

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

Injury No.: 02-081686

Employee: Lillie M. Newson

Employer: BJC Health System

Insurer: Self-insured

Date of Accident: March 1, 2002

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 27, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued April 27, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of March 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two

members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo.App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

William F. Ringer, Chairman

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AWARD

Employee:	Lillie Newson	Injury No.:	02-081686
Dependents:	N/A	Before the	
Employer:	BJC Health System	Division of Workers'	
Additional Party:	N/A	Compensation	
Insurer:	Self-Insured	Department of Labor and Industrial	
Hearing Date:	February 6, 2006	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JED:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: (alleged March 1, 2002)
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Undetermined
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? 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

Employee:	Lillie Newson	Injury No.:	02-081686
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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: \$334.40
- 19. Weekly compensation rate: \$222.93/\$222.93
- 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 N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Lillie Newson	Injury No.: 02-081686
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	BJC Health System	Department of Labor and Industrial Relations of Missouri
Additional Party:	N/A	Jefferson City, Missouri

This case involves a disputed cervical disc surgery resulting to Claimant with the alleged onset date of March 1, 2002. The Employer admits Claimant was employed on said date and that any liability was fully self-insured. The Second Injury Fund is not a party to this claim. Both parties are represented by counsel.

Issues for Trial

1. notice;
2. incidence of occupational disease (medical causation/exposure);
3. temporary total disability; and,
4. permanent partial disability.

FINDINGS OF FACT

Claimant's Testimony

1. Claimant began work for Employer in June 2000 performing medical records data entry work for jobs described as "claims department" and, subsequently, "EOB."
2. A significant part of her job required her to take forms from a printer, tear the perforated [tracking] edges off of the forms, and then match the forms with another set of records (or "EOB") for a given doctor.
3. Claimant testified that by the end of the year 2000, she began to feel a "crick" in her neck. Within a few weeks, she began to feel a burning sensation from the back of her neck, going down into her fingers. She later began to feel numbness in her fingers and pain in her arms.
4. Claimant treated a few times with Dr. Poetz for pain in her neck and arms during 2001. By June 2002 her symptoms had become worse and she was referred to Dr. Barry Singer, a neurologist, who then referred her to Dr. Neill Wright, a neurosurgeon. Surgical [fusion] was performed in July 2002.
5. Claimant testimony at hearing asserted that she always knew her problems were due to the repetitive task of ripping HCFA forms at her job.
6. She testified that Sandy Morris, who had previously performed the same job as Claimant and developed the "same" medical problems as she.
7. Claimant did not demand treatment and did not report the medical problem to Employer as work related until after the surgery. She notified her supervisor, Lynn Miller, that she was taking medical leave for surgery in July 2002. Claimant took six weeks off work and used her sick leave to cover a portion of her time off.

Patrick Venditti

8. Patrick Venditti, manager of Employer's workers' compensation department, testified he performed a computer search for any reported work injuries or claims filed by Sandy Morris, Claimant's predecessor in her position.
9. His search revealed Sandy Morris has not reported any work injuries or filed any workers' compensation claims while working for BJC.

Treatment Record

10. Dr. Poetz's notes contain histories during 2001 referencing arthritis and course of symptoms without reference to work (Exhibit B, pp. 1-11).

11. Dr. Singer's report in June 2002 contains histories referencing moderate to severe multi-level cervical stenosis with a two month history of right arm radiculopathy without reference to work (Exhibit E).
12. Dr. Wright's initial notes on June 2002 contain one year history of aches and pains in the neck and diagnoses of degenerative disc disease, cervical spondylosis and disc herniation at C4-5 without reference to work (Exhibit F, p. 2). Surgery occurred on July 11, 2002.
13. Interim *post-surgical* references by Dr. Wright include, "I encouraged her to seek other employment as her current job involves heavy manual labor." In September 2002, "She has found a new job in which she no longer has the repeated stress on her neck and arms." No enunciation of what "stress" existed may be found which might explain what ergonomics Dr. Wright contemplated. (Exhibit F, pp. 6-7, *duplicated in Exhibit B*).
14. Dr. Wright believed most of Claimant's symptomatology was from her cervical spondylosis which may be compounded by herniation at C4-5 (Exhibit F, p. 4, *duplicated in Exhibit B*).
15. Claimant did not seek workers' compensation benefits in 2000-2002 but used her group health insurance continuously to cover her medical expense, which included several months follow-up with Healthsouth (Exhibits H and I).

Opinion Evidence

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Dr. Raymond Cohen

1. Claimant's expert, Dr. Raymond Cohen, a neurologist, testified that Claimant's repetitive work caused a cumulative trauma disorder in her cervical spine, and attributes the disc herniation to this cumulative trauma disorder.
2. During direct examination and again on cross examination he said he relied on ergonomic descriptions provided by Claimant including the tearing of 400 to 600 forms per day and, additionally, did not know how many pages she tore at one time.
3. On cross examination, he testified this was the first patient he has seen where he opined the clerical job duty of tearing forms caused a disc herniation.
4. He testified other cases he has seen involving clerical workers with disc herniations involved some lifting in their work.
5. He specifically acknowledged that Claimant did not describe any overhead lifting.

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Dr. Krettek

6. Employer's expert, Dr. John Krettek is a neurosurgeon in practice for twenty years. He testified that Claimant's repetitive work duties did not cause the herniated disk in Claimant's neck and her medical treatment.
7. Dr. Krettek testified that Claimant's medical profile and work did not produce the type of cervical condition she exhibits.
8. He stated the repetitive stress could cause Claimant to have other disorders, such as carpal tunnel syndrome or deQuervain's syndrome as a result of [pinching] required to tear paper.
9. Dr. Krettek did not see a connection between the Claimant's repetitive use of her arms and hands and her cervical disc herniation.
10. Dr. Krettek found Claimant had no disability related to her work.

RULINGS OF LAW

Claimant alleges her job duties with Employer caused her to develop a cervical disc herniation. The review of the medical evidence and testimony at trial does not support this contention. Claimant must establish that the occupational disease was caused by conditions in the workplace. Dawson v. Associated Electric, 885 S.W.2d 712 (Mo. App. 1994). Work must be a substantial factor in causing the resulting medical condition or disability. Section 287.020.2 RSMo (2000). The medical expert's opinion must establish a recognizable link between the work and the disease. Hayes v. Hudson Foods, Inc., 818 S.W.2d 296 (Mo. App. 1991). Here, the record of evidence does not prove that claimant's condition is work related.

Claimant's Credibility

Claimant's testimony contained inconsistencies with prior statements and treatment records. Claimant testified at trial that she tore forms in sets of five or six forms at one time. On cross-examination, she was impeached with her deposition testimony wherein she declared the forms had a thickness of two sheets of paper. At the hearing she also testified that she tore many more forms than described in her deposition. Claimant asserted that the deposition transcript contained a typographical error. (It is noted that Dr. Cohen's testimony and report relies on Claimant's representation.)

Claimant was again impeached with her deposition testimony after she stated at trial that she performed lifting for her job with BJC from 2000-2002. When asked about her deposition testimony, she acknowledged her answer was "no." Also, while asserting at trial that she has many symptoms related to her cervical spine and has not benefited from surgery with Dr. Wright, her deposition testimony reveals her earlier belief that she had benefited from the surgery. (Alternatively, her complaints of ongoing symptoms of neck pain are consistent with Dr. Wright's diagnosis of moderate to severe degenerative disc disease and his forecast of additional surgery.) Claimant's assertions about medical causation was unqualified and unfounded. This subject is well outside the scope of her expertise; Claimant was unable to consistently describe her job tasks. Her anecdote about Sandy Morris was uncorroborated and directly rebutted by Mr. Venditti.

Expert Foundation

Although Claimant's examining physician Dr. Cohen testified that her job duties caused her cervical disc herniation, his opinions were fatally flawed, per se, because of his reliance on Claimant's impeached descriptions. Independent of this misplaced reliance, however, he admitted that this was the first patient he had seen where clerical job duties of tearing forms caused a cervical disc herniation. He admitted he usually sees cervical disc herniations where there is some lifting involved with the job duties.

Separately, no correlation may be found between Dr. Cohen's ergonomic assumptions and the patient history, or professional observations, contained in the proffered treatment records of Dr. Singer and Dr. Wright, or even the referring physician, Dr. Poetz. Preliminary to consideration of the *nature* of any ergonomic assumption, Dr. Cohen did not establish a *timetable* of exposure and onset of symptoms. His testimony was conclusory.

Dr. Krettek, a neurosurgeon who performs surgery for cervical disc herniations, testified that Claimant's job duties did not cause the cervical disc herniation. Dr. Krettek was better qualified with his experience as a surgeon and this was apparent in his explanations. The record contains no ergonomic predicate connecting Claimant's repetitive tasks to her disc herniation. The opinions expressed by Dr. Krettek are more persuasive than Dr. Cohen.

Conclusion

Accordingly, 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.
All other issues are moot.

Date: _____

Made by: _____

Joseph E. Denigan

A true copy: Attest:

Patricia "Pat" Secret
Director
Division of Workers' Compensation

Employee: Lillie Newson

Injury No.: 02-081686

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge concluded that employee failed to carry her burden of proving that her cervical disc herniation was caused by her job duties. I disagree.

The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted, extending its benefits to the largest possible class. Questions as to the right of an employee to compensation are resolved in favor of the employee.

Cochran v. Indus. Fuels & Resources, Inc., 995 S.W.2d 489, 492 (Mo.App. 1999).

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. While the claimant is not required to prove the elements of her claim on the basis of "absolute certainty," she must at least establish the existence of those elements by "reasonable probability." Furthermore, the element of causation must be proven by medical testimony, "without which a finding for claimant would be based on mere conjecture and speculation and not on substantial evidence."

Shelton v. City of Springfield, 130 S.W.3d 30, 38 (Mo.App. 2004) (citations omitted).

"An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020." Section 287.067 RSMo. 2000. The employee must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App. 1994). The employee bears the burden of proving a direct causal relationship between the conditions of his employment and the occupational disease. *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. 1999).

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort.

Kelley v. Banta & Stude Const. Co., Inc., 1 S.W.3d 43, 48 (Mo.App. 1999) (citations omitted).

The administrative law judge (ALJ) determined that Dr. Cohen's opinion that employee's job duties caused her cervical disc herniation were "fatally flawed, per se," since he relied on employee's impeached job descriptions. The ALJ also found that employee had presented testimony at the hearing that was inconsistent with her prior deposition testimony regarding lifting, benefits of an earlier surgery, and an injury to a co-worker. I do not believe any of employee's testimony is inconsistent with her prior deposition testimony, and therefore, the ALJ's decision is based upon a credible finding that has no basis.

Employee's deposition was taken on May 9, 2003. The hearing before the ALJ took place on February 6, 2006. The first inconsistency the ALJ found dealt with the thickness and number of forms employee tore during the performance of her job duties. The ALJ believes that employee contradicted her prior deposition testimony that the forms had a thickness of two sheets of paper with her hearing testimony that she tore forms in sets of five or six at a time. Clearly, this is not inconsistent testimony. Rather it was two answers to two separate and distinct questions. The deposition testimony is dealing with the thickness of each form, while the question at the hearing was asking how many total forms she would tear at one time.

The ALJ also pointed out that at the hearing employee testified that she tore many more forms than she described at her deposition. Employer's counsel asserts that in her deposition, employee stated that there were thirteen data sets of forms, and that she tore approximately 100-500 forms each day. At the hearing employee testified that she tore between 100-500 forms in each of the thirteen sets each day. When questioned about this inconsistency, employee explained that it was a typographical error and that she saw the error and had pointed it out to her previous attorney, but no changes had been made. There is no reason to disbelieve employee's explanation for this discrepancy.

The ALJ next found that employee's testimony regarding lifting at work had been impeached. In her deposition employee indicated that lifting was not a regular part of her job. At the hearing she testified that she would occasionally pack up old files and carry them to storage. When questioned about the discrepancy, employee explained that she understood the question in the deposition to be whether she performed lifting on a regular basis. Employee's different understanding of what each question was getting at is understandable, and therefore, her different answers are not inconsistent. Employee believed she was answering two separate and distinct questions, and provided appropriate answers for each question.

The ALJ then attacked employee's credibility regarding whether her surgery of July 11, 2002, was of benefit to her injury. In her deposition on May 9, 2003, employee stated that the surgery had given her some relief. Over two-and-a-half years later at the hearing, employee testified that at first she benefited, but then the pain had begun to return. Clearly, in the time between her deposition and the hearing the effects of the surgery could change. In this instance, the benefit of the surgery was lessened because employee's pain returned. This change over such a long period of time does not show an inconsistency.

Finally, the ALJ held that employee's testimony regarding a co-worker who had the same injury and surgery as employee had been rebutted. The ALJ based this finding upon testimony from employer's manager of workers' compensation benefits. He testified that the co-worker had never filed a workers' compensation claim. While this would be great evidence to rebut a claim that the co-worker filed a workers' compensation claim, it bears little relevance as to whether the co-worker actually had the same injury and surgery as employee.

As stated above, the ALJ used all of this "impeached" testimony to find employee not credible. He then used that to find that employee's expert, Dr. Cohen, delivered a flawed opinion because it was based on employee's incredible description of her job duties; in particular, the number of forms she tore each day. Dr. Cohen's expert medical opinion is based upon his mistaken belief that employee tore only 400 to 600 forms each day. This is a much lower number of forms than employee testified that she tore, which could range between 1,300 and 6,500 per day. Clearly then, if Dr. Cohen believed that the lower number of forms caused employee's injury, the much larger number of forms would do so as well.

The ALJ also found that Dr. Cohen did not establish a timetable of exposure and onset of symptoms, and that there was no correlation between his ergonomic assumptions and employee's patient history or professional observation contained in the records of Dr. Singer, Dr. Wright, or Dr. Poetz. I do not believe this to be an accurate finding. Dr. Cohen did review medical records from Dr. Wright and Healthsouth, and his report does set forth

employee's treatment history and a timeline of events.

Dr. Cohen's report shows that employee began working for employer in 2000 and worked for twenty-one months. His report indicates that during that period of employment, employee tore between 400 to 600 forms each day. Dr. Cohen stated that employee reported no neck problems prior to 2000. After starting this job, employee began to have pain in her neck which radiated down into her arms. This pain continued to worsen during her period of employment with employer, and eventually employee had surgery on July 11, 2002, to repair her cervical disc herniation. Based on the above, Dr. Cohen diagnosed employee with having degenerative disc disease.

Dr. Cohen's expert medical opinion was that employee's herniated disc was caused by an overuse disorder or cumulative trauma disorder of the cervical spine which was sustained at work. He explained that this disorder is caused when a person uses a part of the body repetitively or forcefully more than a normal person would. The condition can affect spinal disks if one does enough repetitive work. He believes that the repetitive part of employee's work that caused the disorder was the tearing of 400-600 forms each day. He explained that the muscles in the arms become fatigued which causes posture to suffer and that the neck becomes painful from having to hold the arms up to perform the tearing motion. Dr. Cohen also stated that a disc herniation is a possible result from degenerative disc disease.

I believe that the above sets forth an adequate timetable of employee's employment in relation to the onset of her symptoms. Dr. Cohen also lays out convincingly the sequence of events of the overuse disorder which resulted in employee's injury. Therefore, I do not believe that Dr. Cohen's testimony was conclusory.

Finally, the ALJ found that Dr. Krettek, employer's expert, was more qualified and persuasive than Dr. Cohen because he is a neurosurgeon and performs surgery on cervical discs. Dr. Krettek testified that he did not believe employee's job duties caused her injury. However, he had no opinion as to what did cause her cervical disc herniation.

I actually believe Dr. Krettek's testimony to be supportive of Dr. Cohen's findings. Dr. Krettek admitted that a repetitive motion disorder could result from repetitive tasks or working in awkward positions. Dr. Krettek also admits that sitting at a desk with the arms extended out in front of the body and the neck flexed down performing tearing motions 100-500 times per day could possibly cause a cumulative disorder of the cervical spine. Furthermore, he admits such actions could cause degenerative disc disease and that if degenerative disc disease is present, any jolt or sudden look up or to the side can cause a tear in the degenerated disc and lead to a ruptured or herniated disc. Dr. Krettek does not believe tearing the forms caused employee's occupational disease because he did not feel that employee used forceful exertion in tearing the forms. However, Dr. Wright opined that employee's job involved rigorous hand activity and that tearing the forms required forceful exertion. Common sense also leads one to the conclusion that employee used forceful exertion in tearing the forms. Employee testified that she tore as many forms as she could at a time. Clearly then, employee was exerting as much force as she could muster. Anyone who is doing anything at the edge of their own capabilities is using forceful exertion.

I believe that the ALJ improperly discounted Dr. Cohen's opinion based on the alleged impeached testimony of employee, and furthermore, that Dr. Krettek's opinion is consistent with Dr. Cohen's findings. Therefore, there is no foundation for the ALJ's decision to discredit employee, and therefore no reason to discredit Dr. Cohen's expert medical opinion.

Based on the above, I believe that employee has carried her burden of establishing a medical causal relationship between her job duty of tearing forms and her cervical disc herniation. Employee has shown through expert medical testimony that the performance of her job duty of tearing forms exposed her to the hazard of a cervical disc herniation, that this exposure was greater than that to the public in general, and that in fact, her tearing of forms caused her cervical disc herniation.

I would reverse the award of the administrative law judge denying compensation. I would award past medical expenses, temporary total disability, and permanent partial disability against employer/insurer.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member