

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

Injury No. 01-169053

Employee: Cheryl E. Tauvar  
Employer: City of Gladstone  
Insurer: Midwest Public Risk of Missouri

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**

Employee claims herein that she suffered compensable injuries by occupational disease, and the parties asked the administrative law judge to resolve the issue of occupational disease. *Transcript*, page 2. Yet, the administrative law judge states throughout his award that the issue in this matter is whether employee sustained an injury by accident, and renders his findings and conclusions in the context of an analysis of the question whether employee sustained an injury by accident. Accordingly, even though we ultimately agree with the administrative law judge that employee's medical causation evidence does not persuasively support her claim, we must write this decision in order to provide the proper analysis.

*Medical causation of an injury by occupational disease*

The version of § 287.067.2 RSMo applicable to this claim sets forth the standard for causation in an occupational disease case and provides, as follows:

An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.

The foregoing section refers us to the "requirements of an injury which is compensable" under subsections 2 and 3 of § 287.020, which provide, in relevant part, as follows:

2. ... An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

Employee: Cheryl E. Tauvar

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(2) 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 employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) 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;

(3) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

The courts have provided some guidance as to how we are to analyze the question of causation in an occupational disease case:

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

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate...

*Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3d 43, 49 (Mo. App. 1999).

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More recently, the courts have clarified that employee is not required to prove by “medical certainty” that work caused an occupational disease, but rather must show “a probability” that working conditions caused the disease. *Vickers v. Mo. Dep’t of Pub. Safety*, 283 S.W.3d 287, 292 (Mo. App. 2009)(citations omitted).

Employee provides expert medical opinions from Drs. Edward Prostic and Daniel Zimmerman. We have carefully reviewed their reports. As detailed in the administrative law judge’s award, both of these doctors lacked (or appear to have overlooked) significant information regarding employee’s preexisting medical history, as well as the timing and onset of her symptoms. We additionally note that each rendered their findings in purely conclusory fashion, and failed to persuasively explain any purported causal connection between the conditions under which employee performed her work and the claimed injuries by occupational disease. They do not discuss whether employee’s work for employer involved an exposure to the claimed injuries which was greater than or different from that which affects the public generally, or whether there was a recognizable link between the claimed injuries and some distinctive feature of the employee’s job which is common to all jobs of that sort. Nor do they identify a probability that employee’s working conditions caused her claimed injuries. Rather, both merely recite employee’s history of developing pain and discomfort while performing her work, and then leap to the conclusion that employee’s work caused her injuries.

For the foregoing reasons, we find the opinions from Drs. Prostic and Zimmerman in this matter lacking persuasive force. We conclude that employee’s work for employer was not a substantial factor causing her to suffer the claimed injuries by occupational disease.

Because employee has failed to meet her burden of proof on the issue of medical causation of her claimed injuries by occupational disease, the other issues are moot, and the claim is denied.

### **Conclusion**

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

The award and decision of Administrative Law Judge Mark Siedlik, issued June 6, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this 12<sup>th</sup> day of March 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## FINAL AWARD

Employee: Cheryl E. Tauvar

Injury No: 01-169053

Employer: City of Gladstone

Insurer: Midwest Public Risk of Missouri

Additional Party: N/A

Hearing Date: March 25, 2014

Checked by: MSS/lh

### 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 September 4, 2001
5. State location where accident occurred or occupational disease was contracted: Gladstone, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
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 that her work duties as a clerk for the City of Gladstone were repetitive and that those work duties caused her injury to her arms, shoulders and low back.
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: Right Hand, Right Elbow, Right Shoulder, Left Hand, Left Shoulder, Low Back
14. Nature and extent of any permanent disability: none found
15. Compensation paid to-date for temporary disability: -0-
16. Value necessary medical aid paid to date by employer/insurer? -0-

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: \$440.00

19. Weekly compensation rate: \$293.35 for temporary total and \$293.35 for permanent partial disability

20. Method wages computation: MO. REV. STAT. §287.250

21. Amount of compensation payable:

Medical Expenses

Medical Already Incurred.....	\$-0-
Less credit for expenses already paid .....	\$(-0-)
Total Medical Owing.....	<u>\$-0-</u>

Temporary Disability

None Claimed.....	\$-0-
Less credit for benefits already paid .....	(\$-0-)
Total TTD Owing.....	<u>\$-0-</u>

Permanent Partial Disability

0% disability.....	<u>\$-0-</u>
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    Total Award: .....\$-0-

22. Second Injury Fund liability: N/A .....None

23. Future requirements awarded: None

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

Employee: Cheryl E. Tauvar Injury No: 01-169053

Employer: City of Gladstone

Insurer: Midwest Public Risk of Missouri

Additional Party: N/A

Hearing Date: March 25, 2014

Checked by: MSS/lh

On March 25, 2014, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Ms. Cheryl Tauvar appeared in person and with counsel, David Slocum. The employer appeared through Kip A. Kubin. The primary issues the parties requested the Division to determine was whether or not Ms. Tauvar sustained an injury by accident arising out of her employment with the City of Gladstone on September 4, 2001, whether the employer received notice of the injury in a timely matter, the nature and extent of the injury and whether the employer is responsible for past medical bills. For the reasons noted below, I find that Ms. Tauvar failed to prove the elements necessary to entitle her to an award under the Missouri Workers Compensation Statutes.

### **STIPULATIONS**

The parties stipulated that:

1. On or about September 4, 2001 (“the injury date”), City of Gladstone (“City”) was an employer operating subject to Missouri’s Workers’ Compensation law with its liability fully insured by Midwest Public Risk of Missouri (f/k/a MARCIT);
2. Ms. Tauvar was its employee working subject to the law in Gladstone, Jackson County, Missouri;
3. Ms. Tauvar filed her claim within the time allowed by law;
4. The City provided Ms. Tauvar no medical care. The claimant does seek reimbursement for medical expenses in the amount of \$10,000.00;
5. The City paid the claimant no temporary total benefits. The claimant seeks no additional temporary benefits.

## **ISSUES**

The parties requested the Division to determine:

1. Whether Ms. Tauvar sustained an injury by accident on September 4, 2001?
2. Whether the claimant's accident arose out of and in the course of her employment with the City of Gladstone?
3. Whether the claimant gave proper notice of the accident to her employer?
4. Whether the employer is responsible for payment of past medical expenses? And,
5. What is the nature and extent of claimant's disability?

## **FINDINGS OF FACT**

Ms. Tauvar testified on her own behalf and presented the following exhibits, all of which were admitted into evidence without objection:

EXHIBIT A—Curriculum Vitae, Dr. Edward Prostic  
EXHIBIT B—Medical Report, Dr. Edward Prostic, February 18, 2004  
EXHIBIT C—Curriculum Vitae, Dr. Daniel Zimmerman  
EXHIBIT D—Medical Report, Dr. Daniel Zimmerman  
EXHIBIT E—Medical Records, Creekwood Surgical Center  
EXHIBIT F—Medical Records, Diagnostic Imaging Centers, PA  
EXHIBIT G—Medical Records, Kendra Pearson, D.C.  
EXHIBIT H—Medical Records, Dr. Dana Towle  
EXHIBIT I—Medical Records, Orthopaedic Surgeon's Inc.  
EXHIBIT J—Medical Records, M.D. Electrodiagnosis  
EXHIBIT K—Medical Records, Diagnostic Imaging Center, P.A.  
EXHIBIT L—Creekwood Family Care  
EXHIBIT M—Medical Records, McDonagh Medical Center  
EXHIBIT N—Medical Records, Midwest Radiology Consultants  
EXHIBIT O—Kansas Division of Workers Compensation Records  
EXHIBIT P—Missouri Division of Workers Compensation Records  
EXHIBIT Q – May 1, 2000 Memo  
EXHIBIT R – May 15, 2000 Memo

Although the employer did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence without objection:

EXHIBIT 3—Curriculum Vitae, Dr. Anne Rosenthal  
EXHIBIT 4—Medical Report, Dr. Anne Rosenthal, June 20, 2006  
EXHIBIT 5—Deposition Transcript, Dr. Anne Rosenthal, May 6, 2009  
EXHIBIT 6—Insurance Application of Claimant, April 15, 2003

Cheryl Tauvar is a 59-year-old woman who currently works as a school crossing guard. Formerly she worked for the City of Gladstone, Missouri. The claimant began her employment with the City in March 1999 as a customer service specialist. She maintained that job title until her last day of employment with the City on September 4, 2001.

As a customer service specialist, she sat at the reception desk, greeted clientele of the city who came to the facility, answered phone calls on a switchboard and performed clerical duties. Her clerical duties included typing, data entry and filing cancelled checks. Part of her job duties involved processing of water bills for the City. She would open the envelopes, remove the check, handwrite information on the checks and place the checks in a stack for processing.

During her employment with the City, she would also have to process route books for the water department and process trays of tax bills. In processing the tax bills, the claimant had to stamp the bills with a spring-loaded stamp, which she asserts caused her arm problems.

Her last day at work for the City was September 4, 2001. The claimant went on administrative leave after that date. The claimant drew unemployment benefits and eventually went to work for Securitas in September 2002 as a school crossing guard. The claimant has performed those duties since that time. The claimant also was employed as a substitute playground monitor for the Parkhill School District for one day. She sustained a fall on the playground on that date.

The claimant attended high school at North Kansas City High School, but did not graduate. She began working for her father doing typing, filing and correspondence in 1971. Immediately prior to joining the City, she worked in a clerical position for Ingals Accounting.

The claimant left her employment with the City of Gladstone on September 4, 2001 as part of a negotiated settlement with the City. She had filed a claim for discrimination based on alleged religious discrimination against her as a Jehovah's Witness.

After leaving the City she drew unemployment benefits until March 2002. She returned to employment with Securitas in September 2002. The claimant performs the job of a school crossing guard. She testified that she continues to have problems holding the stop sign she uses to assist the children across the street and sometimes drops it. Her employer has accommodated her by placing a longer handle on the sign which allows her to rest it on the ground.

The claimant filed her claim for compensation in August 2003, almost 2 years after she left the employ of the City.

## **RULINGS OF LAW**

In every workers compensation case, the claimant has the burden of proof on all essential elements of the claim, including that medical causation between the accident and the injury of which the employee complains, *Groce v. Pyle*, 315 S.W. 2d 482 (Mo. App. W.D. 1958; *Goleman v. MCI Transporters*, 844 S.W. 2d 463 (Mo. App. W.D. 1992). Speculation, conjecture or personal opinion cannot form a basis for an award of compensation in any area of required proof. *Toole v. Bechtel Corp.*, 291 S.W.2d 874 (Mo. 1986). Proof that work is one of a number of possible causes for the injury and disability is not sufficient to form the basis for an award of compensation. *Russell v. Southwest Grease and Oil Co.*, 509 S.W.2d 776 (Mo. App. W. D. 1974). The claimant must prove that the accident was a substantial factor in causing the disability. *See: Cahall v. Cahall*, 963 S.W.2d 368 (Mo. App. E. D. 1998) .

### **INJURY BY ACCIDENT**

The Court is called upon to address a number of issues in the case, and the first of those is whether the claimant sustained an injury by accident. In a repetitive use case, the employee must prove the following:

- (1) The injury was caused from job-related activities;
- (2) The injury arose out of and in the course of employment, and
- (3) The nature and extent of the disability.

Whether the claimant had an injury by accident is the first element of that must be proved. Missouri law recognizes that an accident can encompass gradual and progressive injuries resulting from repeated or constant exposure to on the job hazards. *Smith v. Climate Engineering*, 939 SW 2d 429 (Mo. App 1996). In *Smith* the court found that the repeated flexing and extending of the employee's neck to hang sheet metal constituted an accident, even if there is no unexpected or unforeseen aspect to the duties. The court held that an injury is compensable even if it is the unexpected result of performance of the usual and customary duties of the employee which leads to a physical breakdown or change in pathology. *Smith*, 963 SW2d at 436 (1996). Here the claimant's testimony is sufficient to establish the nature of the exposure, that being her duties as a customer service specialist for the City of Gladstone. However, whether the exposure leads to a physical breakdown or change in pathology requires an evaluation of the medical opinions.

The Court is presented with three divergent medical opinions regarding whether the claimant suffered any affects from her work exposures, those opinions are from Drs. Edward Prostic, Daniel Zimmerman and Anne Rosenthal. Dr. Prostic was the first to see the claimant, and performed his examination at the request of the attorney for the employee. He saw the claimant on February 18, 2004, approximately 3 years after the alleged dates of exposure. At that appointment the claimant complains of symptoms in both of her shoulders and both of her wrists, which she attributes to her job at the City of Gladstone. Relying on that history from the patient, the doctor attributes those problems to her work duties at the City. Dr. Prostic also notes that the claimant makes complaints to her neck, but he does not attribute those to her work duties. Interestingly, the claimant makes no complaints to her low back on that occasion. The doctor

recites a history from the patient, but does not indicate that he reviewed any medical records. He does not note the history of the automobile accident in 1997 nor does he recite any history of the subsequent accident when she jumped from a truck. He performs no diagnostic testing on the claimant and finds the claimant to be at maximum medical improvement and gives disability ratings for each of the shoulders and each of the wrists. However, it does not appear that he reviewed any medical records of her prior arm condition.

Dr. Daniel Zimmerman examined the employee at the request of her attorney on March 5, 2008, approximately 7 years after the date of the alleged occupational exposure. Dr. Zimmerman finds that the claimant has complaints to both of her shoulders, both of her elbows, both of her wrists, both of her hands and fingers. Additionally he notes she complains about her low back. The doctor lists the records he reviews, but does not comment about any of the treatment records from Dr. Datillio, or indicate he was provided with the diagnostic testing of Dr. Hon. He also did not appear to review the records of Dr. Bubelo, her prior personal physician. Based on the history given by the claimant, he opines that the claimant's problems were caused by her work. He gives the claimant a global disability of 64% to the whole person

The claimant, in between these examinations, was examined by Dr. Anne Rosenthal on July 1, 2006. This exam was at the request of the employer and insurer. Dr. Rosenthal evaluated both of the claimant's upper extremities. It should be noted that the claimant made no complaints to her lower back, as was the case with the examination performed by Dr. Prostic. Dr. Rosenthal, unlike the other two examining doctors, was provided with medical records from Dr. Bubelo, which predated her claimed injury. These records noted complaints with both of her arms which she related to an injury to her neck in 1997. In 1998 the claimant had EMG testing which was indicative of moderate right carpal tunnel syndrome and mild left carpal tunnel syndrome. She was able to compare that testing to the testing performed by Dr. Clark on September 12, 2002, and the testing results are almost identical. The doctor also reviewed the numerous medical visits the claimant had with Dr. Datillio between August 28, 2000 to June 5, 2002 with no complaints of problems with her arms, shoulders or back. Dr. Rosenthal concluded, based on her examination and review of the records, that the work activities did not aggravate her preexisting carpal tunnel condition. She also opined that there were no objective findings to support her subjective complaints to the right elbow.

The Court also had available the records from Dr. Towle, who did the carpal tunnel release on the claimant and the records of Dr. Orth, who did the left shoulder surgery on the claimant. None of those records contain any mention to the treating doctors of work being a cause of her conditions of ill.

The Court also reviewed the records of Dr. Datillio. He is the personal physician for the claimant. He sees the claimant on August 28, 2000; March 16, 2001; April 11, 2001; May 8, 2001; May 11, 2001; August 14, 2001; August 28, 2001; August 31, 2001; September 26, 2001; October 23, 2001; October 26, 2001; December 28, 2001; March 4, 2002; March 18, 2002; March 29, 2002; and April 16, 2002. On those occasions, the claimant makes no complaints about her right shoulder, her lefts shoulder, her right elbow, her left elbow, her right wrist, her left wrist, her right hand, her left hand or her low back. The first comment she makes about problems with her arms is on June 5, 2002, some 9 months after she left employment with the

City. She was immediately sent to a neurologist by her physician. This treatment culminated in the EMG testing of September 12, 2002, which was virtually the same as the prior testing in 1998.

The other evidence the Court considers in the matter is the application she prepared for personal insurance in April 2003. On that application, she was asked if she had any problems with her back or her joints. She answered that she did not.

The claimant at the hearing testified about the physical complaints she relates to her employment with the City. She indicated that her right hand gets fatigued when she does any repetitive activity. She said her right hand swells and tingles. She has problems picking up items with her right hand. She complained of a "toothache" like pain which is constant in her right elbow. She has to frequently shake the right arm to get relief. She had carpal tunnel release to that arm with Dr. Towle in 2002.

The claimant complained of pain and numbness in her left arm, especially at night. Also she stated that the left arm swells and her fingers go numb. She has had no surgeries on the left arm.

Her left shoulder aches constantly and she has difficulty using her left arm. She also complained of fatigue to the left arm. She had shoulder surgery to the left shoulder with Dr. Orth in 2003.

The claimant complained of aches in her right shoulder. She has had no surgery to the right shoulder.

Finally, she complained of low back pain which makes it difficult for her to bend, stoop and walk. She also noted "heaviness" in her left leg. She attributes all of these conditions to her work at the City of Gladstone which ended in 2001. The Court after considering the entirety of the evidence does not find the claimant's allegations to be credible based on the contemporaneous medical records of her treating doctors and the statements she made in her insurance application.

In regard to her arm complaints, the claimant had complaints and even a diagnosis of carpal tunnel syndrome even before becoming employed with the City. She had a positive EMG in 1998, which was virtually unchanged in 2002, after her employment concluded with the City. She makes no complaints about problems with her arms until 9 months after her employment was terminated with the City. Finally, in April of 2003, the claimant does not indicate any arm problems when she is completing her application for health insurance. The Court finds this evidence to be more credible than the claimant's testimony at hearing.

In regard to her shoulder complaints, she does not make any complaints to her shoulders until many months after she leaves employment with the City. There are no contemporaneous complaints to her treating doctor. Again, the claimant had complaints of shoulder problems which predated her employment with the City, which she attributed to a car accident in 1997. She does not disclose any shoulder problems on her application for health insurance in April

2003. Specific to the left shoulder, she indicates it was injured in 2003 when she jumped or fell from a truck. She does not give any history of work related injury to Dr. Orth, who performed her left shoulder surgery. Again, the Court finds this evidence to be more credible than the testimony of the claimant at hearing.

In regard to her low back complaints. The claimant makes no complaints to her personal physician during the time she is working for the City for many years after she has left that employment. She does not disclose any low back problems on her insurance application in April 2003. Finally, she does not make any complaints to Dr. Prostic, when he sees her in 2004. The Court finds this evidence more credible than the testimony of the claimant at hearing.

Finally, the Court weighs the opinions of Dr. Rosenthal more heavily than the other examining physicians, because Dr. Rosenthal was provided with medical records which predated the claimant's employment which were not noted in the reports of the other examining doctors. That places Dr. Rosenthal in a superior position to assess whether the claimant's work was a substantial factor in causing her condition. She concludes that it was not.

The Court holds that the claimant fails to prove, more probably true than not true, that the claimant sustained an injury by repetitive trauma. The claimant does not convince the finder of fact that the injuries of which she complains was caused by her work activities.

The other issues in the claim: whether the injury arose out of an in the course of her employment; notice; nature and extent of disability; and past medical expenses are rendered moot by the determination on the issue of accident. The claimant's request for benefits under the Missouri Workers Compensation Act is denied.

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

Mark Siedlik  
*Administrative Law Judge*  
*Division of Workers' Compensation*