

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

Injury No. 10-087428

Employee: Betty Shackelford
Employer: SAB of the TSD of the City of St. Louis
Insurer: Self-Insured

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, 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

Medical causation – aggravation

The administrative law judge denied this claim on the issue of medical causation. She found that because employee's expert, Dr. Volarich, opined that the accident of September 15, 2010, was the prevailing factor causing employee to suffer an aggravation of preexisting degenerative disc disease, his opinion did not meet the proper standard for compensability under the 2005 amendments to the Missouri Workers' Compensation Law, citing *Johnson v. Ind. Western Express, Inc.*, 281 S.W.3d 885 (Mo. App. 2009) and *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo. App. 2008) for this proposition. We disagree with this analysis.

The question of medical causation of any alleged injury by accident must turn on the plain language of § 287.020.3(1) RSMo, which we are required to strictly construe by virtue of § 287.800 RSMo. Section 287.020.3(1) provides that "[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the *resulting medical condition* and disability" (emphasis added). As employer correctly notes in its brief, the word "aggravation" is not defined, and in fact, does not appear at all in Chapter 287. We note also that both the *Johnson* and *Gordon* courts used the word "aggravation" as shorthand for "something less than a prevailing factor." See *Johnson*, 281 S.W.3d at 890-93; *Gordon*, 268 S.W.3d at 459-60. Here, on the other hand, Dr. Volarich uses the word "aggravation" to describe a *resulting medical condition*, not a type of factor, and as later decisions have recognized, an employee may recover compensation for aggravation of a preexisting condition where the accident is the prevailing factor causing such aggravation. See, e.g., *Maness v. City of De Soto*, 421 S.W.3d 532, 540 (Mo. App. 2014); *Randolph County v. Moore-Ransdell*, 446 S.W.3d 699, 710 (Mo. App. 2014).

The foregoing observations notwithstanding, we ultimately agree with the administrative law judge that, in rendering an opinion regarding medical causation, Dr. Volarich relied upon a description of the September 15, 2010, accident that is not supported in the record as a whole. As a result, his conclusions, however sound, are essentially irrelevant and without

Employee: Betty Shackelford

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persuasive force herein. The lack of a persuasive expert opinion with respect to the issue of medical causation is fatal to employee's claim. For this reason, we affirm the award of the administrative law judge denying benefits.

Conclusion

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

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued December 17, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 19th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Betty Shackelford	Injury No.:10-087428
Dependents:	N/A	Before the
Employer:	SAB of the TSD of the City of St. Louis	Division of Workers' Compensation
Additional Party	N/A	Department of Labor and Industrial Relations Of Missouri
Insurer:	Self C/O CCMSI	Jefferson City, Missouri
Hearing Date:	October 20, 2014	Checked by: KOB: dwj

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? Yes
4. Date of accident or onset of occupational disease: September 15, 2010
5. State location where accident occurred or occupational disease was contracted: Saint Louis City
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? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Teaching
12. Did accident or occupational disease cause death? No
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: None
16. Value necessary medical aid paid to date by employer/insurer? \$258.00

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- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for maximum rates
- 19. Weekly compensation rate: \$799.11 / \$418.58
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable: None
- 22. Second Injury Fund liability: N/A

TOTAL: -0-

- 23. Future requirements awarded: N/A

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

The compensation awarded to 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: Jennifer Finley

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Betty Shackelford	Injury No.:10-087428
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	SAB of the TSD of the City of St. Louis	Department of Labor and Industrial Relations Of Missouri
Additional Party	N/A	
Insurer:	Self C/O CCMSI	Jefferson City, Missouri
Hearing Date:	October 20, 2014	Checked by: KOB: dwj

PRELIMINARIES

The matter of Betty Shackelford (“Claimant”) proceeded to hearing to determine whether Claimant is entitled to recover benefits under the Missouri Workers’ Compensation Act (the “Act”). Attorney Jennifer Finley represented Claimant. Attorney Maurice Early represented the Special Administrative Board of the School District of the City of St. Louis (“Employer”), which is self-insured.

The parties agreed that on or about September 15, 2010, Claimant was an employee of Employer, earning an average weekly wage that qualifies Claimant for rates of compensation of \$799.11 for temporary total disability (“TTD”) benefits, and \$418.58 for permanent partial disability (“PPD”) benefits. Employer paid \$258.00 in medical benefits, but no TTD. Venue is proper in the City of St. Louis, Employer received proper notice, and Claimant filed her claim within the time required by the Act.

Employer challenges whether this is a compensable claim. The issues are: 1) Does the incident of September 15, 2010 constitute an Accident under the Act; 2) If so, is the Accident the medical cause of Claimant’s injuries; 3) Is Employer liable for past medical expenses in the stipulated amount of \$1,645.00; 4) Is Employer obligated to pay TTD benefits from September 16, 2010 to June 2, 2011, and 5) What is the liability of Employer for PPD benefits?

The exhibits, admitted into evidence without objection, were: 1) Report of Injury; 2) Claim for Compensation; 3a-d) Dr. Jerome Williams medical records¹; 5) Barnes Care records; 6) Rehabilitation Institute of St. Louis; 8) Barnes Jewish Hospital; 10) Center for Advanced Medicine / Dr. Stewart; 12) Dr. Heidi Prater; 14) ProRehab; 16) Star Center; 18) report of Dr. Volarich; 19) supplemental report of Dr. Volarich; 20) deposition of Dr Volarich; 21) work loss authorizations; 22) certified copies, Division of Workers’ Compensation; 23) deposition exhibits of Dr. Randolph/prior records of Dr. Williams; 24) CCMSI letter ; and A) deposition of Dr. Randolph.

¹ The version of Exhibit 3 originally submitted at hearing contained multiple inconsistencies on its face. At the request of the ALJ, and with consent of opposing counsel, Claimant resubmitted all available sets of Dr. Williams’ records, including 3a) 34 pages certified as of 4/6/2012; 3b) uncertified records (15 pages) from Esse Health; 3c) 6 uncertified pages from the Williams Clinic; and 3d) a duplicate of the 34 pages in 3a, as provided by Employer’s counsel’s office.

FINDINGS OF FACT

Claimant is a 58 year old woman who earned her BA from Harris Stowe State College, and two Master's Degrees from Washington University and St. Louis University, respectively. Claimant's first job teaching math began in 1980 with St. Louis Job Corps. In 1983, Claimant went to work for Employer, where she continued to work as a teacher until her retirement in December 2012.

Claimant had two significant injuries prior to 2010. In 1998, she injured her neck in a motor vehicle accident. Claimant testified she was offered surgery, but chose conservative treatment including physical therapy that was effective in resolving her neck pain. In March 2006, Claimant was at work when she fell on crumbling steps. She put out her right hand to break her fall, and hurt her right arm, neck and hip. As a result of the 2006 fall, Claimant experienced burning, throbbing pain in her right arm. She treated with Dr. Roy Jerome Williams², her personal physician, who diagnosed right cervical radiculopathy and ordered physical therapy. The pain, according to Claimant's testimony, went away, although she settled the workers' compensation claim flowing from the March 2006 injury for 5% PPD of the whole body referable to the neck and 5% PPD of the right hip.

There are no records prior to 2007 in evidence, although the physical therapy records confirm a history of neck pain dating back to the 1998 MVA, and the problems with the right shoulder and neck following the 2006 fall. Claimant's rating doctor, Dr. David Volarich, noted that a cervical MRI from May 18, 2006 ordered by Dr. Doll showed advanced degenerative disc disease at C4-5, C5-6, and C6-7 with spondylotic spurs and dorsal projecting bony spurs which abutted the chord. Dr. William's handwritten records mention ongoing or resolving symptoms of the neck, right upper extremity, flank and/or back pain in 11 of the 15 entries between 2007 and the date of injury. The prior problems in the neck and right shoulder seemed to wax and wane, but improved with treatment.

On Wednesday, September 15, 2010, around 10:00 in the morning, Claimant was standing at the whiteboard in the front of the room instructing the class. She stood with her arm raised, writing on the board, with her head slightly turned. Suddenly, she felt something strike her on the right side of her head, above her glasses. Startled, she turned her head quickly towards the direction of the projectile, and her body followed. She did not fall, trip or stumble. Claimant felt immediate radiating neck pain. Her head also hurt.

Upon inspection, Claimant discovered she had been struck by a ping pong ball-sized wad of crumpled paper wrapped around sunflower seed hulls. She confronted the person whose name was written on the paper, and although he denied having thrown the paper, Claimant sent a request to have the student removed from the classroom. Claimant felt violated, upset, and angry. She reported the incident and saw the nurse after class. She noted mild redness and swelling at the sight of the blow, but noted no break in skin or bruising. She could not finish the day, and went home, where she completed an incident report and called for a doctor's appointment.

² Although the earliest entry in Dr. Williams' records (Exhibit 3a-d) is April 30, 2007, the Rehabilitation Institute records indicate Dr. Williams was directing her care as early as July 2006.

When Claimant saw Dr. Williams on September 17, 2010, she reported the development of headache and “exacerbation of [right] cervical radicular pain.” Reduced right shoulder range of motion and right grip strength was noted. He recommended no weight overhead.

On October 5, 2010, at Employer’s direction, Claimant presented at BarnesCare with complaints of headache, right sided neck pain radiating into the arm, numbness of all fingers and right hand weakness. The site of the blow was tender, but no swelling, discoloration or skin change was noted in the right forehead region. Based on her physical examination and Claimant’s history, Dr. Shockley concluded the neck and right upper extremity complaints were not consistent with a blow to the forehead. Dr. Shockley also gave a credible and detailed explanation of why she thought the headaches were also unrelated, but she nevertheless recommended a head CT for a definitive evaluation³. Claimant was to seek treatment with her personal physician.

Dr. Williams referred Claimant to The Rehabilitation Institute of St. Louis for physical therapy that was temporarily beneficial, according to Claimant. An MRI taken October 21, 2010 revealed “advanced degenerative disc disease at C5-C6 and C6-C7 resulting in predominantly left neural foraminal stenosis at each level, more pronounced at C6-C7.”

Dr. Todd Stewart, a neurosurgeon, evaluated Claimant on November 1, 2010. He identified problems primarily with the shoulder, finding some weakness and limited range of motion, but also noted multilevel cervical degenerative disk disease or spondylosis. He did not think her neck was the primary problem, and recommended therapy and perhaps injections to the shoulder. He attributed the shoulder symptoms to inherent right shoulder disease.

In late 2010, Claimant began treatment with Dr. Heidi Prather, a physiatrist, who diagnosed right shoulder pain and scapulothoracic dyskinesia, and treated Claimant for neck, parascapular, right upper quadrant and low back pain. Objective tests showed no rotator cuff tear, cervical radiculopathy or neuropathies. Dr. Prather noted Claimant had intermittent flares in her symptoms. Claimant reported varying degrees of relief from physical therapy, massage therapy, injections and medication.

Between Dr. Williams and Dr. Prather, Claimant had restrictions that prohibited her from working through July 18, 2011. When Claimant returned to work for the 2011-2012 school year, she required several accommodations to avoid raising her arm to write on the whiteboard. She is now retired.

On August 23, 2012, Claimant submitted to an IME with Dr. David Volarich, who took a history consistent with Claimant’s testimony at hearing, conducted an exam that yielded several objective findings, and testified by deposition based on his report. Regarding the primary injury, he diagnosed “cervical right upper extremity radicular syndrome secondary to aggravation of degenerative disc disease, degenerative joint disease, and disc bulges at C4-5, C5-6, C6-7, S/P non operative treatment [and] right shoulder bursitis with mild rotator cuff tendonitis.” Dr. Volarich testified the work injury of being struck on the forehead by a packet of sunflower seeds

³ It appears the CT was not carried out.

thrown by a student with her startled response⁴ was the prevailing factor causing her symptoms and need for treatment. He thought she was temporarily totally disabled through June 2011, and the charges for her treatment were reasonable and necessary.

Dr. Volarich emphasized Claimant permanently aggravated her preexisting symptoms or difficulties, and did not exacerbate symptoms that then returned to baseline. He assigned PPD of 20% of the body for the cervical spine and 20% of the right shoulder.

On January 11, 2013, Dr. Bernard Randolph performed a physical exam, took a complete history, reviewed relevant records and issued a report. He testified by deposition on August 14, 2013. He concluded Claimant sustained a minor contusion to the forehead on September 15, 2010, but did not sustain any structural injury to the head or neck. Nor did she aggravate or affect the natural disease process of the underlying condition of severe multilevel degenerative cervical disc disease with foraminal narrowing. He described the natural process of severe arthritic change as one that waxes and wanes symptomatically, and could not connect the current symptoms to the event.

As for the shoulder, the mechanism of injury would not produce rotator cuff tendonitis or bursitis. Therefore, Dr. Randolph did not think the treatments for rotator cuff tendonitis or scapulothoracic dyskinesia were related to the incident of September 2010. Dr. Randolph placed Claimant at MMI for the head contusion sustained on the date of injury, found no additional workup or treatment necessary, and rated her disability at 0%.

Claimant currently complains of periodic neck pain, burning, throbbing, and numbness which radiates down the right arm. The shoulder pops, and the pain is stabbing or grinding. Claimant must take medication to lessen the pain, uses compresses and exercises. She has limited strength and motion, wakes during the night in pain, and has given up several hobbies because of her neck and shoulder.

ADDITIONAL FINDINGS OF FACT AND RULINGS OF LAW

Based on the substantial and competent evidence, including the testimony of Claimant, the expert evidence, the medical records and all other exhibits in evidence, I find:

1. Accident.

Claimant sustained an accident on September 15, 2010. Pursuant to the Act, 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. I find Claimant had an accident when she was suddenly and without warning stuck in her temple with a wad of paper wrapped around sunflower seeds. There were objective signs of the blow: Claimant noted redness immediately afterwards and still

⁴ Dr. Volarich felt it was the “startled response of her not expecting that to hit her, that caused the injury.” Further, he said, “I think it was the reaction of the hyperextension and side bending to the left that injured her neck.” While he relied on Claimant’s report she responded to being struck with a projectile by jerking backwards and flailing her right arm up in the process, Dr. Volarich admitted that no other record describes Claimant’s response with such terms.

had tenderness when examined at BarnesCare on October 5, although all visible signs of injury had disappeared. Claimant has met her burden of proving accident.

2. Causation.

Proving accident alone does not result in an award of compensation. Claimant must also establish the accident resulted in injury. When the Worker's Compensation Law refers to an "injury," it means an injury arising out of and in the course of employment. §287.020.3(1). Section 287.020.3(1) further states that "[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." Finally, Section 287.020.3(1) defines "prevailing factor" as "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."

Based upon the plain language of this statute, Claimant is not entitled to compensation unless she proves that: (1) she suffered an accidental work-related injury; and (2) the accident was the prevailing factor in causing both the resulting medical condition and disability. *See, e.g., Bond v. Site Line Surveying*, 322 S.W.3d 165, 170–71 (Mo.App.2010). Causation is established by medical testimony. *Elliott v. Kansas City, Mo., School Dist.*, 71 S.W.3d 652, 657- 58 (Mo.App.2002). Thus, Claimant must prove, with credible medical evidence, that the accidental event of being struck with a wad of paper and seeds is the prevailing or primary factor in causing the medical condition and disability for which she seeks compensation. The evidence does not support such a finding.

I find Claimant did not sustain a compensable injury on September 15, 2010 because the accident was not the prevailing factor in causing both her resulting medical condition and disability. *See Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d 466, 472 (Mo. Ct. App. 2012), *reh'g and/or transfer denied* (Dec. 26, 2012). Rather, the credible medical evidence in this case establishes that Claimant first injured her cervical spine in a 1998 motor vehicle accident and was treated for neck pain and right arm weakness and numbness following that injury. In 2006, Claimant fell and had a recurrence of symptoms for which she received extensive medication and physical therapy. Objective diagnostic tests revealed preexisting advanced degenerative disc disease at the pertinent levels. The records demonstrate the symptoms waxed and waned over the years.

I am convinced by the testimony of Dr. Randolph, who could not connect the current symptoms to the event. While he acknowledged Claimant had an underlying condition of severe multilevel degenerative cervical disc disease with foraminal narrowing, he explained how and why the accident was not the prevailing factor in her condition or disability. He described Claimant's condition as one of severe arthritic change, the natural process of which waxes and wanes symptomatically. While Claimant had a contusion from the blow to the head, there was no permanent structural injury to the head or neck. Dr. Randolph did not even feel she aggravated or affected the natural disease process, because it is always in a state of flux. The medical records support the conclusion that Claimant's neck symptoms were flaring or improving in the years leading up to the work event.

Likewise, Dr. Randolph convincingly explained that the mechanism of injury would not produce rotator cuff tendonitis or bursitis, and therefore did not relate her treatment for rotator cuff tendonitis or scapulothoracic dyskinesia to the incident of September 2010. Dr. Randolph placed Claimant at MMI for the head contusion sustained on the date of injury, found no additional workup or treatment necessary, and rated her disability at 0%.

I am not convinced by Dr. Volarich's opinion for several reasons. Dr. Randolph's explanation is more consistent with the facts and medical records. It is supported by the objective findings and diagnostics. I do not find a sufficient factual basis to find Claimant had a "hyperextension and side bending to the left" reaction, which is at the core of Dr. Volarich's causation opinion. Thus, I do not find the opinion supported by the facts found.

Furthermore, Dr. Volarich does not meet the proper standard for establishing compensability because he finds that the injury of September 15, 2010 was an aggravation of degenerative disc disease in Claimant's cervical spine. Case law preceding the 2005 amendments to the Worker's [sic] Compensation Law indeed permitted a claimant to recover benefits by establishing a direct causal link between job duties and an "aggravated condition." *Johnson v. Indiana W. Exp., Inc.*, 281 S.W.3d 885, 891 (Mo. Ct. App. 2009)(citations omitted). However, the *Johnson* court held under current law, in order for an event that arises out of and in the course of one's employment to entitle an employee who has a prior disability to additional benefits, the event must be a prevailing factor that results in further disability. It is not sufficient that the event simply aggravates a preexisting condition. *Id.* at 892-93, citing § 287.020; *Gordon v. City of Ellisville*, 268 S.W.3d 454, 459 (Mo. Ct. App. 2008).

Claimant had preexisting conditions of the neck and shoulder, the symptoms of which waxed and waned. Her current symptoms are the result of the natural progression of the preexisting disease process. The accident was not the prevailing factor in causing both the resulting medical condition and disability.

3. Medical Expenses, Temporary Total Disability, and Permanent Disability.

Claimant did not suffer a compensable work injury. There is no compensable PPD, and the medical expenses and time lost were not due to the work accident. Employer is not liable to pay any compensation under the Act.

CONCLUSION

The claim is denied.

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation