

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

Injury No.: 05-061946

Employee: Renee Viles

Employer: QuikTrip Corporation

Insurer: QuikTrip Corporation

Date of Accident: May 10, 2005

Place and County of Accident: Belton, Cass County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 16, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Emily S. Fowler, issued May 16, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 8th day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Renee Viles

Injury No. 05-061946

Dependents: N/A

Employer: QuikTrip Corporation

Insurer: QuikTrip Corporation

Additional Party: N/A

Hearing Date: March 14, 2007

Checked by: ESF/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: May 10, 2005.
5. State location where accident occurred or occupational disease was contracted: Belton, Cass 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: The employee stated that the combination of her work duties of repetitive bending, lifting and turning caused the injuries she complained of.
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: low back body as a whole.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? \$6,211.16.
18. Employee's average weekly wages: \$596.80.
19. Weekly compensation rate: \$354.05/\$397.87.
20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

AWARD

Employee: Renee Viles

Injury No. 05-061946

Dependents: N/A

Employer: QuikTrip Corporation

Insurer: QuikTrip Corporation

Additional Party: N/A

Hearing Date: March 14, 2007

Checked by: ESF/lh

FINDINGS OF FACT and RULINGS OF LAW:

On March 14, 2007, the Employee and Employer appeared for a final hearing. The Employee, Renee Viles, appeared in person and was represented by Thomas Stein. The Employer was represented by Brian Fowler. This Court had jurisdiction to hear the case pursuant to §287.110 RSMo.

STIPULATIONS

The parties stipulated as follows:

- 1) that on or about May 10, 2005, the Employer was an Employer operating subject to the Missouri workers' compensation law and its liability was fully insured by QuikTrip Corporation;
- 2) that Renee Viles was its Employee working subject to the law in Belton, Cass County, Missouri, and that Employee's contract for employment was made in Missouri;
- 3) that Employee's claim was filed within the time allowed by law;
- 4) that the Employee's average weekly wage was \$596.80 resulting in a compensation rate of \$397.87 for temporary total disability and \$354.05 for permanent partial disability compensation;
- 5) that Employer has paid no temporary total disability compensation to date, nor any medical care to date;
- 6) that Employee does not request additional medical treatment.

ISSUES

The parties requested the Division to determine:

- 1) whether the Employee sustained an accident or occupational disease arising out of and in the course of employment;
- 2) whether the Employee notified the Employer of the injuries as required by law;
- 3) whether the Employer must reimburse the Employee for medical expenses totaling \$6,211.16;
- 4) whether the Employee suffered any disability, and if so the nature and extent of Employee's disability;
- 5) whether the accident or occupational disease caused the disability the Employee claims.

FINDINGS AND RULINGS

The Employee testified on her own behalf and also her husband Jack Viles testified. The Employee presented the following exhibits, all of which were admitted into evidence without objection:

- A – Medical records of Shaun Holden, M.D.
- B – Medical records of Cass County Medical Center, 1/505
- C – Medical records of John Gillen, M.D.
- D – Medical records of Cass Medical Center 1/17/05 to 2/10/05
- E – Medical records of St. Luke's Northland Hospital
- F – Medical records of John Ciccarelli, M.D.
- G – Medical records of Shawnee Mission Medical Center
- H – Medical report of James A. Stuckmeyer, M.D.
- I – Curriculum Vitae of James A. Stuckmeyer, M.D.
- J – Lien notice for ACR Recovery Services
- K – Medical records from Kansas City Pain Center

The Employer provided live testimony of Jeff Mills, the supervisor with QuikTrip Corporation; Kim Zimmerman, a warehouse manager with QuikTrip Corporation; and further presented the following exhibits, all of which were admitted into evidence without objection:

- 1 – Initial Claim for Compensation, July 8, 2005
- 2 – Cass Medical Center emergency room records
- 3 – Kansas City Pain Center records, 6/7/04
- 4 – Medical Records of Dr. Holden
- 5 – Cass Medical Rehabilitation Services medical records
- 6 – Medical records of Dr. Fleming, 5/11/05
- 7 – Claim for short term disability of Claimant
- 8 – Shawnee Mission Medical Center medical records
- 9 – Medical records of Dr. Ciccarelli from the Spinal Institute

At the time of the hearing, Employee, Renee Viles, hereinafter referred to as Employee, was 55 years of age. She had been employed by Quick 'N Tasty in Belton since February 19, 1990. Her main job title was sandwich maker and machine operator. Her work required her to stand next to a conveyor belt, referred to as the line, and put various types of fast food sandwiches together. She stated that she would constantly turn a 90-degree angle at the waist from a cart to the conveyor and back again throughout the day. Occasionally she would take product off a pallet to put it on the cart that she was working from. The weight of the boxes from the pallets to the cart were approximately 20 to 30 pounds, and she did this approximately four times during her shift. She would reach up and put the product, which would be a meat or a cheese, in a slicer at approximately shoulder level, and as the meat or cheese was sliced she would compile it in a sandwich and turn to the conveyor belt to place the finished product on the conveyor belt. She had to put the meat or cheese in the slicer approximately every 10 or 15 minutes to keep product flowing. She stated she would compile 60 to 80 sandwiches a minute requiring her to make 60 to 80 90-degree rotations a minute from the cart to the conveyor belt throughout her day. Her day generally started at 7 a.m. and she was usually finished by 2:30. She was given a half-hour break for lunch and two 15-minute breaks in the afternoon. She was on her feet the entire day. She stated the heaviest thing she had to lift during the day was what was referred to as a grot box, which was a stainless steel box in the meat slicer which weighed approximately 50 pounds. She would put it in the first thing in the morning and at the end of they day take it out to have it cleaned. She stated that her back hurt over time and got progressively worse.

She stated she went to a doctor in 2004 in Harrisonville, her family doctor, with soreness and stiffness. She said there was no specific accident. She was given physical therapy and muscle relaxers for the pain. She then went to a Dr. Laughlin in June or July of 2004 for the same problems. She stated that in February of 2005 she had an incident at work where she was roving for the day when she stepped on a ham sandwich and slipped and fell on her back. She stated she reported it to Jeff Mills, filled out a form on the computer, which went straight to corporate. They asked if she wanted to go to a doctor and she stated that she wanted to see if it would just work itself out. Then approximately three months later she went to Dr. Fleming when she tried to get out of bed one morning and her knees buckled underneath her. She stated she called Jeff Mills and he told her to get herself to a doctor immediately. That was approximately May 10, 2005.

In reviewing Employee's medical records, both as exhibits from the Employee and Employer, it is noted as far back as September 9, 2002, Employee sought treatment for her back from Dr. Shaun Holden of Cass County Medical Center in Harrisonville. Dr. Holden ordered an MRI of her lumbar spine due to complaints of low back pain that were radiating into both of her legs. The MRI showed that she had extensive multi-level lumbar spondylosis with associated central stenosis from the L1 through S1 level secondary to broad based bulging disks. She had moderate to severe central stenosis of the L1-2 secondary to broad based bulging disks with focal central disk protrusion and associated annular tear. Further, a radiology report from September of 2002 showed mild degenerative changes of the lumbar spine, the lower thoracic spine demonstrated slightly more significant degenerative changes with disk space narrowing and osteophytes. It is noted that in the outpatient registration there is no note of an accident having occurred. In fact, in the Life Well Services patient information sheet filled out by Employee in August of 2002, she states that she had been having problems with her back for approximately a year prior to that time. It appears treatment for Ms. Viles in 2002 consisted of physical therapy over a period of weeks. Employee was seen again sometime in June of 2004 by Dr. Laughlin as a referral from Dr. Holden. He notes that she was complaining of pain in her lower back radiating down both legs in the L5-S1 nerve root distribution and that this had been going on for at least two years. He noted the MRI she had in 2002 and that he was asked to see her because conservative treatment had failed. His diagnosis was lumbar radiculopathy secondary to disk disease, and planned to put Employee on a trial of epidural steroid injections.

In August of 2004, Employee was seen by Dr. Kandice Fleming with complaints of back pain, which were chronic and radicular on the anterior aspect of her lower extremities, also there was tingling in the dorsal left foot. It is noted that there was no physical trauma and that she had a diagnosis history of lumbar spondylosis. She was given Dolobid and Flexeril by Dr. Fleming. She was referred by Dr. Shaun Holden presenting with back pain, joint pain, and left foot numbness. Her history and physical showed that she had pain radiating to the right buttock and right posterior thigh, characterized as intermittent and moderate in intensity, as well as chronic. The medical records states "but intermittent" and then it is illegible "with an acute exacerbation. She stated that the current episode of pain started seven to eight months ago. She doesn't recall any precipitating event or injury. Aggravating factors contributing to the back pain were lifting, bending over, twisting, pushing heavy objects and pulling a load. She had associated symptoms, including paravertebral muscle spasm and radicular right leg pain. She noted some pain relief with rest, heat, muscle relaxants, and narcotic pain medication. She stated the pain worsens with walking, back flexion, back extension, and twisting movements. It is noted in this record under social history that she enjoys yard work and she exercises daily. An MRI showed degenerative disc disease at L2-3 which is mild, L3-4 which is mild, L4-5, L5-S1 which is mild, spinal stenosis was noted at L3-4, L4-5, L5-S1, all of which were mild. It is also noted lumbar spondylosis is noted at L2-3, L3-4, L4-5, L5-S1, all mild. Finally it states that dark disk disease is noted at L1-2, L2-3, L3-4, L4-5, and L5-S1. There is no note as to when this particular MRI was taken. Under Plan it is noted that Employee's findings were most consistent with lumbar degenerative disc disease at L2-3, L3-4, L4-5 and L5-S1, lumbar stenosis at L3-4, L4-5, and L5-S1 and spondylosis. Activity modifications were recommended. Those consisted of avoiding lumbar extension, no lifting, limit her walking. Physical therapy was recommended, including lumbar flexion and abdominal strengthening programs, home exercise program, including lumbar flexion, stretching and abdominal muscle toning and strengthening. She was also given medication and was told to return to the clinic on an as-needed basis.

She was again seen by Dr. Gillen on January 17, 2005, complaining of pain in the back of her legs up by the glute and pain in her lower back. She says she has problems when she first gets up with pain in her back all the time even with medication. She noted these had been going on for two years. She notes that it is worse when she is twisting and lifting, better when she rests and has long hot showers. She was seen in physical therapy by Belinda Brown with a two-year history of low back pain with injections providing temporary relief. The treatment plan was to see the patient for up to three weeks with stretching, stabilization, abdominal strengthening modalities only if needed. Employee apparently went to Life Well Services for physical therapy from approximately January 17 through February 10, 2005.

On May 11, 2005, she was once again seen by Dr. Kandice Fleming complaining of lower back pain starting suddenly on May 10, 2005, with radicular pain in the anterior aspect of the right extremity and tingling in the right leg. The

assessment notes she was suffering from sciatica. On May 17, 2005, she was seen by Dr. John Ciccarelli of the Spinal Institute of Kansas City. He noted that she stated she was suffering from chronic low back pain over the past four years, which had been getting progressively worse. She had been employed as a factory machine operator for almost 16 years. She stated to him that her back pain had become more persistent as far as aching and she had also had continued pain that was worsening progressively involving the right leg, although she did not have significant symptoms on the left. He noted her epidural injections by Dr. Laughlin helped for approximately one month and then her symptoms returned. At the time she was on Oxycontin and also used Hydrocodone. Aggravating factors to her pain include bending, lifting, twisting, prolonged sitting or standing. Walking caused numbness and weakness of her legs as well as back ache. She had no history of prior work-related conditions. She had been seen in physical therapy, had injections, medications, as well as numerous exercises.

On physical exam, he noted that she described a constant aching sensation across the lumbar region, and reported significant right leg pain and tended to walk with a mild antalgic gait. Strength testing in the bilateral lower extremities demonstrated mild weakness in the right EHL and tibialis anterior. The radiographic studies showed from August 14, 2002 demonstrated and L4-L5 spondylolisthesis with questionable pars defects on the oblique images. Dynamic flexion and extension imaging of the lumbar spine obtained by Dr. Ciccarelli demonstrated again a grade 1 spondylolisthesis that increased on dynamic flexion views consistent with dynamic instability. The MRI review that he studied from January 5, 2005, demonstrated in C2 desiccatory changes spanning the entire lumbar spine. After reviewing the information with the Employee he felt that she would be an appropriate candidate for a lumbar decompression and stabilization procedure targeted at L4-5. Employee underwent lumbar discectomy at L4-L5, decompression L4-L5, posterior spinal fusion L4-L5 with instrumentation and use of iliac crest bone graft with 3D TSRH hardware at Shawnee Mission Medical Center on May 20, 2005. On May 11, 2005, Employee signed a claim for short-term disability stating that the condition was not work related. Dr. Ciccarelli also noted that the condition was not due to her occupation. In a letter dated February 28, 2006, to Employee's attorney, Mr. Stein, Dr. Ciccarelli notes that "I feel with a reasonable degree of medical certainty that the patient's symptoms were a manifestation of her underlying spondylolisthesis and I do not feel that her job duties at QuikTrip during her time of employment there was the substantial factor necessitating surgery."

Employee testified that her typical day included breakfast, watch the news, read for a bit, have lunch, watch some TV and read some more. She walks on her treadmill for approximately half an hour. She does some light housework, making beds, dusting, laundry, although she leaves the basket in the basement for her husband to bring up. She states that she occasionally does weeding of her gardens. She takes Advil when her pain gets bad. She also noted that all or most of her bills were paid by the insurance company, but her husband's insurance who covered the bills want the money back. She testified that she felt her back problems were age and somewhat job related. On cross-examination she admitted that when she was younger she ran a tractor and rode horses. She admitted that in 2001 to 2002 she did a lot of flower gardening, including placing large stones around the garden. She also admitted to being involved in transplanting trees, that she likes to be active, has always been an outdoor person. She does a great deal of decorating for holidays, especially Halloween which is her favorite. She admitted she took photographs to work to show her co-employees photographs of a wagon wheel garden that she had put together. She admitted that she did lots of projects on the weekends and sometimes when she would go to work on Monday she would be tired and sore. She admitted that she had a prior Workers' Compensation claim with QuikTrip for her knees in which she had surgery and the employer paid the bills. She knew Workers' Compensation was available if she needed it since the 1990s. She stated that the short-term disability form that she signed was given to her by Randy Wright, a supervisor, and that Randy told her how to fill it out. She states that she is happy with her doctor's services, although she can still not do all the activities she used to. I find Employee's testimony to be credible

Employee's husband Jack Viles testified that they have been married for 38 years this coming June and that he worked as a toolmaker. He admitted that he ran cattle with his brother, and noted that Employee had been complaining of her back for the last five to six years, that it had gotten worse with time. He noted that after she slipped and fell on the ham sandwich that she had a lot of pain that night and that she also complained that she had a lot of pain around her tailbone. When asked about the incident where her knees gave way, he stated that she did not know why that happened. He stated that these days she can't really do much of anything. She is often stiff and sore. He does a lot of the work around the house, including vacuuming. On cross-examination, Mr. Viles was asked whether before the back surgery Employee was active around the farm. He stated she did her share of chores, including the flower garden and some planting. I find the witnesses testimony to be credible.

Employer's witness, Jeff Miles, testified that he had worked for QuikTrip Corporation for 19 years and was a supervisor. He noted that in 2003 to 2005 that the policies and procedures if an associate was injured was to immediately ask if they needed medical attention and then report it to the team leader. If no medical attention was needed, they were then required to fill out a report, print it out, sign it and send it to Tulsa, the headquarters. He stated that Employee never reported directly to Mr. Mills that she had ever been injured. He noted on May 10th, she called that she was going to be late

because she was going to the doctor. He does not recall any conversations about any of her problems being work-related. He did talk to her, however, about her personal life regarding work around the house, including flower gardens, putting up hay, working with the cattle and working on the barn and that she was involved in it all. He stated that there were times when she would come back to work from the weekend and stated that she was tired and sore from her weekend activities. He testified on cross-examination, again, that she did a lot of work around the house, including moving landscaping blocks, building flower gardens, building fence, working cattle and putting a mezzanine in the barn. He stated that he recalled in 2005 that she did the flower garden out front and further that she helped put up a mezzanine. I find the witnesses testimony to be credible

Employer's other witness, Kim Zimmerman, had been employed with QuikTrip for the past 17 years as a warehouse manager as of January of 2005. She reiterated that upon injury an associate was to immediately report it, medical attention was given if necessary; if not, then an accident form was filled out and submitted. She stated that Employee never reported to her any job injuries. When asked about whether or not she was aware of Employee's work activities outside of her job, she stated that she knew she had an active home life, that she worked flower gardens, did a great deal of decorating for the holidays, especially in October. At one point she said that she heard a story of Employee nursing a baby calf. On cross-examination she stated that she believed that nursing the baby calf was somewhere between 2001 and 2004. She noted that the pictures she saw of the flower gardens indicated there would have been lots of hard work and effort, and that she worked on the flower gardens after work in the evenings and on the weekends, and that was sometime between 1999 to 2004. I find the witnesses testimony to be credible.

Claimant was recalled to testify again after hearing the testimony of Mr. Mills and Ms. Zimmerman. She stated that she never built fence, worked cattle or hay, and that they never put the mezzanine in the barn. She stated that she bottle fed a calf one time, which was simply holding the bottle for the calf, and that sometime 20 years ago she had put up hay with her father but had never built fence. She stated that her landscaping work was some 15 years ago, that she now had perennials so that she doesn't have to replace the flowers. She said that transplanting trees was also some 20 years ago when they put some redbuds in. I find this portion of Employee's testimony to be less than credible as it is self serving and contradictory to her initial testimony.

Employee then submitted a medical report by Dr. James Stuckmeyer, which reviewed most of Employee's medical records and came to the conclusion that the occupational duties which she performed at QuikTrip were a substantial contributing factor to the acceleration of a degenerative condition in her lumbar spine ultimately necessitating an operative procedure. He finds that there is no specific history of a traumatic event inciting the development of the severe back and leg symptoms, and it would appear that it was more of a repetitive use-type syndrome which he felt was causally related to the occupational duties she performed while employed at QuikTrip. He assessed a 30 percent permanent partial disability to the lumbosacral spine. In his review, he does note that Employee stated that she had a prior history of lower back pain, and had been evaluated with an MRI and undergone a series of epidural injections.

The first issue for this Court to determine is whether the Employee sustained an accident or occupational disease arising out of and in the course of her employment. This issue is the crux of Employee's claim herein. Although it appears that Employee's work duties may have contributed to some of her back problems with a constant turning and twisting, there was only occasional lifting, approximately two to four times a day of 20 to 30 pounds and one time in the morning and one time in the evening lifting 50 pounds. The diagnosis by Dr. Ciccarelli, who is an independent doctor not connected to the employer, was that Employee suffered from a diagnosis of a grade 1 spondylolisthesis and associated stenosis secondary to it. He did not feel that her symptoms were related to her job duties at QuikTrip, or that they were a substantial factor in necessitating her surgery or medical care. It is clear Employee had back problems dating as far back as 2002, which progressively got worse, clearly due to an underlying degenerative back problem.

The law in effect at the time of Claimant's filing of her claim is found in §287.020.3(1) RSMo.:

§287.020.3(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 incidence of employment."

(2) an injury shall be deemed to arise out of and in the course of employment only if:

(a) it is reasonably apparent upon consideration of all the circumstances that the employment is a substantial factor in the causing of 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 it and unrelated to the employment in normal non-employment life.”

Further, in §287.067 RSMo., “Occupational disease is defined to mean an identifiable disease arising with or without human fault out of and in the course of the employment.” Again, there is reference to subsections of 2 and 3 of §287.020. And, further, under §287.067.7 “Occupational disease due to repetitive motion...the work must be the substantial contributing factor to the injury.

In reviewing all the evidence presented herein, it is clear that Employee suffered from degenerative disc disease for a long period of time. Although her work activities may have contributed to the progression or aggravation of her underlying disease, it is clear they were not a substantial contributing factor hereto. Spondylolisthesis is an ongoing degenerative problem that with or without physical activities can and does deteriorate the back. Further, it has been shown through testimony that Employee participated in activities outside her work time, which were very physical and strenuous, and by her own testimony, she was always very active and liked to work outdoors. Whether or not she actually moved large blocks or transplanted trees within the years from 2002 forward or not, is irrelevant as it is clear that she was still very active in her gardens and her outdoor life during that time period both by her own testimony, as well as the testimony of co-workers and supervisors and her own husband. Therefore this Court finds that Employee did not sustain an accident or occupational disease arising out of and in the course of her employment. Having found that Employee did not suffer an accident or occupational disease arising out of the course and scope of her employment, all other issues are hereby rendered moot. Wherefore, Employee’s claim for benefits is hereby denied.

Date: _____

Made by: _____

Emily S. Fowler
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia “Pat” Secret
Director
Division of Workers' Compensation