cases herein. His examination of Claimant took place on March 18, 2009.

Dr. Poetz listed Claimant's complaints, recorded a history of her various jobs in Alabama and Missouri and reviewed medical records up to the date of the evaluation. Physical examination reflected a loss of motion in all planes of the right shoulder, poor grip strength bilaterally, left knee crepitus, some diminished range of motion in the left knee, a loss of motion in all directions in both the low back and neck, positive SLR bilaterally and surgical scars were present in the right shoulder area and on the neck and low back, as well as portal scars over the left knee.

Dr. Poetz diagnosed prior right shoulder decompression times two with right shoulder rotator cuff tendinitis and impingement syndrome due to the "injury" of May 27, 2005. He diagnosed preexisting lumbar degenerative disc disease with L5-S1 disc protrusion with intractable back pain and aggravation of the degenerative disc disease due to the "injury" on June 6, 2005 requiring fusion surgery. He diagnosed preexisting degenerative joint disease in the left knee with a medial meniscus tear and aggravation of the DJD secondary to the "injury" of February, 2006. Finally he diagnosed preexisting cervical DDD with a herniated C5-6 disc that required fusion surgery due to the "injury" of February, 2007.

Dr. Poetz rated Claimant's preexisting disability at 30% of the right shoulder, 5% of the low back, 5% of the left knee and 5% of the neck and rated the successive "injuries" at 15% of the right shoulder, 40% of the body related to the low back, 35% of the left knee and 40% of the body related to the neck and went on to state that he believed that Claimant is permanently and totally disabled due a combination of the preexisting disabilities and the disabilities that resulted from the four "injuries" giving rise to the four pending claims.

On cross examination Dr. Poetz admitted that he had not reviewed the earlier IME reports of Dr. Berkin so was not aware that Dr. Berkin had stated that all of the disability in Claimant's right shoulder disability pre-existed her transfer to Missouri. Moreover, he admitted he did not know how much overhead work Claimant performed in Missouri compared to how much, if any, she had done in Alabama. He was asked about how long Claimant worked in the Missouri plant:

Q: And do you know how many months, weeks, days, or hours that  
[Claimant] worked in Missouri after she transferred from Alabama?

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<sup>4</sup> Dr. Berkin did not enunciate a degenerative process in the diagnoses or impressions of his narrative report.

A: I do not.

(Exhibit A, p. 40.)

Regarding low back symptom onset, Dr. Poetz agreed that, first, the first back complaints reported to Dr. Warren and Dr. Chapel *post-dated* the event at home in July, 2005. Second, that Claimant history to Dr. Backer attributed her acute complaints to that July event at home. Third, that nowhere in the plant Clinical Notes is there any report of a back injury related to her job here in Missouri. Fourth, that she couldn't have been injured at work in February, 2006 (when she tried to go back to work post-surgery) when lifting a heavy box if she had in fact refused to lift the box due to the risk of a back injury. Also, Dr. Poetz admitted he found no history of low back injury in the Clinic Notes of Employer despite giving direct testimony of an "injury" on June 6, 2005. He also admitted that the February 2006 failed attempt to return to work was recorded in the Clinic Notes as pain with slight bending and refusal to lift a box contrary to her restrictions. (p. 48, 49.)

Dr. Poetz also acknowledged that the cervical herniated disc at C5-6 was a diagnosis that had been made in 2003 so was prior to her transfer to Missouri. As to the left knee, Dr. Poetz was not aware of how much standing and walking on concrete Claimant had done in Alabama or in Missouri, and that Claimant has attributed the knee condition to both walking and standing at work and also to, perhaps, favoring her leg due to her back condition. He was also aware that a lumbar MRI had been done in 2002 and again in 2005 but the latter was only sought after the event at home in July 2005. He could not tell if the disc bulges were present prior to that event.

*Mr. Lalk – Counselor*

Claimant offered the deposition of Mr. Timothy Lalk, vocational rehabilitation counselor, as Exhibit C and his narrative report as Exhibit D. Mr. Lalk conducted an interview and records review. Lalk's report contains a detailed medical history, a description of Claimant's work at Chrysler in Alabama and Missouri, a list of her complaints and capabilities, a family and social background, and an educational background and vocational history. Lalk also performed testing that showed that she reads at a high school level, her math skills were at a 7<sup>th</sup> grade level and that overall, she scored at an 11.4 grade level, making her a candidate for post-secondary training. However, when Lalk took into consideration Claimant's reported symptoms and limitations as well as the various limitations placed upon her by the various physicians whom she has seen, Lalk concluded that she was incapable of competing in the open labor market due to her high pain level and the need to recline periodically throughout the day, although Claimant does have the potential to be retrained for work that she might be able perform even with her current limitations.

On cross-examination, Mr. Lalk admitted that he had not seen the medical reports of either Dr. Berkin or Dr. Cantrell. He further admitted that it was his understanding that Claimant was able to continue to work at the Huntsville Plant because the jobs that she performed there did not require overhead work or heavy lifting, particularly the job as the benefits representative. He also did not know the requirements of the benefits representative job and agreed that, but for her claim that she had to recline periodically during the day, Claimant would be able to perform that

work currently. Lalk also agreed that it is difficult to motivate and place a worker whose options are limited to entry-level jobs in which they would earn less than they are currently receiving in disability benefits. The witness also agreed that he saw no medical records or reports that indicated that a physician had advised Claimant to recline to reduce or alleviate her symptoms and saw no reports in which she has been deemed to be permanently and totally disabled.

*Dr. Cantrell*

Employer offered the deposition of Dr. Russell Cantrell as Exhibit 1 and 2. He examined claimant and reviewed medical records. A second examination and second deposition occurred due to Claimant's successive Claim filings. Claimant gave a history of prior right shoulder injury and treatment in Alabama with the resulting permanent work restrictions and her prior history of low back symptoms which also resulted in work restrictions on lifting and overhead work. Her work in Alabama was such that these restrictions could be accommodated. However, she claimed that when she transferred to Missouri and started to use power tools suspended overhead and was required to bend and lift, and her right shoulder and low back pain increased despite the efforts that were made to find work that she could perform. Due to an episode of acute back pain and sciatica occurring on July 2, 2005 surgery proved necessary and thereafter Claimant was never able to return to work successfully.

Dr. Cantrell performed a clinical examination which was positive for a twenty-five percent loss of motion in the right shoulder, tenderness with deep palpation in the low back area, a moderate loss of motion in the low back and low back pain with SLR (although SLR was negative for radicular symptoms) She was found to have good muscle and nerve function in both her upper and lower extremities.

Dr. Cantrell stated that he did not believe Claimant's work in Missouri was a substantial factor in causing her need for low back surgery. His opinion was based upon, first, the lack of findings by the surgeon of an acute condition such as a herniated disc; second, the fact that the low back pain was due to long-standing DDD; and, third, the fact that the acute condition was triggered by the July 2, 2005 lifting incident at home as per the surgeon's notes.

Regarding the right shoulder, he did not believe that her work in Missouri caused additional injury to her right shoulder. Dr. Cantrell was given the hours worked by Claimant upon transfer to Missouri (detailed above). As a result of this lack of causation, Dr. Cantrell did not attribute any PPD in her low back or shoulder to her work in Missouri although he did believe that some work restrictions were appropriate due to these established pathologies.

On cross examination, Dr. Cantrell admitted that Claimant's work in Missouri was more strenuous than that which she performed in Alabama, that she did have to lift, carry and place metal parts and that surgery was not recommended until after her transfer, but he would not agree that Claimant's shoulder symptoms in June of 2005 might have masked her low back pain or that the pain that she experienced on July 2, 2005 was just a manifestation of an earlier injury, particularly since she attributed the acute symptoms to lifting at home. These acute symptoms at home follow longstanding degenerative disc disease that predates Claimant's transfer to Missouri.

\* \*

When Dr. Cantrell re-examined Claimant on April 22, 2013, he updated Claimant's medical history and complaints. He reviewed additional medical records, particularly those involving Claimant's left knee and neck. His physical examination continued to show loses of motion in the neck and low back, pain on movement but no muscle spasm. There was physical and documentary evidence of the two cervical operations and the left knee surgery.

Dr. Cantrell commented on the treatment records that revealed neck complaints going back to the late 1980's but which were not persistent through Claimant's work in St. Louis. Instead, these symptoms developed long after she left her employment at Chrysler per the statements that she made to several of her treating physicians in Alabama.

Based upon Claimant's medical history before her transfer, the limited amount of time that she worked in Missouri, and the information contained in the post-employment medical records from Alabama, Dr. Cantrell concluded that there is no medical causal connection between Claimant's work in Missouri and her need for neck and left knee surgery. As to Claimant's ability to work, Dr. Cantrell believes that she can do sedentary work or light duty at most. He also stated that his opinions regarding the low back and right shoulder have not changed since his first examination and deposition.

On cross examination, Dr. Cantrell stated that his opinion regarding the causation of Claimant's torn knee cartilage is consistent with her history of experiencing an onset of acute knee pain and locking upon standing and turning and would not agree with the supposition that the injury could have been due to a history of micro trauma to the knee over time at work.

#### *Claimant's Credibility*

Claimant's testimony was unreliable historically and unconvincing regarding her association of serious chronic symptomatology with the *de minimis* total work hours recorded in Missouri between March 21 and April 24, 2005. No new injuries are documented during either her three weeks of work or her few weeks of training. Only with the advent of a non-work related injury are treatable symptoms reported by Claimant, to her private physicians, as occurring at home. Her testimony was uncorroborated with the medical treatment record. Treatment with Dr. Warren began on April 25, 2005 for symptoms of insomnia and depression. Rather it correlates with pre-transfer medical events (in Alabama) or post-April 2005 events; as admitted, Claimant never returned to work after April 2005.

#### RULINGS OF LAW

All four Claims allege regular work duties on Employer's assembly line caused occupational disease. Repetitive trauma occupational disease claims necessarily fail without substantial exposure to a demonstrated repetitive trauma. Here, all alleged injuries (and exposures) are uncorroborated in Employer's Clinic Notes comprising Exhibit 3 (admitted without objection). The Clinic Notes are the only comprehensive medical record during the relevant times herein. A review of these notes reveals employee used the Clinic for both

personal and work-related medical conditions. Records of private providers do not reflect symptoms or work histories that might predicate either repetitive trauma or new injuries.

Claimant's four cases each plead onset dates that are not preceded by any sustained work period; the third and fourth cases plead onset dates subsequent to Claimant's retirement.

### Incidence of Occupational Disease

#### *Exposure and Medical Causation*

Injury alleged to have occurred by repetitive trauma is compensable under Chapter 287. Section 287.067.7 RSMo (2000). A claimant must prove all the essential elements of the case. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo.App. 1990). Dolen v. Bandera's Cafe, 800 S.W.2d 163, 164 (Mo.App. 1990). A claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." Sellers v. Trans World Airlines, Inc., 752 S.W.2d 413, 415 (Mo.App. 1988). A claimant must identify a hazard of occupational disease to which he was exposed on his job. Section 287.063.1 RSMo (2000). A two pronged test remains the law: (1) proof of an exposure greater than that which affects the public generally and (2) proof of a recognizable link between symptoms of the condition or disease and a distinctive feature of the job. Lytle v. T-Mac, 931 S.W.2d 496 (Mo.App. 1996). Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 48 (Mo.App. 1999).

Medical causation, which is not within the common knowledge or experience of lay understanding, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath v. Satellite Sprinkler's Sys., 877 S.W.2d 704, 708 (Mo. App. 1994). Silman, 891 S.W.2d at 175. As with all proofs in complex medical evidence, 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. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

The standard of proof that was in effect in May and June 2005 (i.e. first and second cases) is proof that the conditions of employment were "a substantial factor" in causing the harm for which medical treatment has been needed and which has resulted in the claimed disability. Sec. 287.020.2. RSMo. 2000. The "a substantial factor" standard does not require proof that the work was the predominate cause but the work must be more than merely a triggering or precipitating factor. It must be noted that the legislature excluded "progressive degeneration" from occupational disease. Section 287.067.2 RSMo (2000).

As with all proofs in complex medical evidence, 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. Wm. Montgomery & Assoc., 891 S.W.2d 173, 176 (Mo.App. 1995), *citing* Pippin v. St. Joe Mineral Corp., 799 S.W.2d 898, 904 (Mo.App. 1990). Here, both of Claimant's experts were shown to have been either under-informed or misinformed about Claimant's work exposure in the Missouri plant. Claimant herself admitted she did not know what she was doing during her last week of work (T. p. 81). Dr. Berkin was

unaware of Claimant's pre-transfer low back condition requiring injection therapy in 2004. Missouri courts have held that it is reasonable to expect experts to be fully informed. Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

### FIRST CASE

Here, Claimant is attempting to prove that her work in Missouri caused her to contract an occupational disease that re-injured her right shoulder. Before her transfer, she had undergone four surgeries on her shoulder and claims to have had permanent restrictions of no overhead work or lifting greater than five pounds with her right upper extremity. Her work in Alabama did not approach these restrictions and she was able to continue her job there. The question presents what effect, if any, did her very limited work in Missouri have on her right shoulder and was that claimed exposure sufficient to constitute a substantial factor in causing a compensable repetitive trauma injury. Apparently, a least one of Claimant's jobs here did involve her needing to pull a power tool down from overhead and she did have to do some lifting in at least one other job. However, when measured against the few hours worked in Missouri, Claimant exposure to each of these positions necessarily reduces exposure to the other the other.

Claimant offered testimony from two different experts. However, Claimant's opinion evidence is unsupported by treatment records or ergonomic facts that give probative force. Dr. Berkin, reviewed Dr. Tindell's shoulder treatment records, but nevertheless, attributed all of the right shoulder disability to the 1985 shoulder injury. He reiterated the point later in a supplemental report. Dr. Poetz contradicts his co-expert and baldly asserts a causal connection, diagnosing tendinitis and impingement syndrome (her "injury") and thirty percent PPD. However, no right shoulder problems or symptoms appear in the Medical Department records until June 6, 2005, just over six weeks after she has last worked on the line.

It was not until four days later, on June 10<sup>th</sup>, that she first mentions her right shoulder *history* to Dr. Warren (whom she began seeing since the day after her last day of employment in 2005, or April 25). The first *treatment* that she had for her shoulder after her transfer was that which she received from Dr. Tindell in Alabama beginning on June 21, 2005 while on a leave of absence. Dr. Tindell's final diagnosis was consistent with the known chronic condition (comprising the four surgeries in Alabama). Claimant last shoulder treatment was two weeks later but she claims she had some therapy for her shoulder while treating for her low back in the following months.

Employer's clinic notes contained no suggestion of new injury and only one reference to work restrictions. The only treatment records are the two weeks with Dr. Tidell in Alabama who diagnosed chronic conditions and provided medications. Dr. Poetz's reliance on Dr. Tindell's notes is misplaced inasmuch as the notes neither predicate new symptoms nor document sufficient ergonomic details of exposure. Regarding ergonomics, Dr. Poetz admitted on cross-examination that he did not know how much overhead work Claimant performed in Missouri. Dr. Poetz does not appear to have been properly informed about Claimant's mere three weeks (approximately thirty hours each) of actual floor work in Missouri acknowledged by Claimant at trial. As a result, Dr. Poetz was materially misinformed, or mistook, the description and duration

of Claimant's *de minimis* exposure. Admission of a contrary matter weakens the value of expert opinion. DeLisle v. Cape Mutual Insurance, 675 S.W.2d 97 (Mo.App. 1984).

Claimant's *condition* is not disputed. Nevertheless, Dr. Poetz's report and testimony provides no support for his disability rating since he doesn't even state that Claimant's pre-existing symptoms and findings have changed or increased as a result of Claimant's work in Missouri. Dr. Berkin rejected shoulder disability from work in Missouri flatly. Any weakness in the underpinnings of an expert opinion goes to the weight and value thereof. Hall v. Brady Investments, Inc., 684 S.W.2d 379 (Mo.App. 1984). On the other hand, Dr. Cantrell testified that he found no evidence that Claimant's Missouri employment resulted in any additional injury to the right shoulder and, as such, assigned no disability beyond that which was present prior to her transfer.

This Claim then involves a situation where an employee with a significant chronic disabling injury transfers to a new job and experiences an increase in symptoms when asked to do work that arguably exceeds practical work restrictions but where there is no showing that the work (just three weeks, or more) caused any change in the underlying pathology or any increase in disability. Dr. Poetz described in detail some job procedures unsourced in his notes and not to be found elsewhere in the record, including Claimant's own direct testimony. The evidence demonstrates, at most, that Claimant's brief work exposure in Missouri resulted in temporary exacerbation of subjective shoulder complaints. This temporary triggering or precipitation of longstanding symptoms where the triggering or precipitation did not rise to the level of a "substantial factor" in causing a new "injury" that constitutes an independent occupational disease.

Dr. Cantrell's testimony is more persuasive for three reasons. He was better informed about the exposure, especially the duration of any alleged exposures. His conclusions are reconcilable with the balance of the record, particularly the pre-transfer medical record. Dr. Cantrell never was impeached or confronted with a mistaken fact of assumption. Claimant failed to establish by a preponderance of credible evidence that permanent disability, if any, was the result of the subject exposure and not that of a non-compensable, or prior, or subsequent event. See Plaster v. Dayco, 760 S.W.2d 911, 913 (Mo.App. 1988). Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. 1991).

## SECOND CASE

In this Second Case, alleging low back injury, Claimant's experts are found to lack sufficient bases to conclude a work injury occurred during Claimant's brief work in Missouri. Although Claimant underwent surgery in November 2005, Claimant had worked only a few weeks before taking a leave of absence. Approximately a month later, without having returned to work from her leave of absence, Claimant reported a lifting accident at home causing low back symptoms prompting her to seek treatment. The at-home accident history is traced in the records of her private providers. Prior to her transfer to Missouri, Claimant had developed substantial low back symptoms diagnosed as degenerative disc disease and claimed long-term work restrictions imposed in Alabama to protect her back from strain or injury. Claimant re-injured her back at home in July 2005 that led to her surgery four months later with Dr. Backer.

Other than Claimant's assertion of repetitive trauma, there are several likely causes of, or factors contributing to, the symptoms that led to Claimant's need for low back surgery. These are: 1) Claimant's pre-existing severe symptoms diagnosed as degenerative disc disease, including injection therapy (in 2004), 2) the acute injury that took place at home around July 2, 2005 and, 3) the progressive pathology with increasingly disabling symptoms from the degenerative disc disease (unaffected by Claimant's work or a superimposed trauma).

Claimant's chronic low back problems diagnosed as degenerative disc disease prior to her transfer to Missouri is beyond dispute. Treatment over several years including a full set of epidural steroid injections as recently as November 2004 created the need for permanent lifting restrictions. Equally clear is that on or about July 2, 2005 Claimant had a sudden onset of acute low back pain and sciatica while handling clothes at her apartment, which compelled her to seek urgent care two days later. Degenerative disc disease is a progressive condition that advances with age independent of trauma. Again, the legislature excluded "progressive degeneration" from occupational disease. Section 287.067.2 RSMo (2000).

Claimant only worked about three weeks in Missouri prior to her surgery. The 98.1 hours that she logged between March 21, 2005 and April 22 (see above) included two-three days sitting in a classroom and other time spent training on the line working with another transferee and a regular Missouri employee. This *de minimis* exposure to Employer's assembly line is, at once, unknown to Claimant's experts and improbable as an injuring exposure (necessarily unexplained in the record by Claimant's under-informed experts). On June 6, 2005, a visit to Employer's Clinic involved work restrictions that she had been given by her family doctor, however, she admitted that she had not worked under those restrictions since she had been out of the plant on vacation or sick leave since April 22.

Claimant's history and testimony is unreliable regarding the seriousness of her low back condition. She appears not to have mentioned her back problem to Chrysler's medical personnel until April 19, 2005 and then only mentioned her history of back symptoms when giving a medical history when she was undergoing a reinstatement exam after having been out due to chest pain. When next seen in Medical on May 27, 2005, she was again there to reinstate after an absence, this time due to depression and stress, no mention was made of her back and by then she was off work over one month (last day worked was April 22). Although she began seeing Dr. Warren (St. Louis area) on April 25, 2005 she only mentioned stress headaches and insomnia to him. On May 5, 2005 Claimant has the same complaints but added a new complaint, chest pain. On June 10, 2005 she added her shoulder, but not her back.

On July 4, 2005 Claimant went to St. Luke's Urgent Care reporting a sudden onset of low back pain and sciatica on July 2, 2005 at home while handling clothes. She did not go to Dr. Warren for her back until after the July 4<sup>th</sup> treatment and only then did he refer her to Dr. Chapel. When she went to Dr. Chapel, she again dated the onset of her back pain to July 4<sup>th</sup>. Claimant saw Dr. Backer (surgeon) on September 29, 2005 and, again, attributed her low back pain to the event at home. Claimant is neither working nor reporting symptoms on or about the alleged June 6, 2005 injury that she pled. Although Claimant denied some of these notes at trial, it must be observed that there is consistency and cogence in these private treatment records to credit those denials.

Dr. Berkin's qualifications warrant some scrutiny given the longstanding, complicated pathology in issue. To qualify an expert, a witness must have knowledge, skill, training, experience or education supporting the opinion which is intended to aid the trier of fact. Nixon v. Lichtenstein, 959 S.W.2d 854 (Mo.App. 1997). The extent of qualification usually pertains to the weight to be given evidence rather than admissibility. Donjon v. Black & Decker (U.S.), Inc., 825 S.W.2d 31 (Mo.App. 1992). Separately, the facts upon which he based his opinions are not supported by competent evidence. It is well established that there must be competent evidence to support the reasons and facts relied on by a medical expert to give the opinion sufficient probative force to be considered substantial evidence. Silman, supra.

Dr. Berkin's factual suppositions were often incorrect or incomplete: first, he thought that Claimant worked continuously for two months in St. Louis performing a job or jobs requiring bending and lifting whereas she worked less than three full weeks over a thirty day period (March 21 to April 22); second, he was not aware of the contents of the St. Luke's Urgent Care record for July 4, 2005; third, he failed to acknowledge the lack of back complaints (i.e. non-treatment) to Dr. Warren until after July 4, 2005; fourth, he failed to acknowledge that Dr. Chapel did not see Claimant until after the events of early July, 2005; fifth, he failed to mention, much less account for, the history given to Dr. Backer about the date of symptom onset; sixth, he failed to apprise himself of the weight of the side panels that she had to lift and move in the single job to which she has attributed most of her back problems; seventh, based upon the prior and subsequent medical records, there is no basis upon which he could convincingly explain that Claimant's work in Missouri caused a lumbosacral strain "with a protruding disc at L5-S1 and bulging discs at L5-S1 and L1-2.

Similarly, Dr. Poetz's qualifications must be considered given the complex pathology in issue. Nixon, supra. Don Jon, supra. Dr. Poetz is not a surgeon and such expertise is warranted in a surgery case where causation is disputed. This point is made imperative in context with the complicated facts of this case. Again, Claimant's expert's testimony was inexact and inaccurate as the result of unfounded assumptions. First, he stated that Claimant worked "long hours" on the side rail job which is odd since in discussing the alleged shoulder "injury" he wrote that she worked "several months" on her first job in St. Louis, with radiators. Second, when he was discussing the neck claim, he focused on her supposed need to perform a lot of overhead work, not a feature of either the side rail job or the radiator job. Dr. Poetz did not seem to realize that most of the time that Claimant worked on the floor involved training where she did not work on jobs alone but instead shared duties with another transferee and a regular Missouri employee. Third, Dr. Poetz contemplated Claimant beginning stress classes after onset of low back pain approximately June 2005. The record shows Claimant stopped working effective April 22 and had already taken stress classes. Dr. Poetz was not fully informed in this case to render opinions on causation.

Employer's expert, Dr. Cantrell, is a specialist in pain management and he treats patients with spine and joint injuries. He is associated with an office that specializes in orthopedics and sports medicine. His qualifications are somewhat better than Claimant's experts. More importantly, his understanding of the work place exposure and hours worked is reconciled clearly with the balance of the evidentiary record and his testimony, while challenged by Claimant, may not be said, in this case, to be impeached or even refuted.

Dr. Cantrell ultimately opined that L5-S1 surgery in November 2005 was the full manifestation of Claimant’s long-standing history of disabling degenerative disc disease that, if aggravated by any recent (post-transfer) events, it was the lifting incident at home of July 2, 2005. Absent clear evidence that Claimant was exposed to repetitive trauma at work, the July 2 incident becomes a plausible accident event that caused disabling symptoms. The medical record of Dr. Backer compels the conclusion that the non-work event was a substantial factor in leading to Claimant’s need for treatment or contributed to her current permanent disability. Claimant presented insufficient evidence through competent testimony to find a causal connection between Claimant’s work in Missouri and Claimant’s onset of low back symptoms giving rise to surgery. Dr. Cantrell was more persuasive than either Dr. Berkin or Dr. Poetz.

THIRD AND FOURTH CASES ONLY

The 2005 Reform Bill made changes to the laws that affect the third and fourth cases. The parties stipulated a February 28, 2006 injury date for the left knee claim. The standard of proof in effect on the date of this alleged injury is whether the conditions of employment were “the prevailing factor” in causing the harm for which medical treatment was needed and which resulted in the claimed disability. Sections 287.020.3(1), (2). and 287.067.2-3, RSMo. (2005).

THIRD CASE (Knee)

Notice

Section 287.420 RSMo (2005) requires an employee to give the employer written notice within thirty days of the diagnosis of the occupation disease causing the injury. The only exception is where the employer had actual notice and was not prejudiced by the lack of notice. However, the claimant has the burden of proof on both the notice and prejudice issues. In this case, Claimant admitted she did not report the left knee condition to Employer but mentioned to a supervisor that she was having generalized leg pain secondary to her low back condition. As discussed above, Claimant’s testimony is not reliable. Her assertion lacks detail and context that make it worthy of belief. Again, the Clinic Notes comprising Exhibit 3 lend no corroboration to her testimony about reporting knee injury complaints to Employer’s Clinic.

Here, the only event that could constitute actual notice to employer was the filing of the Claim.<sup>5</sup> Thus, Claimant’s claim fails for lack of notice to Employer as prescribed. Claimant failed to comply with the notice requirements contained in Section 287.420.

\* \* \*

Assuming, *arguendo*, that Employer received proper notice, Claimant, nevertheless, failed to present sufficient evidence of exposure and medical causation linking her actual exposure to line work at Employer’s Missouri plant to her knee and neck Claims. Repetitive

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<sup>5</sup> Reference to the minutes reveals a filing date September 11, 2008, about 22 months after her left knee surgery.

trauma injury is compensable “only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.067.3 RSMo (2005).

Moreover, it is necessary to prove, where there was a preexisting condition of the same kind or type, that there was more than a mere worsening of the same condition due to the most recent exposure, Miller v. U.S. Airways Group, Inc., 316 S. W. 3d 462 (Mo. App. 2010). Proof of an aggravation of a preexisting condition is not sufficient to establish a right to compensation unless the aggravations rise to the level of becoming the prevailing factor in causing both the need for treatment and disability. Payne v. Thompson Sales Co., 322 S. W. 3d 590 (Mo. App. 2011)

Dr. Berkin did not examine Claimant’s left knee and was not aware of any claim of work-related injury to that body part since it was not filed until after his examination. Dr. Poetz’s testimony is not credible for a number of reasons, to wit: Dr. Poetz is a family practitioner, not an orthopedic surgeon or physiatrist, and so lacks the qualifications to tender an opinion addressing the issue of whether Claimant’s work caused her to contract an occupational disease affecting her left knee, particularly in this complicated set of circumstances.

Claimant did not work in February 2006 except for her two brief attempts to work on February 13 and 15 which only precipitated a comment that the job that she had been assigned to on the morning of February 13 was jerking her right shoulder. Claimant had not worked since April 24, 2005. Claimant was unclear as to whether her claim of left knee injury was due to standing and waking on concrete at work or due to favoring her left knee due to her chronic low back and right leg symptoms (or both). There is not a single report of left knee pain or other symptoms in any of the medical records prior to the reference to the October 28, 2006 event.

Dr. Poetz lacked the necessary details concerning the claimant’s job duties in Missouri, and the number of hours that she worked in Missouri, to assess whether they created the hazard or risk of causing a torn medial meniscus or degenerative knee joint disease. Dr. Poetz was assuming that the claimant worked “long hours” standing and walking at work, whereas it is admitted that she only worked about two and one-half weeks in Missouri and that did not involve even a forty hour work week during any of the three weekly pay periods. Dr. Poetz contemplated a February 2006 retirement (p. 75), yet embraces the October 2006 onset date without reference to any earlier knee complaints. Accordingly, there is no explanation in evidence as to the medical basis of Dr. Poetz’s supposition that her work caused the pathology that Dr. Moore addressed at the time of his December 2006 surgery. Dr. Poetz did not have any basis to conclude that Claimant’s degenerative joint disease was aggravated by Claimant’s work, since he did not review any pre-allegation diagnostic studies.

Claimant’s knee locked in late October 2006 after not even attempting to work since February 2006 and after not working even a full shift since April 22, 2005. She was found to have an *acute* tear to her medial meniscus that required surgery. Then, in September 2008 she filed a Claim and reached back to her last job to allege a basis to claim workers’ compensation benefits. Claimant’s proffer of evidence is, again, insufficient to prove that the her brief period of work in Missouri was the prevailing factor in causing her need for left knee surgery and causing her to sustain permanent disability.

Dr. Cantrell, at the time of his second evaluation, wrote, and he later testified consistently with his written opinions, that Claimant's torn medial meniscus was due to an acute injury that took place when Claimant's left knee locked on or about October 28, 2006. He rejected any thought that the knee injury resulted from the "micro trauma" theorized by Claimant's attorney. (Exhibit 2, p. 37.) Dr. Cantrell's opinions were better founded and more persuasive than Dr. Poetz.

#### FOURTH CASE (Neck)

Of each of the four cases that Claimant is simultaneously pursuing, this Claim is the claim in which the required treatment was the most remote from her last date of active employment (i.e. April 2005). The stipulated onset date of February 8, 2007, is just a few days short of a year after her last attempt to work in Missouri and about 22 months after the last time that she had been able to work for (nearly) a full shift at Employer's Missouri plant. The first neck symptoms post-transfer were recorded in January 2007 even though Claimant had been under active medical treatment in 2005 and 2006 for her right shoulder, low back and left knee.

Once again, Dr. Poetz's qualification must be considered given the complex pathology in issue. Nixon, supra. Don Jon, supra. As a family practitioner, his emphasis is less focused than Dr. Cantrell's who, while not a surgeon, specializes in spine and joint injury in support of surgeons in his practice. Again, more importantly, his testimony is easily reconciled with the balance of the record. Whereas, Dr. Poetz's admissions regarding omissions in his knowledge of medical and work events undercut the probative value of his opinions. His testimony was inexact and inaccurate as the result of unfounded assumptions and the lack of a documented history of exposure to repetitive trauma or treatment record. Reliance on Claimant's representations to Dr. Poetz is misplaced due to her poor credibility on medical and work events elsewhere in the record. On the other hand, all of the documentary evidence supports Dr. Cantrell's conclusions.

Dr. Poetz attributed her need for neck surgery to her overhead work in Missouri, but if she indeed did any such work after her transfer, it was done in only one of the jobs which she performed in Missouri for a period of one or two weeks. On cross-examination, Claimant could not remember what she performed during her last week of work. Dr. Poetz's inaccuracies in evaluating the other cases bears on his testimony here. As part of the same evaluation, he also attributed an aggravation of her pre-existing right shoulder condition to overhead lifting but attributed her low back "injury" to the claimant's lifting, bending and carrying in a job that did not involve overhead work. He identified nothing ergonomic to predicate repetitive trauma to Claimant's knee. He was mistaken that Claimant worked "long hours" for "several months" in Missouri (see above).

More simply, Dr. Poetz does not explain how his causation opinion reconciles the lack of any neck complaints from the last date of Claimant's active employment in 2005 and her 2007 treatment in Alabama. He fails to reconcile the history that was given to the treating physicians in Alabama describing on onset of significantly increased symptoms sometime in January, 2007 (post-retirement) and Claimant's statement at that same time indicating that her condition was not due to her work. Unexplained in the record is his dismissal of the prior diagnosis of degenerative disc disease and a C5-6 herniation (from 2003) on the representations by Claimant

that she was asymptomatic from then until (presumably) she transferred to Missouri; at the same time, he ignored the absence of verified symptoms from the transfer date until early 2007.

The absence of neck complaints in the contemporaneous medical records is noteworthy. When seen by Dr. Warren on April 25, 2005, three days after her last work in 2005, her neck examination was normal. Even the Chiropractor, Dr. Chapel, listed symptoms no higher than her mid-back and the cervical area was not listed by Claimant or the doctor as a problem area. Neck complaints were also absent from the medical records of Dr. Warren and Dr. Backer that extend into 2006. There is simply no explanation for this lack of documentation other than to conclude that Claimant's need for surgery grew out of her acute onset of non-work related symptoms in January 2007.

The facts of this case are very similar to those in Payne, *supra*. There Claimant attempted to prove that his need for neck surgery was due his having injured his neck while shoveling snow at work. However, he had a history of a prior cervical HNP, failed to report an injury to his employer, failed to complain to his co-workers, failed to seek medical care promptly and when treatment was initially sought, six weeks after the shoveling event, he did not attribute his neck symptoms to an incident at work and stated that his symptoms had been present for 2 days, not 6 weeks. In that case, the ALJ, the Commission and ultimately the appellate court concluded that Payne failed to prove that the activity at work was the prevailing factor in causing his need for treatment and disability. Dr. Cantrell's opinions are better-reasoned and more persuasive than those of Dr. Poetz.

Dr. Cantrell testified that there is no causal connection between Claimant's brief work in Missouri, which ended no later than February 15, 2006, and perhaps as long ago as April 22, 2005, and her need for cervical surgery in February of 2007. He based his opinions on the fact that she had reported cervical complaints dating back to the late 1980's or early 1990's, she had been given the diagnosis of degenerative disc disease and a herniated disc at C5-6 in 2003 and when she finally sought more current treatment for her neck on February 8, 2007 that she reported having experienced a sudden onset of neck pain of unknown cause (but indicated at the time that it was not work related) and 20 days later, on February 28, 2007 she told Dr. Parker that her intermittent neck and shoulder pain had become significantly worse four weeks earlier and that she now also has radiation into her left arm.

#### Notice

Assuming, *arguendo*, a compensable repetitive trauma occupational disease, compensation would have nonetheless been denied due to a failure of notice. The claimant's testimony that she reported neck complaints to one or more of her supervisors in Missouri, and attributed those symptoms to her jobs to which she was assigned, is not credible. There is no record of her having complained to Employer's Clinic of any neck injury whether by accident or repetitive trauma. No mention of current neck symptoms can be found in the records of Dr. Warren, Dr. Chapel, Dr. Backer or of St. Luke's and, as such, cannot be corroborative of Claimant's suggestion that she reported her neck injury to supervisors.

In an occupational disease case, the thirty day period begins to run when the “condition” has been diagnosed. Section 287.420 RSMo (2005). Assuming, *arguendo*, Claimant was not diagnosed with degenerative disc disease and a C5-6 herniation in 2003, her surgery on February 12, 2007, was based upon medical diagnosis from Dr. Parker on February 8, 2007, which commenced the 30 day notice period. Yet, no Claim was filed for another 19 months. Claimant simply is not credible and this leads to the conclusion that she failed to provide the notice that the statute requires.

Conclusion

Accordingly, in the Fourth Case, identified by Injury Number 07-134224, on the basis of the substantial competent evidence contained within the whole record, Claimant is found to have failed to sustain her burden of proof. Claim denied. The other issues are moot.

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

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

Joseph E. Denigan  
*Administrative Law Judge*  
*Division of Workers' Compensation*

