

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

Injury No. 09-094722

Employee: Jackie Pressley
Employer: Homewood Suites
Insurer: National Surety Corporation
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Dismissed)

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 and decision of the administrative law judge with this supplemental opinion.

Discussion

Injury arising out of and in the course of employment

The administrative law judge denied this claim on the issue of medical causation, finding that employee failed to satisfy her burden of proving her employment activity of wringing out a wet cleaning rag on February 28, 2009, was the prevailing factor causing her to suffer a left wrist injury. We agree that employee's left wrist injury is not compensable, but for somewhat different reasons. Section 287.020.3(2) RSMo provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The courts have interpreted the language of subsection (b) above to involve a causal connection test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012). The *Johme* court held that an employee who fell and suffered injuries when her foot slipped off her sandal while making coffee "failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her normal nonemployment life." *Id.* at 512.

We are of the opinion that employee has failed to satisfy the § 287.020.3(2)(b) causal connection test because the risk source herein—wringing out a wet rag—is not identified

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on this record as involving a level of physical stress or strain to which employee would not be equally exposed in her normal nonemployment life. Dr. Feinstein persuasively testified that it would be unusual to suffer an injury from a low-grade activity such as this, and Dr. Volarich did not specifically address the question of unequal exposure. Given this record, we find that the simple action of wringing out a wet rag would not involve forces sufficient to cause employee's injuries if the tendons and bone structure of employee's left wrist were not already compromised. We believe our legislature specifically contemplated such injuries—and declared that they would not be compensable—when they instructed that “[a]n injury is not compensable because work was a triggering or precipitating factor.” § 287.020.2 RSMo.

Employee did testify that her job duties involved repetitive and strenuous use of her hands and wrists, and that she would often have pain in her hands at the end of a workday. But employee does not provide expert medical testimony identifying such duties as the prevailing factor causing a repetitive motion injury of the type contemplated under § 287.067.3 RSMo, and has made clear, in both her brief and at oral argument in this matter, that she is pursuing an accident theory of injury based on the isolated February 28, 2009, rag wringing incident. “An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved ... is one to which the worker would have been exposed equally in normal non-employment life.” *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 674 (Mo. 2009). Because employee has failed to convince us that the activity of wringing out a wet rag involved a risk or hazard to which she would not have been equally exposed in her normal nonemployment life, we are convinced that “[t]he injury arose during the course of employment, but did not arise out of employment.” *Id.*

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Linda J. Wenman, issued August 15, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 24th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Jackie Pressley

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 am convinced that the decision of the administrative law judge should be reversed in favor of an award of permanent partial disability benefits from both employer and the Second Injury Fund.

First, I wish to register my disagreement with the administrative law judge's determination that employee failed to demonstrate that the accident of February 2009 was the prevailing factor causing her to suffer a compensable injury of the left wrist. Dr. Volarich testified that the accident was the prevailing factor causing employee to suffer a severe strain injury and aggravation of arthritic change at the distal ulna with a corresponding 30% permanent partial disability. Dr. Feinstein, meanwhile, did not address the question whether employee suffered a severe wrist strain or aggravation of arthritic change at the distal ulna resulting in permanent partial disability. Instead, his ultimate causation opinion focused exclusively on the question whether the accident could be deemed the prevailing factor causing a rupture of the extensor tendon to the left index finger. Thus, Dr. Volarich's opinion that the February 2009 accident caused employee to suffer a severe strain injury and aggravation of arthritic change at the distal ulna resulting in permanent partial disability stands wholly un rebutted on this record.

Notably, Dr. Feinstein agreed, in a letter dated November 10, 2010, that employee "injured the wrist at work in February of 2009 while wringing out a rag," and that "the tendon was partially torn as a result of the initial rag wringing incident of February 2009." *Transcript*, page 526 (emphasis added). At the request of employer's counsel, Dr. Feinstein authored a letter dated May 1, 2011, wherein he purported to "clarify" his earlier causation opinion and stated he believed the rag wringing incident was not the prevailing factor causing employee's "injury." *Transcript*, page 524. Again, though, it appears the only "injury" to which Dr. Feinstein refers in the context of a prevailing factor analysis is the extensor tendon rupture. In fact, on cross-examination, Dr. Feinstein confirmed that he believed employee suffered a *partially torn tendon* as a result of the February 2009 accident.

It thus appears to me that we are faced with uncontested medical opinions from both Dr. Volarich and Dr. Feinstein that the rag-wringing incident caused employee to suffer an injury in the form of either: (1) a severe strain and aggravation of arthritic change at the distal ulna as identified by Dr. Volarich; or (2) a partially torn tendon as identified by Dr. Feinstein. The administrative law judge thus erred as a matter of law in finding that employee failed to meet her burden of proof with respect to the issue of medical causation, as it is well-settled in Missouri that "[t]he commission cannot find there is no causation if the uncontroverted medical evidence is otherwise." *Hayes v. Compton Ridge Campground, Inc.*, 135 S.W.3d 465, 470 (Mo. App. 2004).

I also disagree with the majority's conclusion that employee failed to satisfy the unequal exposure requirement of § 287.020.3(2)(b) RSMo, because the majority fails to apply the

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relevant and controlling case law on the issue. In *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010), the Missouri Court of Appeals, Southern District, held that:

[T]he application of [§ 287.020.3(2)(b)] involves a two-step analysis. The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.

Id. at 467.

I acknowledge that in the case of *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012), the Supreme Court of Missouri focused on the unequal exposure requirement (or second step of the test set forth above), but I do not read the *Johme* decision to diminish the precedential value of *Pile*, for several reasons. First, and most importantly, our Supreme Court could have simply overruled *Pile* in the *Johme* decision if it had wished to do so, but it did not. That our highest court declined to overrule a decision which the Missouri Court of Appeals, Eastern District, discussed in its decision ordering a transfer, see *Johme v. St. John's Mercy Healthcare*, ED96497 (Oct. 25, 2011), and upon which the Commission relied in its award, implies that the Court saw some wisdom in the *Pile* approach, and wished to leave that precedent undisturbed.

Second, the *Johme* court did not purport to shift the analysis away from the first-step *Pile* question whether a risk is related or unrelated to employment, but rather exhorted us to take better care in identifying the actual risk at issue: the Commission had considered the *Johme* employee's activity of making coffee as the risk that caused her injuries, and analyzed whether making coffee was "related" to her work, but the Court defined the relevant risk as "turning and twisting her ankle and falling off her shoe." *Id.* at 508, 511. Having appropriately defined the risk, the Court proceeded to the unequal exposure analysis, as there was no need to discuss the first-step *Pile* question whether the employee's turning and twisting her ankle was integral to her work as a billing representative: it clearly was not.

In contrast, here we have a risk source—wringing out a wet cleaning rag—that was not only related to employee's work for employer, but integral thereto: employee was a housekeeper whose duties frequently required her to wipe down surfaces with cleaning rags. I find that the risk source of employee's injury was directly *related* to her work for employer as a housekeeper; as a result, I conclude that employee's injury did not come from "a hazard or risk *unrelated* to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life." § 287.020.3(2)(b)(emphasis added).

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Even if an unequal exposure analysis is appropriate in this case, I disagree with the majority's (implied) determination that employee was equally exposed to the risk of wringing out wet cleaning rags outside of and unrelated to her employment in normal nonemployment life. Employee credibly testified (and employer did not provide any contrary evidence) that she cleaned between 15 and 20 rooms for employer *per day*. Employee described "intense cleaning" that required wiping down nearly every surface of employer's hotel rooms. *Transcript*, page 19. There is no evidence whatsoever on this record that would suggest (let alone prove) that employee daily cleaned between 15 and 20 rooms in her normal nonemployment life. In fact, employer, in its cross-examination, did not ask employee any questions at all about her activities with cleanings rags in her normal nonemployment life.

In sum, I am convinced that given the uncontested expert medical evidence, and the absence of any evidence that employee was equally exposed to the risk of wringing wet cleaning rags in her normal nonemployment life, this record compels a finding that employee was injured not merely *while* she was at work, but *because* she was at work. See *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315, 321 (Mo. App. 2012). I disagree with the majority's choice to deny this claim. I find that employee met her burden of proving she suffered compensable left wrist injuries by accident on February 28, 2009. I would reverse the decision of the administrative law judge and award permanent partial disability benefits from the employer and the Second Injury Fund.

Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Jackie Pressley Injury No.: 09-094722
Dependents: N/A Before the
Employer: Homewood Suites **Division of Workers'**
Additional Party: Second Injury Fund (dismissed by award) **Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Insurer: National Surety Corporation
Hearing Date: May 13, 2014 Checked by: LJW

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 as February 28, 2009
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee alleges while ringing out at rag at work, she felt a pop in her left wrist.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Alleged left hand/wrist and left index finger.
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None paid by Employer.
16. Value necessary medical aid paid to date by employer/insurer? \$7,250.18

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- 17. Value necessary medical aid not furnished by employer/insurer? \$13,922.00 sought by Employee.
- 18. Employee's average weekly wages: \$280.00
- 19. Weekly compensation rate: \$186.68 / \$186.68
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable: -0- None

22. Second Injury Fund liability: No None

TOTAL: - 0 -

23. Future requirements awarded: N/A

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jackie Pressley	Injury No.: 09-094722
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Homewood Suites	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund (dismissed by award)	Jefferson City, Missouri
Insurer:	National Surety Corporation	Checked by: LJW

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on May 13, 2014. Post-trial briefs were received from the parties on June 13, 2014. Attorney James Hoffman represented Jackie Pressley (Claimant). Homewood Suites (Employer) is insured by National Surety Corporation and represented by Attorney Robert Kerr. The Second Injury Fund (SIF) was represented by Maria Daugherty, but the portion of the claim involving SIF is dismissed due to findings made in this award.

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: accident; arising out of and in the course and scope of employment; occupational disease; medical causation; liability of Employer for past medical expenses; liability of Employer for past temporary total disability (TTD) benefits; nature and extent of permanent partial disability (PPD) as to Employer and SIF; sanctions against Employer; and enforcement of a settlement agreement as applies to Claimant. Claimant offered Exhibits A-L, and Employer offered Exhibits 1-4. SIF offered no exhibits. All offered exhibits were admitted into the record. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be summarized.

1. Claimant is 60 years old and began working for Employer during April 2008. Claimant initially sought an employment position as a shuttle driver, but accepted a position as a housekeeper. Claimant described her job duties as typical hotel housekeeping duties, with performance of additional housekeeping duties as all of Employer's rooms were suites. The additional duties required thorough kitchen cleaning, wiping of walls, and additional vacuuming. After cleaning a suite, Claimant carried the dirty linens that weighed approximately 40 pounds to a laundry chute. Claimant lifted the laundry to waist level to place it in the chute. Claimant worked a 40 hour work week. Claimant testified the work made her exhausted and physically

sore at the end of the day. Claimant testified during May 2008, she developed a “lump” on the back of her left hand near her wrist. The “lump” was not reported to Employer as an injury.

2. On February 28, 2009, Claimant was engaged in her usual housekeeping duties when while ringing out a cleaning rag, she felt a pop in her left wrist. She felt an immediate sharp pain in her wrist, she notified Employer of the event, and when offered medical care, she told Employer she would wait and see if it was just a sprain. Claimant testified on direct examination that the pain in her wrist gradually got worse with the pain extending to her elbow. Claimant testified on cross examination her wrist did not hurt constantly after the February 2009 injury.

3. Between February 28, 2009 and June 27, 2009, Claimant sought no medical care related to her left wrist.

4. On June 27, 2009, while at home, Claimant reached down with her left hand to scratch her leg, felt a pop in her left index finger, and she was unable to bend or straighten her left index finger. Claimant felt shooting pain from her left wrist to her left elbow. She notified Employer and was directed to Barnes Care for medical treatment. On July 2, 2009 following examination, the Barnes Care physician diagnosed a non-traumatic rupture of the left index finger extensor tendon, along with a February 2009 left wrist sprain. The physician noted “based on the information I have seen, I consider this problem undetermined for work related.” Claimant was placed in a finger and wrist splint, occupational therapy was ordered, and Claimant was referred to Dr. Feinstein, a hand surgeon.

5. Claimant was seen by Dr. Feinstein on August 11, 2009.¹ Dr. Feinstein reviewed the left wrist x-rays taken by Barnes Care on July 2, 2009, and noted the x-rays showed significant arthritis at the distal radial ulnar joint with joint space narrowing and irregularity as well as osteophyte formation. In addition to the left index finger extensor tendon rupture at the level of the wrist, Dr. Feinstein also diagnosed distal radial ulnar joint osteoarthritis of the left wrist. Dr. Feinstein was not asked to provide a causation statement, and he ordered a left wrist/hand MRI.

Claimant was next seen by Dr. Feinstein on September 2, 2009. Dr. Feinstein noted the left wrist MRI demonstrated moderate to marked left wrist osteoarthritic changes, extensor digitorum tenosynovitis, and a small radiocarpal joint effusion. Following treatment discussion, Claimant and Dr. Feinstein agreed to pursue surgical intervention involving tendon transfer to replace the extensor tendon rupture of the left index finger, and partial resection of the distal radial ulna to remove the osteophytes. Dr. Feinstein noted the surgery would be scheduled subject to appropriate authorizations being obtained.

On September 22, 2009, Claimant underwent the following surgical procedures: tendon transfer, extensor digiti quinti tendon from the small left finger to the extensor digitorum communis of the left index finger; and a partial resection of the left distal ulna at the wrist. During surgery Dr. Feinstein noted “there was a large osteophyte, protruding dorsally from the distal ulna. There was arthritic wear seen on the head of the ulna.”

¹ The request for treatment appears to have been directly approved by an Employer representative, not their insurance company. This practice continued until Employer’s Insurer issued a claim denial letter to Claimant on November 6, 2009.

Following surgery, Claimant received post-operative medical treatment and occupational hand therapy. On March 10, 2010, Dr. Feinstein found Claimant to be at maximum medical improvement (MMI) and released her from medical care.

6. During the course of Claimant's treatment with Dr. Feinstein, no medical causation request was made of Dr. Feinstein. On November 10, 2010, Dr. Feinstein responded to a letter issued by Claimant's attorney requesting information regarding the injury. Dr. Feinstein responded as follows:

I received your letter dated November 5, 2010 regarding Ms. Jackie Pressley. I will try to answer your questions to the best of my ability. As you know, Ms. Pressley initially injured the wrist at work in February 2009 while wringing out a rag. It would be unusual to rupture a tendon from a low-grade activity such as this. Ms. Pressley was diagnosed with distal radioulnar joint osteoarthritis in the left wrist, which I believe was a precursor to the tendon injury. Osteophytes, or "bone spurs," from the arthritis most likely proved to be a precursor to tendon injury by wearing through some of the tendon fibers. This allowed for the tendon to be weakened, and more prone to injury as a result of more minor trauma, such as wringing out a rag. Therefore, when Ms. Pressley did wring out the rag in February 2009, she experienced the wrist and forearm pain that "...shot from her wrist up her forearm." Then, on June of 2009, when she scratched her leg, the tendon ruptured since it was even further weakened.

Thus, I do believe the tendon was partially torn as a result of the initial rag wringing incident of February 2009. I do not believe that a healthy tendon ruptured while scratching her leg in July of 2009, but more likely that an injured tendon ruptured in July of 2009. (Exhibit 4, depo exhibit 2)

During deposition testimony, commenting on his letter, Dr. Feinstein testified he felt Claimant's distal radial ulnar joint arthritis was a precursor to the tendon injury because she had bone spurs at the site that can be sharp and "sometimes will actually tear through a tendon, or make a tendon weaker by eroding through a tendon."

Dr. Feinstein also testified that "the rag wringing incident was not the prevailing factor, but the preexisting osteoarthritis at the distal radial ulnar joint which caused bone spurs to form [w]as the prevailing factor." (Exhibit 4, pg.18) Dr. Feinstein also testified the reason to perform the ulnar resection was "to remove the bone spurs and the ulna, which tend to be very sharp and more pronounced than the radius bone." (Exhibit 4, pg. 29) Further, Dr. Feinstein testified that rubbing of Claimant's tendon would occur with any activity in or away from work. (Exhibit 4, pg. 37)

7. On June 30, 2010, Dr. Volarich examined Claimant at her request. Following a review of Claimant's medical records, x-rays, and physical examination, Dr. Volarich opined as follows:

It is my opinion the work accident that occurred 2/20/09 when Ms. Pressley was wringing out a cleaning rag using her right wrist in a hyperextended fashion to wring out the cloth when she felt a "pop" in the dorsal ulnar compartment of the left wrist, is the substantial contributing factor as well

as the prevailing or primary factor causing the left wrist strain injury and aggravation of ulnar compartment arthritis at the distal ulna that required partial resection of the distal ulna at the wrist.

It is my opinion that the left hand index finger extensor tendon rupture is not a work related injury since the action performed was one of that of every day activity and it occurred at home. (Exhibit F, depo exhibit A)

Dr. Volarich was deposed twice, on November 3, 2010 and January 8, 2014. During his November 3, 2010 deposition, Dr. Volarich opined Claimant's February 2009 injury caused an ulnar compartment injury, severe rotator strain of the ligaments, and aggravated an asymptomatic arthritis. (Exhibit F, pgs. 10-11) Dr. Volarich further opined during the injury the surface of Claimant's ulna bone was "irreversibly damaged" causing Dr. Feinstein to resect it "because you can't do anything else with it." (Exhibit F, pg.12) Dr. Volarich testified the reason Dr. Feinstein performed the surgical repair was due to chipped ulna cartilage and inflammation. (Exhibit F, pg.13) During his January 8, 2014 deposition, Dr. Volarich acknowledged he had never discussed this case with Dr. Feinstein. (Exhibit G, pg. 22)

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

Issues relating to accident, occupational disease and medical causation

Claimant bears the burden of proving the essential elements of her claim by producing evidence from which it may be reasonably found that an injury resulted from the cause for which the employer would be liable. *Griggs v. A.B. Chance Co.*, 503 S.W.2d 697 (Mo.App. 1973). Whether Claimant's injury was an accident or occupational disease, both §287.020.3 RSMo., and §287.067.2 RSMo. 2005, provide work related injuries are compensable only if the accident or occupational exposure was the prevailing factor in causing both the resulting medical condition and disability, ordinary gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable, and further, as to injury by accident, an injury is not compensable because work was a triggering or precipitating factor.

This case is not determined by whether Claimant's injury was caused by accident or occupational disease, rather it is determined by which medical expert's opinion regarding medical causation is accepted. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds).

Two physicians, Dr. Volarich and Dr. Feinstein have offered causation opinions regarding this case. As noted in an earlier finding, Dr. Volarich opined during the February

2009 cloth wringing incident Claimant suffered an ulnar compartment injury, severe rotator strain of the ligaments, and aggravated an asymptomatic arthritis. (Exhibit F, pgs. 10-11) Dr. Volarich further opined that during the injury the surface of Claimant's ulna bone was "irreversibly damaged" causing Dr. Feinstein to resect it "because you can't do anything else with it." (Exhibit F, pg.12) Dr. Volarich also testified the reason Dr. Feinstein preformed the surgical repair was due to chipped ulna cartilage and inflammation. (Exhibit F, pg.13) During his January 8, 2014 deposition, Dr. Volarich acknowledged he had never discussed this case with Dr. Feinstein. (Exhibit G, pg. 22) Dr. Volarich provides no explanation for why Claimant could have continued to work with such a significant injury without receiving any medical care until the June 27, 2009 leg scratching event.

The treating surgeon, Dr. Feinstein, opined "the rag wringing incident was not the prevailing factor, but the preexisting osteoarthritis at the distal radial ulnar joint which caused bone spurs to form [w]as the prevailing factor." (Exhibit 4, pg.18) Dr. Feinstein also testified the reason to perform the ulnar resection was "to remove the bone spurs and the ulna, which tend to be very sharp and more pronounced than the radius bone." (Exhibit 4, pg. 29) Dr. Feinstein testified he felt Claimant's distal radial ulnar joint arthritis "was a precursor to the tendon injury because she had bone spurs at the site that can be sharp and "sometimes will actually tear through a tendon, or make a tendon weaker by eroding through a tendon." Further, Dr. Feinstein testified that rubbing of Claimant's tendon due to the spurs would occur with any activity in or away from work. (Exhibit 4, pg. 37) This testimony comports with the mechanism of Claimant's injury, namely, Claimant's osteoarthritis spur was rubbing and weakening her tendon with *any* activity. Work merely provided the *place* that the initial tearing started, making Claimant's February 28, 2009 alleged injury a precipitating or triggering event only and not the prevailing factor in causing the injury.

The trier of fact determines whether medical evidence is accepted or rejected, and the trier may disbelieve uncontradicted or unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W. 2d 525, 527 (MO banc 1993). Based on the foregoing discussion, I find the opinion of the treating surgeon, Dr. Feinstein, to be credible and persuasive, and accept his opinion that Claimant's alleged injury was not caused by her work duties. I further find Claimant failed her burden to establish her job duties produced an accident or occupational disease that arose out of and in the course and scope of her employment.

CONCLUSION

Claimant's claim is not compensable. Employer owes no benefits to Claimant. The claim against SIF is dismissed. The remaining issues in dispute are moot.²

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

² Medical charges in the amount of \$13,922.00 remain unpaid. These charges represent billing of the surgical center and anesthesia. As this case is not compensable, the bills are not owed to Claimant. However, the evidence presented in this case clearly demonstrates a representative of Employer authorized the medical care associated with these bills. Although the health care providers involved can seek remedy for the charges by filing a Medical Fee Dispute Direct Pay application, it is clear the charges are owed by Employer/Insurer, and I strongly recommend the charges be paid by Employer/Insurer to the health care providers without delay.