

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

Injury No. 17-006709

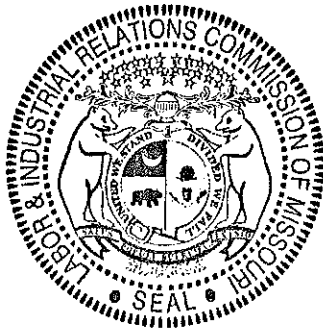
Employee: Jerry Sample  
Employer: Drivers Management LLC  
Werner Enterprises, Inc.  
Insurer: Ace American Ins. Co. c/o ESIS

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 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 Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 30, 2019, and awards no compensation in the above-captioned case.

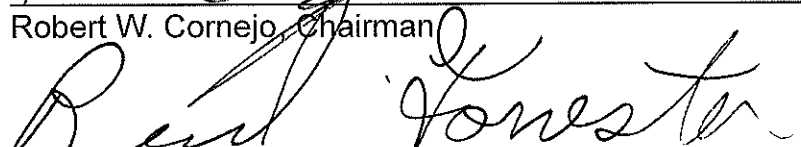
The award and decision of Administrative Law Judge Bruce Farmer, issued April 30, 2019, is attached and incorporated by this reference.

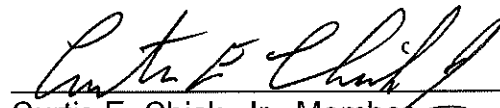
Given at Jefferson City, State of Missouri, this 30<sup>th</sup> day of October 2019.

LABOR AND INDUSTRIAL RELATIONS COMMISSION



  
\_\_\_\_\_  
Robert W. Cornejo, Chairman

  
\_\_\_\_\_  
Reid K. Forrester, Member

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

Attest:

  
\_\_\_\_\_  
Secretary

## AWARD

Employee: Jerry Sample

Injury No.: 17-006709

Employer: Drivers Management LLC  
Werner Enterprises, Inc.

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

Insurer: Ace American Ins. Co. c/o ESIS

Hearing Date: March 5, 2019

Checked by:

Briefs submitted: March 29, 2019

### 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 January 2, 2017
5. State location where accident occurred or occupational disease was contracted: alleged Callaway County
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:  
Allegedly delivering loaded rolltainers to retail stores
12. Did accident or occupational disease cause death? No. Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: alleged neck
14. Nature and extent of any permanent disability: n/a
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer: \$0

Issued by DIVISION OF WORKERS' COMPENSATION

- 17. Value necessary medical aid not furnished by employer/insurer? \$0
- 18. Employee's average weekly wages: \$743.23
- 19. Weekly compensation rate: \$495.48 for TTD / \$477.33 for PPD
- 20. Method wages computation: by stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: None

23. Future requirements awarded: None

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jerry Sample

Injury No.: 17-006709

Employer: Drivers Management LLC  
Werner Enterprises, Inc.

Before the  
**Division of Workers'  
Compensation**

Insurer: Ace American Ins. Co. c/o ESIS

Hearing Date: March 5, 2019

On March 5, 2019, the parties appeared for a hardship hearing. Employee, Jerry Sample, appeared in person and with his attorney, Michael Kelley. The employer and insurer appeared by counsel, Robert Haeckel. The parties requested to file post-hearing briefs and the case was submitted on March 29, 2019.

### STIPULATIONS

1. Drivers Management, LLC/Werner Enterprises, Inc. was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by Ace American Insurance Co., c/o ESIS Inc.
2. On January 2, 2017, Jerry D. Sample was an employee of Drivers Management, LLC/Werner Enterprises, Inc. and was working under the Workers' Compensation Act.
3. Venue is proper in Cole County, Missouri.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The average weekly wage was \$743.23, resulting in a compensation rate of \$495.48 for temporary total disability benefits and \$477.33 for permanent partial disability benefits.
7. The employer-insurer paid for no medical aid.
8. The employer-insurer paid no temporary disability benefits.

**ISSUES**

1. Whether Claimant sustained an occupational disease.
2. Whether the alleged occupational disease arose out of and in the course of employment.
3. Whether the alleged occupational disease caused the injuries and disabilities for which benefits are now being claimed.
4. Whether Claimant is entitled to future medical treatment to cure and relieve the effects of the alleged work injury.
5. Whether Claimant is entitled to temporary total disability benefits for the period from January 17, 2017 to present.

**EXHIBITS**

Employee Exhibits:

1. Deposition of Dr. Thomas Lee and exhibits
2. DOT Physical – 10/24/16
3. Fulton Clinic Medical Records
4. Midwest Orthopedic Pain & Spine Records
5. Mineral Pain Center Records
6. Dr. Xiahohui M. Fan Records
7. Correspondence from Employer HR Rep Patti Anderson, 1/24/17 & 2/15/17

Employer-Insurer Exhibits:

- A. First Report of Injury
- B. Claim for Compensation
- C. Answer to Claim for Compensation
- D. Employer wage verification
- E. Dr. Russel Cantrell medical reports and curriculum vitae
- F. Deposition of Dr. Michael Chabot and exhibits
- G. Copy of Employee's Missouri CDL license
- H. Subpoena duces tecum – 2/12/19
- I. Missouri State Child Support Lien

The employer's objection to Employee's Exhibit 7 is overruled. All other exhibits are admitted without objection.

## DISCUSSION

Jerry D. Sample ("Claimant") is 43 years of age (DOB: 2/29/76). He is 6'2" tall and weighs in excess of 300 pounds. Claimant's only current medication is over-the-counter Ibuprofen, an anti-inflammatory. Claimant is not currently working. He has a high school diploma and received his Missouri Commercial Driver's License (CDL) on November 30, 2016. (Ex. G). Claimant's last regular employment was with Drivers Management, LLC/Werner Enterprises, in early 2017. Claimant subsequently took a medical leave of absence in 2017, and was ultimately terminated, when he did not return to work.

Claimant's entire prior employment history includes at least 16 years of roofing work. This work involved heavy lifting, climbing, and bending. From 2013 to 2015, Claimant worked "rough necking" in the Oklahoma and Texas oil fields. As a rough-necker, Claimant worked up to 12 hours per day, performing multi-week shifts, including weekends. Claimant did "everything imaginable" on the oil rigs. The work required continuous hoisting of pipes overhead, by use of a cable, onto oil rigs, and swinging sledge hammers. While working as a rough-necker, Claimant sustained multiple back injuries, in the nature of sprains/strains, as well as a foot and smashed finger injury.

Claimant completed a private truck driving course at Mineral Area Community College in the fall of 2016. He began working for Driver's Management/Werner Trucking ("employer" or "Werner") on October 24, 2016. Claimant passed a Department Of Transportation ("DOT") physical examination on that date. (Ex. 2). The DOT examination consisted of a self-administered medical history completed by checking off boxes for any admitted complaints, a blood pressure test, a urinalysis, height and weight measurements, a vision test, a hearing test, and the doctor's review of body systems including ENT, lungs, and neurological status. (Ex. 2). The DOT physical exam did not require any x-rays of the cervical spine, much less an MRI of the neck to identify chronic, multi-level pathology.

Claimant underwent a 5 to 6 week training period with a Drivers Management supervisor. His Missouri CDL license was issued on November 30, 2016. (Ex. G). At that time, Claimant was provided with a Drivers Management truck and trailer, and was assigned to a dedicated Dollar General retail-store account. During training, his routes only required "drop and hook," with no loading or unloading freight. He concluded training by December 16, 2016, and was scheduled to begin driving solo after Christmas 2016.

The Dollar General account included multiple delivery locations, primarily in Missouri, centered out of employer's Fulton, Missouri terminal. Claimant's solo delivery route involved picking up his preloaded trailer at the Fulton terminal, performing a safety inspection, driving to 3 to 5 retail stores as scheduled by the employer, and dropping off loaded totes or "rolltainers" from his trailer at each store. Each rolltainer was on wheels, and was 3.5 feet long, two feet wide, and up to six feet tall. The weight of each rolltainer varied, depending on its contents. Claimant's work duties did not involve stocking the

rolltainers or loading the rolltainers in the trailer. Claimant testified a loaded rolltainer could weigh between 200 and 1,000 pounds. No further evidence was presented on the weight of the rolltainers or the amount of physical force needed to move them. Delivery at each store required Claimant to offload 10 to 24 rolltainers from his trailer, which he pushed or pulled into the store.

While working alone after Christmas 2016, Claimant experienced general muscle soreness in both shoulders and arms while performing his job duties. These complaints came on gradually in the one to two weeks after Christmas 2016, and worsened over time. As Claimant conceded, he did not sustain a work accident, event or trauma, occurring on a specific date or during a single work shift involving his neck, shoulder, and right arm. Rather, Claimant recalled his physical complaints of shoulder and full arm pain gradually worsened over time. Claimant testified that he later developed "an electrical sensation" in both arms. Sometime before 1-17-17, after an ice storm kept him home over the weekend, Claimant notified his fleet manager of his complaints. Claimant testified that he did not have previous neck or arm complaints, or treatment for neck or arm symptoms.

Claimant testified that he started working by himself unloading rolltainers after Christmas 2016. He further testified that his last day of work was January 16, 2017. Thus, there were 15 working days between December 26, 2016 and January 16, 2017, excluding holidays.

### **Medical Evidence**

The Employer arranged for Claimant to be treated at Fulton Clinic on 1-17-17. Claimant reported he had injured his right shoulder and the right side of his neck. He complained of pain in the right shoulder and numbness in the right arm, along with restricted range of motion. He was diagnosed with right shoulder pain, right neck pain radiating into the right arm, and muscle spasms. Cervical spine x-rays were negative for acute fracture and revealed loss of cervical lordosis, with slightly diminished disc space height at C4-5 and C5-6. Right shoulder x-rays were negative for fracture, dislocation, or significant degeneration. Claimant was prescribed Prednisone and Flexeril, without refill, and was only taken off work for 1-17-17, the day of treatment. (Ex. 3). He did not return to work.

Thereafter, Claimant sought medical care on his own with his personal physician, Dr. James Moore, D.O., in Farmington, Missouri. (Ex.4, 5). On 1-23-17, Claimant reported he had been working, driving a truck, and gradually developed an onset of pain and numbness in the right side of his neck, into the right trapezius and shoulder, and down the right arm. Dr. Moore did not document any specific work event or discrete work injury. Nor did Claimant directly attribute his complaints to any specific work activity. Dr. Moore referred Claimant to Dr. Orr, a chiropractor, and Dr. Fan, a pain management physician, both of whom shared office space with Dr. Moore. (Exs. 4, 5, 6).

Dr. Orr examined Claimant on 1-23-17 and started Claimant on a course of conservative care. A 1-25-17 cervical spine MRI revealed disc desiccation at C3-4, C4-5, C5-6, and C6-7; a focal disc protrusion at C5-6 on the right; and a broad-based disc bulge at C6-7. When Claimant returned to Dr. Orr on 1-31-17, he reported neck pain on the right, which was aggravated by bending, lifting, driving, and working overhead. Claimant received chiropractic treatment from Dr. Orr on 2-6-17, 2-7-17, 2-8-17, 2-9-17, and 2-13-17.

On 2-6-17, Claimant returned to Dr. Moore, reporting right shoulder pain, which radiated into the right arm. He no longer experienced right shoulder pain when he turned his head to the left. Claimant's right arm numbness was less frequent. (Exs.4, 5).

On 2-13-17, employee treated with Dr. Fan. He complained of neck pain which began gradually, with no apparent injury. Claimant rated his pain as 6/10 in severity. The pain involved the bilateral shoulders and upper arms, and was aggravated with any activity. Dr. Fan diagnosed pain in the cervical region. On 2-14-17, Dr. Fan performed an interlaminar epidural steroid injection at C7-T1. (Exs. 4, 5, 6).

Claimant also treated with Dr. Orr on 2-14-17. He noted improvement in his complaints, rating his pain as 5/10 in severity. Dr. Orr's exam revealed moderate spasm and hypertonicity in the right shoulder and neck. Claimant's disability index rating remained at 70%. The next day, on 2-15-17, employee returned to Dr. Moore. While employee reported some improvement with injection and cervical traction, he still experienced right shoulder pain. Dr. Moore's physical exam did not document any abnormalities. Employee treated with Dr. Orr on 2-15-17, and 2-16-17. His exam and symptoms were unchanged. (Exs. 4, 5).

During the next few months Claimant continued to treat on his own with Drs. Orr, Moore and Fan. While treating with Dr. Orr on 5-4-17, employee rated his pain as 2/10 in severity. On physical exam, Claimant had mild spasm and inflammation in the neck and right shoulder. (Exs. 4, 5).

### **Dr. Cantrell**

Dr. Cantrell evaluated Claimant on 3-14-17. (Ex. E). Dr. Cantrell reviewed a Report of Injury referencing a 1-2-17 injury date, which contained the Werner Employee Injury Report completed on 2-14-17; the records of Fulton Clinic, x-ray studies of employee's right shoulder and cervical spine taken on 1-17-17, and a 1-25-17 cervical spine MRI. Dr. Cantrell did not have the records of Drs. Moore, Orr, or Fan available for his review at the time of his 3-14-17 evaluation. (Ex. E).

Claimant reported he began working for Werner approximately 1 month before seeking treatment for neck pain complaints radiating to his right shoulder and upper extremity. Claimant reported no specific event that led to the onset of symptoms. Rather,



Claimant reported that he began experiencing a gradual onset of pain complaints in his neck, which radiated into his right shoulder. (Ex. E).

On reviewing the 1-17-17 right shoulder x-ray study, Dr. Cantrell noted it was unremarkable for any acute abnormality or significant degenerative changes. The 1-17-17 cervical spine x-ray revealed a decrease in cervical lordotic curvature, without any acute bony abnormality. Dr. Cantrell also reviewed the 1-25-17 cervical spine MRI. It evidenced a broad-based disc bulge at C6-7, and a focal disc protrusion to the right of midline at C5-6, which distorted the spinal cord, without any corresponding acute spinal cord signal changes. (Ex. E).

Dr. Cantrell performed a physical exam. Claimant had active range of cervical spine motion which was full in flexion, with mild posterior neck pain at the end range. Cervical extension was full, without pain complaints. Left rotation was slightly limited, and reproduced pain complaints in the right neck. Right rotation was full and pain free, as was bilateral side-bending. Claimant had full, painless range of motion of the bilateral shoulders. He had no rotator cuff weakness or myotomal weakness in either upper extremity. In fact, Dr. Cantrell found Claimant had excellent strength in his bilateral upper extremities. Claimant's reflex exam was equal and symmetric at the biceps, triceps, and brachioradialis. He had negative Hoffmann's sign in both hands. (Ex. E).

Based on the information available to him at the time of his 3-14-17 evaluation, Dr. Cantrell found Claimant had radiographic evidence of disc pathology at the C5-6 level, resulting in spinal cord compression. Claimant did not have any spinal cord signal changes at the level of spinal cord deformity, which indicated the discogenic pathology at the C5-6 level and the level below was pre-existent to employee's occupational activities. While there was radiographic evidence of a significant disc protrusion at C5-6 and cord compression at the same level, Claimant did not have any upper motor neuron findings on exam. Nor did Claimant have any lateralizing neurologic deficits. In the absence of a discrete work injury or event, Dr. Cantrell opined Claimant's occupational activities performed over the course of three weeks while working on a Dollar General account were not the prevailing factor in the cause of the radiographic abnormalities documented on the 1-25-17 cervical spine MRI. (Ex. E).

Dr. Cantrell found Claimant had reached MMI regarding the alleged work injury, and any additional medical treatment provided, including follow up injections by Dr. Fan, would not be necessitated by that injury. Based on Claimant's physical exam, Dr. Cantrell saw no reason to medically restrict his work activities. (Ex. E).

Dr. Cantrell issued a second report on 9-5-17, after reviewing additional medical records. Dr. Cantrell's review of these additional medical records did not alter his opinions, as set forth in his 3-14-17 report. In Dr. Cantrell's opinion, Claimant's documented gradual onset of pain complaints was inconsistent with an acute disc herniation attributed to a specific work injury. Dr. Cantrell diagnosed degenerative disc disease at the C5-6 and C6-7 levels, as evidenced by disc desiccation, broad-based disc bulging at C6-7, and a more

focal disc protrusion at C5-6. Claimant did not have any lateralizing neurologic deficits supportive of cervical radiculopathy, or any upper motor neuron findings supportive of a cervical myelopathy. In Dr. Cantrell's opinion, Claimant's occupational activities leading up to 1-2-17 were not the prevailing factor in the cause of his medical condition or disability. Employee had reached MMI, and did not require any further medical treatment for his alleged work injury. He was capable of returning to regular work duties, without limitation. (Ex. E).

### **Dr. Chabot**

Dr. Michael Chabot, a board certified orthopedic surgeon, evaluated employee on 9-22-17. Claimant reported he worked for the Dollar General account for Werner. Claimant's job duties required moving wheeled totes, which had already been loaded and stacked into his trailer, into Dollar General Stores. Moving the wheeled totes into the stores required employee to push and pull the totes. Claimant reported he began experiencing right shoulder pain and discomfort in December 2016, around Christmas time. Employee did not recount or report any specific event, or injury responsible for the onset of his right shoulder pain. Claimant's symptoms seemed to wax and wane. The pain became more significant and constant by the second or third week of January 2017. When Dr. Chabot asked employee if there was any specific or new event in January 2017 which was responsible for the aggravation or exacerbation of his complaints, employee stated there was no specific event or work activity he could recount. (Ex. F, 7-9; Dep. Ex. 2).

Dr. Chabot reviewed Claimant's medical records. He also reviewed the 1-25-17 cervical spine MRI. Dr. Chabot interpreted the MRI to show evidence of disc desiccation at C3-4, C4-5, C5-6, and C6-7; and a large extruded disc herniation at C5-6 on the right, which extended into the posteriolateral region on the right, and significantly narrowed the right neuroforamina. (Ex. F, 13; Dep. Ex. 2). Dr. Chabot noted the desiccation, or loss of water content in the discs from C3-4 to C6-7, as well as the spondylosis in the cervical spine, occurred over a matter of years, rather than a matter of weeks or months. (Ex. F, 15-16; Dep. Ex. 2).

Dr. Chabot reviewed Dr. Cantrell's 3-14-17 report and observed the history Claimant provided to Dr. Cantrell on 3-14-17 was very similar to the history provided to him. (Ex. F. 15-16; Dep. Ex. 2). Dr. Cantrell did not identify any spinal cord signal changes (myelomalacia). Nor did Dr. Chabot find evidence of such spinal cord signal changes. That employee did not have any spinal cord signal changes at the C5-6 level established to Dr. Cantrell the discogenic pathology at that level, and the level below, pre-existed Claimant's occupational activities in the weeks leading up to 1-2-17. Additionally, Dr. Cantrell noted employee did not have any upper motor neuron findings, myelopathy or lateralizing neurologic deficits on examination. Dr. Chabot agreed with Dr. Cantrell's findings on these matters. (Ex. F. 16-18; Dep. Ex. 2).

Dr. Chabot reviewed employee's deposition testimony and performed a physical exam. Claimant moved without difficulty. He was able to dress and undress himself

without assistance. A neck examination revealed mild tension involving the posterior cervical paraspinal and trapezius musculature, bilaterally. Claimant's cervical range of motion was reduced in all directions by 25%. The Spurling's test, a neural compressive test meant to reproduce or elicit symptoms associated with disc herniation, was negative. Dr. Chabot's upper extremity neurologic exam revealed decreased sensation involving the left extensor forearm. Claimant's reflexes were equal and symmetric. Motor strength testing was normal, 5+/5+. Hoffmann's sign was negative. Dr. Chabot noted the disc protrusion documented on the 1-25-17 MRI scan was on the right side, so the relevance of Claimant's left forearm symptoms were questionable. As Dr. Chabot explained, a right-sided lesion should produce right-sided symptoms. While the localized extensor forearm changes could suggest there were lateralizing symptoms, those changes were relatively non-specific, and did not follow a clear neurologic pattern. (Ex. F 17-19, 21-23; Dep. Ex. 2).

According to Dr. Chabot the degenerative changes shown at multiple levels in Claimant's cervical spine on the objective diagnostic studies occurred as the result of a chronic, ongoing degenerative condition, which had been present for years. The presence of disc desiccation at four levels in Claimant's cervical spine was one reason Dr. Chabot found employee's cervical condition had a non-occupational cause, and did not result from his work duties for the employer. Dr. Chabot found the prevailing factor in his cervical spine condition was chronic degenerative changes, which resulted in the pathology documented on the 1-25-17 MRI, and which were unrelated to employee's work duties. Claimant's history of a gradual and non-specific onset of symptoms was consistent with a chronic, long-term degenerative condition, associated with chronic changes. In Dr. Chabot's opinion, Claimant's work duties were not the prevailing factor in his cervical spine condition. Rather, the prevailing factor was the pre-existing, degenerative disc disease in his cervical spine. The pre-existing degeneration in Claimant's cervical spine predisposed him to developing a disc herniation. As Dr. Chabot observed, the medical records did not support a conclusion that Claimant's work duties were responsible for the development of his cervical disc pathology. Rather, Dr. Chabot found Claimant's cervical disc pathology pre-existed his employment with Werner, and would have progressed, regardless of the activities performed. (Ex. F, 25-29; Dep. Ex. 2).

Dr. Chabot found the disc herniation shown on the 1-25-17 MRI was not the result of Claimant's employment. As Dr. Chabot explained, a patient did not need a specific injury to develop a cervical disc herniation. A degenerated disc, which was represented by loss of disc hydration on objective diagnostic studies, was a sufficient reason for a disc to herniate. The 1-25-17 cervical spine MRI revealed disc desiccation at multiple levels. Claimant had objective medical evidence of multi-level, chronic cervical disc desiccation and degeneration, which pre-existed his employment at Werner. (Ex. F, 26-29; Dep. Ex. 2).

Subsequent to his 9-22-17 evaluation, Dr. Chabot reviewed Dr. Lee's report and deposition. Dr. Chabot noted Claimant provided Dr. Lee with a different description of the onset of his complaints. Dr. Chabot disagreed with Dr. Lee's causation opinions. (Ex.

F, 29-31; Dep. Ex. 3). Dr. Chabot was also critical of Dr. Lee's reliance on the DOT physical exam. Dr. Chabot found a standard pre-employment DOT physical exam without MRI scanning could not be expected to reveal the extent of cervical disc pathology. DOT physicals did not include a thorough neurologic exam. So, unless an employee had profound neck and arm complaints, radiculopathy or neurological changes at the time of the DOT exam, claimant would pass the exam, and the doctor performing the exam would have been unable to identify his cervical disc herniation. (Ex. F, 30, 37).

### **Dr. Lee**

Dr. Thomas Lee, a board certified orthopedic surgeon, evaluated Claimant at the request of Claimant's counsel on January 4, 2018. Dr. Lee examined Claimant, took a history of his job duties, and reviewed medical records in evidence. He gave his deposition on April 1, 2018.

Dr. Lee reviewed Claimant's January 25, 2017 MRI of the cervical spine. He testified that it showed a large, right sided herniation at the C5-6 disc space that put compression of the nerve root in the spinal cord. While he acknowledged some pre-existing degeneration, Dr. Lee testified that these findings were common in patients of similar age.

Based on a reasonable degree of medical certainty, Dr. Lee testified that Claimant's job duties were the prevailing factor in causing the acute, large, right sided disc herniation at C5-6. The onset of his symptoms coincided with his strenuous work activities for Employer. There was no other event to explain the onset. He viewed no medical records that pre-existed Claimant's work for Employer. Dr. Lee did not think Claimant would have passed his DOT physical if a herniation that size pre-existed his employment for Employer.

Dr. Lee acknowledged that Claimant could not pinpoint an exact incident when he hurt himself. He explained that his inability to pinpoint an exact incident was not inconsistent with the disc herniation being related to his strenuous work activities. He explained that Claimant was sore from starting a new job, so the herniation symptoms could initially overlap with a muscle strain.

Dr. Lee believes surgery is necessary to cure and relieve the effects of the work injury. Dr. Lee testified that Claimant is currently restricted to no lifting more than 20 pounds, no pushing or pulling more than 75 pounds on a four wheel cart, and no commercial driving. The work injury was the prevailing factor in the C5-6 disc herniation, need for treatment, and disability.

### **FINDINGS OF FACT AND RULINGS OF LAW**

Under Missouri's Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim. *Fischer v. Archdiocese of St. Louis*, 739 S.W.2d 195, 198 (Mo. App. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581 (Mo. App. 2002). Proof is made only by competent and substantial evidence,

and may not rest on speculation. *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974).

A claimant's expert in an occupational disease case must establish within a "reasonable probability" that the disease was caused by the conditions in the work place. *Pippin v. St. Joe Minerals Corp.*, 799 S.W. 2d 898, 902 (Mo. App. 1999). Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. *Morris v. Captain D's*, 537 S.W.3d 420, 424 (Mo. App. 2018). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Pace v. City of St. Joseph*, 367 S.W.3d 137, 150 (Mo. App. 2012).

Medical causation, not within the common knowledge or experience, 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 Systems, Inc.*, 877 S.W. 2d 704, 708 (Mo. App. 1994). The existence of spinal injuries or disease and other occupational diseases are medical conditions not within common knowledge and must be established by expert medical evidence.

There are two general categories of compensable injuries - injuries by accident and injuries by occupational disease. *Lankford v. Newton Cty*, 517 S.W.3d 577, 584 (Mo.App.S.D.2017). An "accident" is an unexpected traumatic event or unusual strain, identifiable by time and place of occurrence, and producing at the time objective symptoms of an injury, caused by a specific event during a single work shift. § 287.020.2. Claimant does not assert an injury caused by accident. He testified repeatedly that he could not identify a specific traumatic event and this testimony was consistent with the history he provided to multiple providers.

Therefore, this issue does not need to be addressed in detail. On reviewing the record in its entirety, including Claimant's testimony and the medical and documentary evidence, it is readily apparent there exists no competent or substantial evidence demonstrating that Claimant experienced an unexpected traumatic event or unusual strain clearly identifiable by time and place of occurrence, and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

An occupational disease is an identifiable disease, arising with or without human fault, out of and in the course of the employment. Ordinary diseases of life, to which the general public are exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease, as defined in Section 287.067. The disease need not to have been foreseen or expected, but after its contraction, it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. Section 287.067.1.

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the medical condition and disability. The "prevailing factor" is the primary factor, in relation to any other factor, causing the 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. § 287.067.2.

An occupational disease exists under the Act where a peculiar risk or hazard is inherent in the working conditions, and a disease follows as a natural result. *Moreland v. Eagle Picher Tech.*, 362 S.W.3d 491,505 (Mo. App. 2012). Whether a particular employment involves a peculiar risk is determined from two criteria: 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 employee's job, which is common to all jobs of that sort. *Id.*; *Smith v. Cap. Reg. Med. Ctr.*, 458 S.W.3d 406, 407 (Mo. App. 2014) (to meet the burden of proof as to causation for a claim of occupational disease, employee has to submit medical evidence establishing the probability the working conditions caused the disease).

The competent and substantial medical evidence demonstrates employee's neck condition does not constitute an "occupational disease," within the contemplation of the Act: a disease which is the natural incident or result of a particular employment, developing gradually from long, continued work in that employment, and serving to attach to that employment, a hazard distinguishing it from the ordinary run of occupations. The medical condition at issue is not a compensable occupational disease. Rather, it is a pre-existing, progressive degenerative condition.

The competent, credible, probative and substantial medical evidence, including the objective diagnostic studies and the findings and testimony of Drs. Chabot and Cantrell, show employee had degenerative disc disease, a pre-existing condition, which affected multiple levels of his cervical spine. It was this pre-existing degenerative condition which caused the cervical pathology documented on the 1-25-17 MRI, namely, multi-level cervical spondylosis, disc desiccation and degeneration, a disc herniation at C5-6 to the right, and a disc bulge at C6-7. The multi-level disc desiccation and degeneration, as well as the pathology at C5-6 and C6-7, were longstanding and chronic. The pathology documented on the MRI pre-existed Claimant's employment, and was unrelated to his work duties for the employer. The work activities employee performed during the brief period between 12-26-16 and 1-17-17 did not worsen or bring about a change in Claimant's pre-existing, degenerative cervical pathology.

That Claimant's neck condition is pre-existing and degenerative in nature, is shown by the objective medical evidence, including the 1-25-17 cervical spine MRI. § 287.190.6(2). That MRI revealed disc desiccation at C3-4, C4-5, C5-6, and C6-7. Additionally, the MRI revealed a disc herniation at the C5-6 level on the right, and a broad-based disc bulge at C6-7. Both Dr. Chabot and Dr. Cantrell found the cervical spine

pathology documented on the 1-25-17 MRI was longstanding, chronic, and degenerative nature, and pre-existed claimant's work activities.

In Dr. Cantrell's opinion, Claimant's documented, gradual onset of pain complaints was inconsistent with an acute disc herniation attributed to a specific work accident, or work event. Additionally, Dr. Cantrell found Claimant's occupational activities performed over the course of three weeks between 12-26-16 and 1-17-17 while working for employer were not the prevailing factor in the cause of Claimant's neck condition, in particular, the cervical spine pathology on the 1-25-17 MRI. Dr. Cantrell found the discogenic pathology at C5-6 and C6-7 pre-existed Claimant's occupational activities taking place during that 3-week interval. (Ex. E).

Likewise, Dr. Chabot testified that Claimant's cervical spine condition was pre-existing, chronic and degenerative, and did not result from his work activities. Dr. Chabot diagnosed history of herniated disc at C5-6, history of cervical radiculopathy, and disc degeneration at multiple cervical levels. As Dr. Chabot observed, a disc herniation could be caused either by a traumatic event, or could occur without a traumatic injury as the natural consequence of degeneration and aging.

Dr. Chabot also found employee had cervical spondylosis. Spondylosis was deterioration and spurring along the margins of the cervical vertebra. This condition was degenerative in nature. It was not the type of condition which occurred over the course of 3 weeks, or even 3 months, of employment. Rather, spondylitic changes occurred over the course of several years. And, as Dr. Chabot found, the disc desiccation documented from C3-4 to C6-7 in employee's cervical spine also occurred over a matter of years, rather than a matter of weeks or months. (Ex. F 15-16; Dep. Ex. 20).

Dr. Chabot found the prevailing factor for Claimant's cervical spine condition was his pre-existing degenerative disc disease and chronic degenerative changes, which resulted in the pathology on the 1-25-17 MRI. This pathology was unrelated to Claimant's work duties. Claimant's history of a gradual and non-specific onset of symptoms was entirely consistent with a chronic, long-term degenerative condition, associated with chronic changes of the nature Claimant had, and which were documented on the objective diagnostic studies, in particular, the cervical spine MRI. Dr. Chabot found Claimant's work duties were not the prevailing factor in his neck condition. Rather, the prevailing factor in Claimant's neck condition was the pre-existing degenerative disc disease in his cervical spine. This pre-existing degenerative condition pre-disposed employee to developing a disc herniation. As Dr. Chabot found, the medical records did not support a conclusion that Claimant's work duties were responsible for the development of his cervical disc pathology. (Ex. F 17-19, 23-29; Dep. Ex. 2).

Dr. Lee's findings and testimony do not require a contrary result. Dr. Lee failed to provide a persuasive explanation of how 17 days of work duties caused Claimant's cervical spine pathology, including the C5-6 herniation. Moreover, Dr. Lee's opinion was premised on the work history Claimant provided, and the fact he passed a DOT exam and a company

physical exam. The DOT exam is irrelevant as the exam does not involve the type of diagnostic testing that would have uncovered Claimant's degenerative cervical disease.

Dr. Lee also premised his opinions on Claimant's history of a longer period of work duties and thus, a longer period of occupational exposure. However, the work and complaint onset history provided to Dr. Lee was inaccurate, as he conceded. As Dr. Lee acknowledged, the history he relied on regarding Claimant's employment and symptom onset, and on which he based his opinions, was that provided directly to him by Claimant. He also acknowledged if Claimant's history of symptom onset occurring two weeks after Christmas 2016, and worsening during the next 3 weeks while working for employer until February 2017 was inaccurate, it could affect his opinions. (Ex. 1, 28-31).

Given Dr. Lee's concessions, his finding that Claimant's work was the prevailing factor causing his cervical spine condition was without a substantial basis in fact, and does not constitute competent or substantial evidence, sufficient to support a finding either of causation or a compensable occupational disease under the Act. *Thomas*, 282 S.W.3d at 627. An expert's opinion must be based on substantial information, and there must be a rational basis for the opinion. *Id.*

Dr. Lee acknowledged, however, degenerative disc disease was caused by aging, genetics, and non-occupational factors. He conceded the multi-level disc desiccation and degenerative disc pathology in Claimant's cervical spine documented on the 1-25-17 MRI occurred over a matter of years, rather than over a period of weeks. Significantly, Dr. Lee admitted those types of degenerative changes and pathology occurred in individuals, *regardless* of whether or not they were employed. He found the pathology shown on the MRI, including disc desiccation and spondylosis, was consistent with chronic, progressive, degenerative disc disease. (Ex. 1, 33-37). Dr. Lee's findings in this regard suggest Claimant's cervical spine pathology, including the C5-6 herniation, was the result of his pre-existing, progressive degenerative disc disease, and not his employment activities. §287.067.

After review of the entire record, I find that the opinions of Drs. Cantrell and Chabot are more credible than those of Dr. Lee and Claimant's treating physicians. Drs. Cantrell and Chabot's opinions are supported by the objective medical tests and exams.

I also find that Claimant's testimony was not particularly credible. On direct and cross examination, as well as questioning by the undersigned, Claimant was inconsistent and evasive in his testimony. This was evident in trying to establish a time line of his work activities after his training concluded.

### **CONCLUSION**

Therefore, I conclude that Claimant has not met his burden of proof. I find that Claimant did not sustain an occupational disease arising out of and in the course of his



employment with the Employer. I further find that his employment was not the prevailing factor causing his neck condition and the pathology set forth in the MRI.

This matter was heard on a hardship basis as Claimant sought a temporary award for medical treatment and temporary total disability. Having failed to demonstrate he sustained a compensable injury, the remaining issues are moot. Claimant is not entitled to recover any workers' compensation benefits. Therefore, a final award is entered and Claimant's claim for compensation is denied.

I certify that on 4-30-19,  
I delivered a copy of the foregoing award  
to the parties to the case. A complete  
record of the method of delivery and date  
of service upon each party is retained with  
the executed award in the Division's case file.

By mp

Made by: Bruce Farmer  
**Bruce Farmer**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

